THE POLITICAL ECONOMY OF DISMISSALS

by

MATTHIAS P. BECK

M. Arch., M.U.P.

University of Kansas (1989)

Submitted to the Department of Urban Studies and Planning in Partial Fulfilment of the Requirements for the Degree of

DOCTOR OF PHILOSOPHY

(Urban Studies)

at the

MASSACHUSETTS INSTITUTE OF TECHNOLOGY

June 1996

© Matthias Beck, 1996. All rights reserved.

The author hereby grants MIT permission to reproduce and to distribute copies of this thesis document in whole or in part.

Signature of Author______________________________

Department of Urban Studies and Planning
May, 1996

Certified by______

Professor Martin Rein
Thesis Supervisor

Accepted by______________________________

Professor Frank Levy
Department Graduate Committee

JUN 26 1996
THE POLITICAL ECONOMY OF DISMISSALS

by

MATTHIAS P. BECK

Submitted to the Department of Urban Studies and Planning
in Partial Fulfillment of the Requirements for the Degree of
Ph.D. in Urban Studies

ABSTRACT

The US has entered a new wave of corporate restructuring and
downsizing. In some sense this restructuring is made possible, and
perhaps encouraged, by the exceptional US system of dismissal
regulation. By contrast to most advanced industrial nations, the US
does not have a comprehensive system of dismissal regulation,
industrial tribunals, or severance pay arrangements. The question
this thesis investigates, is why neither collective bargaining, nor
legislation in the US have developed into a comprehensive system of
d dismissal regulation, leading ultimately to a heavy reliance on
litigation in dismissal matters. The analysis is structured in five
parts.

The introduction examines competing views on the need to regulate
employment termination, and the adequacy of different types of
regulation. Neoclassical economic theory views the unconstrained
dismissal of employees favorably, as it ensures a speedy allocation of
the factor labor. Employers dismissing a worker, however, hardly
encounter the full cost of their actions, since the costs of
dismissals are partially externalized to the state and society. The
analysis reviews efficiency and equity arguments on dismissal
litigation, as well as more recent analyses, which base the rejection
or approval of this litigation on efficiency wage and/or implicit
contract theories. Noting that efficiency wage based arguments fail
to give clear guide lines, the introduction concludes with an
examination of alternative property rights based view of dismissals.

Part A (Chapters I to III) analyzes the forces which regulate and
restrict the job as a property. Employment contracts are rarely in
the form of a tidy document. The rules of individual employment,
including those referring to its termination, usually have to be
deduced from successive layers of written and unwritten rules. The
most formalized of these layers are regulations at the national level.
A second source of rules is created by accepted customs, which are
upheld by work groups and frontline management at the plant level. A
third level of regulations evolves from individual challenges to
employer conduct, usually in the form of private law suits. Chapters
I to III explore the rules created by all three layers--the law,
unions, and the courts--in that order. I start by examining the
historical evolution of common law dismissal regulation, and its
partial replacement by statutory law, particularly that pertaining to
collective bargaining. One element of the US exceptionalism with
regard to dismissals is that these rules sets rarely interact, with
statutory rights being restricted to union workers. Chapter II
discusses the initiatives unions have taken to restrict the employer's
power to dismiss at plant level, the customs that have arisen from
them, and the tradeoffs unions encountered by adopting these policies.
Plant level rules are of particular importance to the unionized US workplace, where the particular strength of these initiatives may have discouraged unions from pursuing dismissal regulation in the wider political arena. Chapter III then explores the evolution of unjust dismissal litigation. I suggest that the development of dismissal litigation was triggered by a confluence of factors, such as declining union coverage, the influence of the consumer, environmental and civil rights movements, as well as concerns with fraudulent acts against the government.

Part B (Chapter IV) complements the qualitative analysis of Part A, with a quantitative investigation of the effects of different routes to dismissal regulation. My analysis starts with a review of transaction-costs theories of the employment relationship and an assessment of their implications with regard to the firm's dismissal decision. I then introduce a transaction-costs model of the firm's termination decision. One possible outcome suggested by this model is that dismissal litigation can have adverse effects, raising the total number of those discharged. I examine the possibility of adverse effects a) for public sector employees, and b) for private sector, non-manufacturing employees. In both cases provisional evidence for a positive--i.e., adverse--relationship between the adoption and incidence of unjust dismissal litigation, and the incidence of permanent layoffs is identified. The concluding section of Chapter IV investigates whether layoffs have been reduced substantially in the context of collective bargaining initiatives. The thesis concludes by laying out alternative options for dismissal regulation.

Thesis Supervisor:  Martin Rein

Title: Professor
BIOGRAPHY

The author was born in 1964 in Aalen, in southern Germany. He began his studies in Architecture and City Planning at the Univeristaet Stuttgart in 1983. Participating in an exchange program, he entered the University of Kansas' graduate program in Urban Planning and Architecture, from which he graduated with a M.Arch and a M.U.P. degree in 1989. In the same year he started his doctoral studies at MIT's Department of Urban Studies and Planning. He passed his Qualifying Examination for the Ph.D. in Urban Studies in 1991 (with distinction), and Political Science in 1992 (with high distinction).

In 1994, he became a lecturer in Economics and Economic History at the University of Glasgow (UK). In 1995, he obtained a permanent lectureship in Economics at the University of St Andrews (UK). Apart from teaching undergraduate and graduate level courses in labor economics, and law and economics at the University of St Andrews, he is also lecturing on social science methodology for the postgraduate training program at the University of Glasgow.
TABLE OF CONTENTS

Introduction

PART A
Institutional Determinants of Dismissals and Job Security

I. EMPLOYMENT TERMINATION AND THE LAW: A HISTORICAL OVERVIEW OF COMMON LAW AND STATUTORY PROVISIONS

II. UNIONS AND PLANT LEVEL DISMISSAL PROTECTION: THE PROBLEMS AND CONFLICTS OF THE "LOCAL" APPROACH

III. THE COURTS AND INDIVIDUAL DISMISSAL PROTECTION: WRONGFUL DISCHARGE LITIGATION - EVOLUTION AND PROBLEMS

PART B
Different Pathways to Dismissal Protection? A Quantitative Analysis

IV. INDIVIDUAL VERSUS COLLECTIVE DISMISSAL PROTECTION A QUANTITATIVE ASSESSMENT

PART C
Dismissal Regulation: Normative Views, Conclusions, and Recommendations

V. CONCLUSION

References
Bibliography
American Statutes and Laws
English Statutes and Laws
American Cases
English and Scottish Cases
Tables and Figures
Appendices
Preface

The US has entered a new wave of corporate restructuring and downsizing. An April 1996 report in the Economist states that companies have terminated at least 1.7 million workers since January 1993--and a total of 3.1 million in this decade. The number of job cuts affecting individual companies are staggering: between 1993 and 1995 Kodak eliminated 14,100 jobs, Westinghouse 4,900, Scott Papers 10,500, and IBM 36,000 jobs. In some respects, the current wave of restructuring differs from that of the early 1980s. In the 1980s, many of the companies undergoing mass restructuring were manufacturing firms, whose profit margins had deteriorated. Today's wave of restructuring affects primarily white collar employees, often in companies with sound profit margins. AT&T, which is currently cutting almost 50,000 jobs, for instance, experienced a fourth quarter profit increase of 12%, creating profits of about $1.5 billion (excluding restructuring charges).

In some sense this restructuring is made possible, and perhaps encouraged, by the limited and faulty US system of dismissal regulation. Many labor economists and legal experts have stressed the relative backwardness of US dismissal regulation. This view is based primarily on the combination of a notably incomplete system of common law discharge protection, with a highly selective system of statutory dismissal protection. While most collective bargaining agreements include clauses that prohibit the discharge of employees except for
"good cause", these provisions often fail to provide an effective source of dismissal protection: first, because of the limited coverage of workers through union contracts (today less than 20% of the non-farm workforce are covered by collective bargaining agreements). Second, because of union discretion which allows union representatives to refuse arbitration to an individual; and third, because of the court's traditional adherence to managerial prerogatives, which tends to render dismissals for alleged economic reasons untouchable. This thesis explores the lengthy process in which this specific political economy of dismissals was created, and examines what forces currently limit job loss.
THE POLITICAL ECONOMY OF DISMISSALS

Introduction

This thesis is about dismissal, or more precisely, employment termination. Specifically, it is about a US exceptionalism, namely the absence of comprehensive dismissal regulation in the US, its origins, and its consequences. In the narrow, legal sense, a dismissal is the typically isolated incident of the discharge of an employee for various reasons. The topic of this thesis is not dismissal in this sense, but rather the termination of employment relationship in general. Such terminations include, a) "classical" dismissal, that is the discharge, of an individual employee because of her personal characteristics, who is then replaced with another worker; b) "strategic dismissal", that is the discharge of workers based on the adoption of a particular managerial strategy or policy (such as subcontracting, prevention of overstaffing); and c) redundancies, that is the discharge or permanent layoff of workers for economic reasons, including plant closings. While these distinctions are of some importance to legislature, this thesis does not rely on such a categorization, but rather views dismissal as a unified phenomenon. This is case because there is much blurring between these categories, which is becomes particularly apparent in the context of a legal historical analysis. The just-cause standard of the unionized workplace, created to prevent arbitrary discharges, for instance, once a formal arbitration apparatus developed into a much more general
mechanism which could protect workers whose dismissal was based on a skill mismatch or even economic reasons.

1. The US Exceptionalism

Industrial relations specialists have frequently noted that the US is the last industrialized country that does not have comprehensive dismissal legislation. The existing US regime of dismissal protection is characterized by a high degree of fragmentation. Existing employees' rights statutes protect particular groups of the workforce against certain types of dismissals, but effectively cover only a small fraction of the workforce. In the past three decades, the protection of employees from discharge has, if anything, decreased. Union densities have declined, eroding the discharge protection which has traditionally been provided through just-cause rules and the grievance and arbitration apparatus of the unionized workplace. The federal courts, following the appointment of approximately 150 judges, meanwhile are said to have become less sympathetic to individual claims of unjust discharge, based on age, disability, or minority status.

Broadly speaking, the absence of such regulation affects two principal groups of employees. First, it affects employees whose dismissal is based on their personal characteristics, skills, or actions. Employees may be singled out for dismissal because management perceives them as incompetent or their skills as inadequate, but equally, individual dismissals may occur in
retaliation of legitimate workers' actions such as the objection to unethical or criminal activities by the employers. The Michigan law Professor Theodore St Antoine (1984) has estimated that approximately 70% of all US workers have no guarantee against arbitrary dismissal. Extrapolations from figures on discharge arbitration have indicated that about 200,000 to 500,000 workers annually are discharged without cause. Other estimates have suggested that, in every year, approximately 150,000 to 200,000 non-union workers would be entitled to a remedy and/or reinstatement under a just-cause criterion.²

Intrinsically related to the US anomaly of limited dismissal regulation, has been the phenomenon of intensifying unjust dismissal litigation, which the US has experienced over the last 15 years. Partly due to the absence of comprehensive unjust dismissal legislation and reduced coverage by collective bargaining agreements, the US courts have faced a continuous increase in private common law unjust dismissal suits. Today the number of unjust dismissal cases pending in state courts alone, may well exceed the 25,000 to 30,000 mark. Employers in the US have responded to this rise in dismissal suits by devising a comprehensive set of litigation-avoidance strategies.³ These strategies range from disclaimers to be signed by the employee at the time of employment, fixed term routine contract revisions, to the creation of in house dismissal-arbitration councils. In addition, insurance firms are now offering policies that protect firms against the liabilities of wrongful termination suits.

The second group of workers affected by the absence of dismissal regulations includes employees whose discharge is the result of a
strategic management initiative or of economic pressures. By contrast to the UK, Germany, and a host of other advanced industrialized nations, US workers have no statutory entitlement to severance pay. Perhaps more important is a less tangible aspect of the US discharge regime, namely the limits placed on the involvement of employee organizations in influencing or preventing redundancies.\textsuperscript{4} US courts, over the last 50 years, have protected the rights of employers to close branches and dismiss workers with little or no interference from unions. By contrast to European codetermination schemes, therefore, the ability of US unions to affect decisions on redundancies is very limited. The number of workers affected by this type of "economic" termination can be gauged with data from the Displaced Workers Survey. For the five year interval from 1979 to 1984 this survey reported that a staggering 11.4 million employees (an average of 2.28 million annually) lost their job due to plant closings, employers going out of business, or layoffs from which there was no recall. Since then the number of job displacements has decreased, reaching a low in the 1985 to 1990 interval with 8.9 million displaced workers (or an average of 1.79 million displacements annually).\textsuperscript{5} Over that same period, the sectoral composition of terminations has meanwhile shifted from production industries to services, although the relative incidence of terminations in production industries is still almost twice as high in production as compared to services (see Table i(1)). If we assume that roughly 500,000 individual workers are dismissed annually without cause, approximately three times as many workers are subject to terminations for economic or strategic reasons, as are to individual dismissals.
On the whole, amongst industrial relations and labor law experts, there is some consensus, that the US regime of dismissal regulation is "backwards." By contrast to most advanced industrial nations, the US does not have a comprehensive system of dismissal regulation, industrial tribunals or severance pay arrangements. While, US courts grant several types of exemptions from employment at-will, the court doctrines have as yet not aggregated to a comprehensive unjust dismissal statute. Similarly, while statutory law places restrictions on the employers' rights to dismantle union firms, the courts have been divided with regard to the bargaining rights they are willing to grant union representative in such termination decisions. Not surprisingly, calls for the US system of dismissal regulation have been string throughout the last decades, having perhaps intensified during the last wave of corporate restructuring.

2. The Debate on Dismissal Regulation

Today the dismissal regulation is a hotly debate topic, both amongst political circles and amongst experts. In February 1987, for instance, the AFL-CIO Executive Council has, for the first time in its history, called for the legislation, establishing employee protection against "arbitrary" employer conduct, and the provision of "safeguard[s] ... against discharges without cause." According to the AFL-CIO council, such legislation represented "a basic labor standard, that is the hallmark of a decent society" and should be made available to all US workers. Union initiatives to introduce
such legislation, despite repeated attempts have been thwarted by congress, most recently by a Republican majority under Gingrich.

Much of the expert literature, meanwhile has focused on the phenomenon of unjust dismissal litigation. Susan Mendelsohn (1990) has estimated that between 1980 and 1987 inclusive, more than 150 articles on dismissal litigation appeared in the major American legal journals. My own estimate locates the number of articles on unjust dismissal appearing in the ten major applied management and personnel journals over the last ten years as being somewhere in the high 200s. The next sections will briefly review the key arguments which have been discussed in the context of economic and transaction economic analysis.

2.1 The Need for Dismissal Regulation - A Macro-Level View

Whereas much of the industrial relations implicitly assumes that the restriction of dismissal per se is a desirable social good, this is not the case for most neoclassical analyses. In the prototypical neoclassical view, the right of employers to dismiss a worker, at least on a macro-level, contributes to an efficient allocation of resources. Under perfect competition, the employer adjusts the quantity of labor demanded to a given wage rate. In other words, employment in a specific sector "a" is increased, so long as the last worker's marginal productivity equals the wage the employer is required to pay her or him. If wages rise too fast, say because productivity in other sectors rises faster than in sector "a", the
employer will start dismissing workers (or in a less extreme case, stop hiring them). Over time, an optimal level of fluctuation will be achieved, which will ensure that employees are allocated to the most productive sectors of the economy.10

Job-security enhancing, employment-protection legislation, according to neoclassical analysis, can hamper this process, and create inefficiencies or "rigidities." Such rigidities arise as part of the steady expansion of the government and its increasing interventionist role in the economy. Together rigidities and interventions can reduce geographical mobility, skill/occupational mobility, job mobility, and the sectoral reduction of wages to market clearing levels.11 In a pure market economy, reduced mobility results in an inefficient reduction of factor movements, which, in the long run, reduces the productivity and competitiveness of a country.

Advanced industrial economies, however, have ceased to be pure market economies. Once the state has intervened, the dismissal of employees itself is no longer unproblematic. Under a system of unemployment insurance and welfare payments, an employer externalizes much of the costs of a dismissal to society. Displaced workers can add to unemployment insurance expenses and welfare payments, without the dismissing employer paying for it. With the company not bearing the true costs of dismissals, additional distortions in the allocation of resources arise. More workers are employed in industries which are likely to experience frequent job loss, and dismissals are more likely to occur than if employers were accountable for at least a part of
their cost. Ultimately, therefore, on a macro-level, the question whether restriction on dismissals are beneficial is undecided.

An alternative route to the assessment of dismissal regulation is to look not at the economy as a whole, but at the operation of the firm. A firm's efficiency may be improved if the employer has the right to dismiss employees at-will, but such a solution can encourage employer opportunism and may have tradeoffs with respect to equity issues.

2.2 Efficiency versus Power Asymmetry: The Classical Debate

Favorable views of the employment-at-will are typically based on a rigid application of the neoclassical theory of the firm and the market. The neoclassical paradigm implies that markets are the most effective mechanism for operating the labor market. Any deviation from market processes in deciding economic outcomes, such as the enactment of dismissal protection legislation, is assumed result in inefficiencies. In the concrete context of dismissal regulation, two principal types of inefficiencies are assumed to arise, once the employers right terminate employment is restricted; namely increases in monitoring costs and organizational inefficiencies. Counter-arguments meanwhile stress issues arising from the power asymmetry of worker and employer.
2.2.1 Efficiency and Equity

The first type of inefficiency results from increases in monitoring costs due to a reduction of the deterrence effect of dismissal. Neoclassical analyses typically assumes that the unadulterated keeps monitoring costs at a minimum.\textsuperscript{12} Knowledge that each party can renounce the agreement decreases the chances that a worker will not put forth the expected levels of performance, and that employers will not proffer the promised compensation. Since employee shirking can be costly and monitoring is often impossible, the freedom of the employer to dismiss ensures output. An alteration of this contract format through a restriction of dismissals, reduces this threat of a dismissal and can ultimately reduce output in existing firms, hinder the creation of new firms, or lead the employer to hire fewer workers.\textsuperscript{13}

A second type of inefficiencies is said to arise from the restriction of the employers dismissal right, concerns the organizational efficiency of the firm. Since restrictions on firing for reasons of redundancies cannot be completely separated from restrictions on unjust dismissal, interference with the right to dismiss, and particularly the imposition of penalties, are said to result in excess employee capacities (quantity decision) as well as inflexibilities regarding the choice of the workforce (quality decisions). As an exponent of this view, Gary Becker has warned against the "the courts' becoming a pink slip police."\textsuperscript{14} He suggests that court policing of dismissals erodes managerial property rights
and, in the long run eliminate incentives for the creation for the creation of new firms. Arguing along similar lines, the British right-wing philosopher John Gray has argued that interference "[with] managerial decisions such as restrictions on hiring and firing, are likely to destroy entrepreneurial intuition and self confidence."

Successful managerial conduct, in Gray's view requires the ability to act in situations where much theoretically desirable information is lacking. Managers and/or entrepreneurs succeed in environments of uncertainty because they possess tacit knowledge; that is, knowledge that cannot be articulated, that exists only in use and can be attained only by experience of its use. In order for tacit knowledge be effective, managerial decision making has to be unconstrained.15

According to Picot and Wenger (1988), additional problems arise, when employees exploit available restrictions on dismissal. Picot and Wenger suggest that,16

If employees have protective rights there is no guarantee that these rights cannot be exercised in order to expropriate the employer. Protection against dismissal, for example, may reduce work effort because the employer cannot fire 'at-will' ... The ensuing moral hazard problems are a strong argument in favor of short-term termination rights.
("The Employment Relation ...", p. 32)

Like most orthodox neoclassical analyses, Picot and Wenger's reflects an asymmetrical and perhaps biased view of the employment relationship. The protection of employees from dismissals is viewed as expropriation or as a deviation from some natural state, whereas little or no attention is paid to the problems created for dismissed
employers. Not surprisingly the previous arguments have been countered early on by arguments which stress the generic differences between a conventional contract and an employment contract, and the special position of the employee vis a vis the employer in a firm, respectively.

In essence most first-generation arguments in favor of dismissal regulation rest on the notion that employment contracts are conducted on the basis of a power asymmetry. The contemporary literature cites two principal sources of such power asymmetries.17 Firstly, employer's financial resources considerably exceed those of employees. As a rule, the adverse effects of quits are therefore unlikely to endanger the financial well being of an employer. Employees, by contrast, depend on their jobs for their financial well-being, an cannot effectively use the threat of quitting. Secondly, since skills are not perfectly transferable, employees can face long job searches and/or incur wage losses due to inadequate matching. Employers, meanwhile (depending on the business cycle) can recruit from a more or less extensive pool of possible future employees, thus facing short replacement periods and/or replacement losses.

Although convincing at first sight, more recently, power asymmetry arguments have been subject to some criticism. Opponents of power asymmetry arguments hereby have argued that, unless employers have an interest in dismissing workers beyond economic rationality, the presence of power asymmetries does not explain why an employer would take advantage of this position in a manner that would warrant
legal intervention. If decisions are ruled by economic rationality on both the employer's and the employee's side a profit-maximizing employer is said to have nothing to gain from an unjust dismissal. Discharges will therefore be limited to those instances where they are necessitated by economic circumstances or the personal characteristics of employers. This conduct will be enforced by the possibility of reputational damages, which helps create an additional incentive for employers to discharge on justifiable grounds only.

2.2.2 Implicit Contracts and Opportunism: Second Stage Arguments

More recent arguments in favor of a restriction the at-will right of employers have reversed the "shirking" and "opportunism" argument (applied earlier in defense of employment-at-will). Here, the presence of implicit contracts is used as justification of a restriction of the dismissal rights of employer.

In the traditional model of the labor market, the employer pays a worker the value of her or his marginal product for each pay period. Efficiency wage models assume that any single pay period's wage is insufficient to deter shirking. According to Becker and Stiglitz this problem can be resolved by compensation schemes where the employee pays the employer a bond upon taking a job. Bond schemes of this kind are impractical mostly because workers are unable to borrow sufficient funds at the start of their jobs. The practical alternative to bonds posted at the beginning of an employment, lies in a wage structure which internalizes the 'bond effect'. Such wage
structures typically defer a part of a worker's wage to later periods of her or his employment. In terms of the employment contract this means that the worker is offered a more or less steep age-wage profile, which provides wages below the worker's marginal product for the early years of her or his employment and wages above the marginal product for the later years.

By shifting proportionally more compensation to later years, the employer raises the cost of termination to the worker. If dismissed, the employee loses his accumulated deferred wages in escrow. The worker therefore has greater incentive to put in an effort throughout her or his working life. This scheme as a whole, nevertheless, is preferable to the employee, as she or he is likely to be paid the higher wage associated with the employee's assumption of continual higher effort.24

With regard to dismissal and employer shirking, the difficulty with such a scheme is how the total amount of deferred wages, changes over time. In the early years of the job, when wages paid are below the employee's productivity level, the total amount of deferred benefits rises, reaching a maximum around the mid-period of employment. Following this reversal point [R], the amount of benefits is paid off, as wages rise above the marginal product of the worker. If the firm discharges a worker at or after the reversal point [R], that is during the second half of the job, it not only avoids paying the extra cost of the disincentive payments, but also incurs the wage savings it has accumulated from the time it hired the employee. In a
world in which no market or legal constraints operate, a firm hence has a rational incentive for the dismissal of a productive worker for no cause (see Figure i(1)).\textsuperscript{25} Therefore, dismissal protection can be an imperative, particularly for those workers who are in a long term relationship with a firm.

\textbf{2.2.3 Employer Opportunism and Dismissal Litigation: An Unresolved Problem}

Despite this apparent imperative for a restriction of the doctrine of employment-at-will which ensues from the combination of a prevalence of deferred benefit systems with the incentive to dismiss unjustly, this justification of restrictions argument is not unproblematic. The Chicago law professor Epstein (1984), has suggested that the firm's concern with its reputation in the labor market will prevent such opportunistic discharges.\textsuperscript{26} Epstein argues that workers have access to information about opportunistic firms, which will ensure that firms with a history of opportunistic conduct will run out of business. In a not untypically circular Chicago school argument, Epstein hypothesizes that, if reputation would not discipline opportunism, workers would negotiate for restrictions on dismissals; given that such clauses are rare or completely unknown, opportunism must also be negligible.\textsuperscript{27}

Williamson (1987), arguing along similar lines suggests that managerial self interest itself will limit "downward opportunism." Says Williamson\textsuperscript{28}
I submit, however that just as a responsible labor union will examine the merits of worker complaints (worker opportunism) before bringing them forward through the grievance machinery (Williamson, 1985, pp. 155-56), so will managers be deterred from abusing workers who developed firm specific capital ... (Transaction Cost Economics, pp. 6-7)

The primary restraint on managerial opportunism, in Williamson's view is the firm's interest in preserving firm specific capital. One problem with this argument is that the firm's relative valuation of an individual's firm specific capital might vary and/or decline. Previously acquired firm specific skills might become obsolete, encouraging the firm to unjustly dismiss a worker, if the firm assesses the value of these skills as below the gains it can make from a discharge.

Problems also arise from the process of information acquisition. A Research Note in the Harvard Law Review (1989), has suggested that transaction costs are likely to weaken reputational restraints on managerial misconduct. The job searcher cannot easily obtain information about a firm's personnel relations, because the applicant is likely to feel inhibited from asking a potential employer about employment practices. Firms may moreover deliberately project a false image of job security and steady employment relations.

2.2.4 The Problem of Tradeoffs

A perhaps even greater difficulty in judging the appropriateness of dismissal regulation arises from the questions about cost and
efficiency of such regulations. Whereas some research suggests that employees should be protected against discharges by a European style just-cause standard, others question whether efficiency considerations do in fact justify proposals advocating such regulation. This is the line taken in the 1989 Harvard Law Review's analysis of at-will employment, where the authors suggest that a tradeoff exists between the costs of unjust dismissals, and the costs of legal enforcement of dismissal standards. The Note explains,

From a purely efficiency based perspective, the fact that ... employer opportunism exist does not necessarily justify a general good cause standard. Remedyg opportunism does achieve efficiency gains ... Such benefits, however, come only at a cost. Where the fact finder can collect information and evaluate claims easily ... a judicial remedy may be appropriate ... Reasonable solution may thus be limited exceptions like the public policy, implied contract, and faith exception. However in the general case the employer's motive is only implicit, information for the fact finder make the remedy much more costly.

(Harvard Law Review Note, at p. 528)

A recent estimate indicates that the enforcement costs of a dismissal statute could be substantial. H. Peritt (1989), basing his estimates on the average number of claims filed with the Equal Employment Opportunity Commission and the National Railroad Adjustment Board, suggests that between 30,000 and 100,000 claims could be filed under a general good cause statue. The average federal labor arbitration hearing in 1986 cost approximately $1,500 in arbitrator's fees alone. Adding in the cost per party, total arbitration costs under a statute could amount to $100 to $500 million in 1986 prices.

The dilemma between the potential gains from the enforcement of legislation which prevents opportunistic discharges and the cost of
its enforcement (narrowly or broadly defined), is likely to remain unresolved as neither gains nor costs can be accurately assessed.\textsuperscript{35} Therefore, some studies have taken a different route from the traditional cost benefit approach, which underlies much of the literature on dismissal litigation. Such approaches explore wrongful discharge litigation from a rights, rather than a cost perspective. Hypotheses based on the rights or property rights approaches are particularly suggestive in the context of opportunistic dismissals after the reversal point, as they directly address questions as to how to with accumulated property rights, such as the deferred wage of employees. Before exploring this route, I will briefly discuss some principal critiques of "shirking" arguments. These critiques are relevant primarily because they reveal some of the key assumptions on the regulation of employment termination are based.

3. Shirking and Dismissal – A Theoretical Critique

The notion of shirking, on which much of the above arguments have been based, is problematic for several reasons. Apart from the bias resulting from the predominant application of the concept to employees only, the argument is suffering from conceptual weaknesses. In some cases shirking arguments take recourse in tautology. Because workers shirk, they must be monitored. Workers in turn, shirk because monitoring is impossible.\textsuperscript{36} In others, evidence for shirking is based on anecdotal evidence. The latter is the case in the above mentioned Harvard Note, whose exclusive source of evidence for shirking is the
The principal objection to notions of shirking, cheating or opportunism, however, is not their conceptual weakness but their negative bias. While these behaviors may exist in the workplace, a general principle of shirking rests, as Cartier (1994) has argued, on a questionable view of human behavior as well as a lack of objectivity. In theory this is the case for both the assumption of employer, and employee shirking. In practice, however, the presence of a strong economic incentive to shirk or act opportunistic on the employer side, and the absence thereof on the employee side, renders arguments about employer shirking more credible. Arguments about employer opportunism derive their fortitude not from the imposition of unwarranted behavioral assumptions, but rather the realization of the existence of real economic incentives to act opportunistically. The dismissal of an employee past the reversal point may, for the employer, represent little more than a "cost saving opportunity", which is likely to carry little or no social taboo in the business world. Given existing laws, most instances of such employer conduct will carry no penalty, since as long as the employer's conduct does not fall within any of the relatively narrowly described categories the law is inapplicable. The "opportunistic" worker, by contrast, is continually subject to the threat of discipline through dismissal. In addition she or he will lack any real economic incentive to shirk or act opportunistically. Not conducting the work required during the time on the job does not provide workers with additional income, and a
reluctance to perform at one's level of ability is unlikely to yield monetary or other of advantages to an individual employee. Conscientious behavior in unsupervised work may reflect respect for oneself, for the contract, for other workers or the employer; or responsibility for standards or rules of a professional organization. It can ensue from the sense of identity, craftsmanship, or satisfaction which work can confer.  

This asymmetry in the incentive structures per se could justify an asymmetric treatment of dismissals, in which the discharge of a long tenured employee would be treated more suspiciously than an employer's claim that the worker shirked and was dismissed for justifiable grounds. Despite marked differences in the incentives structure, arguments about employer opportunism alone, however, do not yield an effective guideline as how to regulate dismissals. This is the case not only because of the costs of the enforcement of potential legislation of such a standard, but also because of the inherently implicit nature of the contractual arrangements. This implicitness extends to the characteristics of the non-linear wage contract, as well as the unexpressed performance standards imposed on the workers. The following section will discuss, albeit on a very provisional level, how a justification of dismissal regulation could be constructed without relying on notions of opportunism or shirking. This argument relies heavily on property rights approaches.
4. Exploring Alternative Views

The property rights view of job security is based on a substantial critique of notions of shirking, and more broadly, the neoclassical model of the firm. We briefly discuss these arguments, as they form the basis for an alternative conception of dismissal regulation, which we start introducing later on.

4.1 A Critique of the Neoclassical Theory of the Firm

One of the key implicit assumptions of shirking and opportunism approaches to dismissal is that employees as an economic and legal group are distinct and clearly distinguishable from the owner/managers of the firm. This approach reflects the neoclassical model of the firm, wherein, according to Arrow,\textsuperscript{40}

\[
\ldots \text{ workers are not part of the firm. They are purchased on the market, like raw materials or capital goods. Yet they (or some of them) carry the information base } \ldots \text{ they are neither owners nor slaves.}
\]

\textit{(Information and Organization of Industry, 1994)}

In the neoclassical model, workers are excluded from the stakeholders of the firm. They are assigned no role in managing the firm or themselves, or in monitoring the quality of output or the characteristics of the labor process.\textsuperscript{41} Perceiving workers as factor input, the neoclassical model rejects any worker claims of property rights in the firm. This rejection is justified on several conceptual and even "ethical" grounds. Central to it is a view that places uncertainty at the center of the activity of the firm.
According to typical neoclassical analyses the organization of the firm is based on an implied contract to allocate risk asymmetrical between the employer and employee.\textsuperscript{42} In this context, workers surrender discretion to their employer in exchange for the avoidance of risk, and are consecutively "guaranteed" an individually or collectively negotiated wage.\textsuperscript{43} As a result of the asymmetric contract, owner/managers are assigned supervisory functions in the firm. This is necessary, because contract performance by the worker cannot be guaranteed. Compliance with contractual obligations is enforced by monitoring, influenced through the terms of the wage bargain, or subtly conditioned by working conditions, mutual control or other such means.\textsuperscript{44}

Following the neoclassical dictum of voluntary choice and exchange, employees submit to this exchange voluntarily. Models of managerial and entrepreneurial activity propose that each individual makes a career choice by comparing entrepreneurial income to earnings from non-entrepreneurial employment. This decision depends on the individual's "endowment with entrepreneurial characteristics." The exercise of entrepreneurial skills, is--despite evidence to the contrary--invariable linked to risk taking by the entrepreneur; which ultimately justifies the exclusion of workers from stakeholder status.\textsuperscript{45}

The problems of this neoclassical division of manager and worker are substantial. The essentially "ethically" based division between
the higher risk taker who receives greater rewards, and the low risk
taker whose rewards are low, is at best antiquated and at worst
manipulative. The job loss of workers typically poses a greater
threat to the economic well being of the worker than does--given
contemporary legal and institutional arrangements--bankruptcy to the
employee. Apart from this political bias, the neoclassical view of
the division between employer and employee is intellectually
inconsistent as regards dismissals and job security in particular.
Firstly, if managers are required to monitor the performance of the
worker under the contract, i.e., screen that the work required is
performed, workers should have an equal incentive and/or right to
monitor the performance of managers, as managerial performance will
impact dramatically on their future ability to perform under the
contract. In other words, if managerial authority is justified by
risk taking, the risk of job loss encountered by individuals, should
at least to some degree authorize workers to exercise some control
over managerial decisions. Secondly, if managerial rewards are
justified because of the managers distinct entrepreneurial activities
(as argued by Gray and others), workers whose input into the firm is
innovative and entrepreneurial should be granted managerial status, if
only on efficiency grounds (i.e., in order to allow them to implement
their innovation effectively). Thirdly, if firm specific skills
account for a substantial increase in the productivity and profits of
the firm, the worker's property in these skills should be protected,
particularly if they will not be rewarded elsewhere or have not been
adequately remunerated by the firm.
Chapters I and II will examine how workers' claims with regard to the first issue--control over managerial decisions which affect job security--have been rejected. Claims of the second category, i.e., those regarding innovation or invention by worker, essentially fall under the category of intellectual property rights. Here too, the law has been reluctant to restrict traditional and potentially antiquated notions of entrepreneurial authority. Claims of the third category, where employees view their job as property--primarily because they have made investments in the expectation of continued employment--finally have received ambiguous treatment, which deserves closer attention. I examine legal and conceptual issues only, as legal decisions invoking a property rights in jobs are still rare.

4.2 The Property Rights View: An Alternative Conception of Dismissal Regulation

The foundations of property rights views of dismissal regulation were laid in the late 1970s. While diverse in content and methodology, these views have some commonalities. Property rights theories conventionally define as a firm's owners, those persons who share two rights: the right to control the firm and the right to appropriate the firm's residual earnings. Many firms are owned by persons who also supply the firm with some factor of production, usually capital.

According to Hansman (Professor of Law and Economics at Yale) a legal analogy exists between the producer cooperative and the business
In the producer cooperative, say a dairy cooperative, ownership rights are held exclusively by virtue of the fact that the farmer sells milk to the firm. Not all farmers who sell milk to the firm need be owners, since the firm may purchase some milk from non-members who are simply paid a fixed price but do not exercise control over the firm or participate in the division of residual earnings.

In the typical cooperative, the members engage in continuous exchanges and vary their volume of transactions with the firm. By contrast to the Knightian entrepreneur, who is also the primary innovator in the firm, ownership in the cooperative is assigned to persons who have the transactional relationship of a resource supplier to the firm. The reason for this is, that the ownership relation is used to mitigate some of the costs that would arise in the case of contracting. The advantage of assigning ownership to the supplier of resources extends to issues of market power, as well as ex post market power or lock-ins. In terms of market power, this ownership by resource suppliers reduces efficiency losses associated with the setting of input prices above marginal costs. Ex post market-power benefits arise from the fact that owner-suppliers of capital, or other resources, must make transaction specific investments upon entering into the transactional relationship. Once such a transactional relationship has been entered into, exit becomes costly; a situation which can be exploited by the firm, unless it is at least partially controlled by the owner-suppliers of resources. Ownership of the firm by the supplier or investor reduces such incentives for opportunistic
behavior. A final advantage of the above system lies in the possible reduction of managerial opportunism can be reduced because of the owners' incentive in exercising control.53

The crucial issue involved in the cooperative analogy is that ownership need not be, and frequently is not, associated with the actual investment of a lump sum of capital, the provision of raw material, or an intermediate product. In other words, the distinction of investor owners according to the amount, timing, and nature of the resource provided to the firm has no legal bearing on ownership rights. Conversely, property rights do not depend on the amount, timing, and nature of the resource provided. Key to the property rights claim is that a resource has been provided consistently on which the firm's performance crucially depended, and for which the provided was not compensated at the market rate at the time.

By supplying the input of her or his labor continuously to the firm, the worker can acquire a property right in the firm. Some property rights analysis would suggest that any worker continuously employed for a given time period has acquired such a property right. This being the case primarily because the job has enabled an employee to "achieve social status, personal opportunity, and power" which in turn has benefited the firm.54 Dismissal from the respective job endangers these achievements and therefore must be compensated for, say by a severance payment.
A second, less radical view, qualifies this analysis. Workers acquire a compensable property rights in their job if the compensation they received does not account fully for the work done. This will typically be the case if the worker is paid on the basis of a non-linear wage contract, and has been dismissed before completion of lifetime employment. It is also the case if the worker has acquired substantial firm-specific skills whose acquisition helped the firm to increase productivity, but which cannot be transferred to other firms. Since foregone earnings in an implicit contract situation, and those lost through the non-transferability of skill can not be immediately valued, an approximation rule has to be applied. One simple rule of thumb is to approximate these losses through the payment of a sum which rises with tenure, as well as the individual workers earnings, up to a certain number of years.

5. Study Objectives, Structure and Methodology

Despite a strong commitment to the protection of property rights in other areas, the US legislature and courts have been reluctant to acknowledge property rights in jobs and protect these accordingly. The key aim of this analysis is, to identify the forces which have given rise to the US exceptionalism of a comparatively weak protection of these job-property rights. By contrast to much of the mainstream industrial relations analyses, my study adopts a particular angle, which emphasizes the role of the courts in reaffirming managerial prerogatives. The recent industrial relations literature, in part, assumes an almost unrestricted room for strategic initiatives by
employers and unions. This, I consider unrealistic. The choice of strategies adopted by employers and unions is constrained by an institutional framework in which the courts as final umpire play a major role. This institutional framework not only rules out certain choices, but, perhaps more importantly, conditions the preferences and choices made by relevant actors.

The core of my analysis is structured in two main parts. Part A (Chapters I to III) discusses the principal factors which impact on the right of employers to dismiss workers, namely regulations on the national level, plant level initiatives by unions, and individual court action. Part B (Chapter IV) complements the qualitative analyses of Part A with a quantitative investigation of the effects of different routes on the dismissal of employees. The conclusion then identifies the key themes which characterized the evolution of the US dismissal regime and speculates about how these developments can be explained. A more detailed outline of all three sections is given below.

a) Overview of Part A: Institutional Determinants of Dismissals and Job Security

Part A (Chapters I to III) analyzes the forces which regulate and restrict dismissals. The regulation of the employment relationship, particularly with regard to the dismissal and termination right of employers, is of some complexity. This is due primarily to the open-ended and multi-layered nature of the employment contract. Most economic interaction, including the establishment of the employment
contract, is mediated by a process of contracting. Contracts define the obligations and rights which are necessary to govern an exchange. A normal sales contract is "complete", because there is ex ante agreement on the responsibilities of both parties over the whole period of the exchange. Such contracts are possible when the exchange is simple and predictable. This is not the case in the employment contract. Ex ante agreements of the employment contract typically fail to cover future rights, responsibilities, and contingencies; primarily because the parties expect that once employment has gone under way, gaps will be discovered and amended ex post.55

The incompleteness of the employment contract reflects a high degree of uncertainty about the future conduct of employment, both with regard to the tasks specified and the duration of the contract. Since it is not possible to formulate a contingent contract covering the entire tenure of employment, hiring is typically done on the basis that future terms will be varied; whether by one-to-one negotiation, collective bargaining, or management edict. Employment contracts, as a consequence, are rarely in the form of a tidy document. The rules of individual employment, including those referring to its termination, usually have to be deduced from successive layers of written and unwritten rules. The most formalized of these layers are regulations at the national level. These include two broad types of regulations, rules emerging from common law legal tradition which cover all workers, and statues which cover particular groups such as unionized employees. A second source of rules is created by accepted customs, which are upheld by work groups and frontline management at
the plant level. These plant level rules of conduct usually achieve some level of force and formalization in the unionized workplace, where they can have substantial impact on the employment rights of workers. A third level of regulations evolves from individual challenges to employer conduct, normally in the form of private law suits. Such challenges are typical of the non-unionized workplace where employees have few other sources recourse apart from the courts. The restrictions on employers, created by these challenges, are less rigid than those created by the other two institutions; particularly because they depend on the ability of individuals to commit resources to a dispute whose outcome is uncertain.

Chapters I to III explore the rules and practices of discharge created by all three layers—the law, unions, and courts—in that order. These three layers interact, in providing dismissal protection. This interaction can be additive, the cumulative protection available from different layer can have a strengthening effect. But it can also be competitive, that is the strength of one layer can induce relevant actors to neglect pathways available in another layer. Chapter I starts by examining the historical evolution of common law dismissal regulation, and its partial replacement by the statutory regulation, particularly that pertaining to collective bargaining. In the case of common law dismissal regulation we observe a gradual movement of the US dismissal regime away from its British origins, which culminates in the adoption of employment-at-will. The adoption of the at-will standard itself created problems, particularly with regard to the organizing activity of unions. These detrimental
effects of the at-will rule on organizing activities caught legislative attention when, during the New Deal, the orderly extensions of collective bargaining was considered part of national a agenda for recovery. Despite the passage of sweeping regulations with regard to dismissal protection of union member, the key acts were limited to union members, and had virtually no impact on the legal status of non-union workers. Perhaps more importantly, even within the arena of collective bargaining, the courts when interpreting new statutory law steadily reaffirmed managerial prerogatives against union demands to be involved in termination decisions. Chapter II discusses the initiatives unions have taken to restrict the employer's power to dismiss at plant level, the customs that have arisen from them, and the tradeoffs unions encountered by adopting these policies. Here I argue that, contrary to the assumptions of "business union" view of US labor organizations, the unions were actively involved in initiatives to secure the jobs of union members. That these initiatives did not result in broad "visible" legislative drives, I argue, was predominantly due to the success of local plant-level initiatives. Chapter III, finally, explores the evolution of wrongful discharge litigation which become prominent in the 1980s, primarily because of a decline in union densities, which rendered unavailable the plant-level protection provided in the unionized workplace. In addition to declines in union coverage, the creation of exemptions from at-will employment by the courts was triggered by a confluence of political factors, such as declining union coverage, the influence of the consumer, environmental and civil rights movements, as well as concerns with fraudulent acts against the government.
Throughout part A, a particular emphasis is placed on the forces, which acting together, have created the spotty and perhaps haphazard system of dismissal protection in the US. In this context, the role of the courts is of paramount importance, not only because of unwillingness to grant unions a broader involvement in termination decisions, but also because of their tolerance of a fundamentally unequal rights.

b) Overview of Part B: Individual Versus Collective Dismissal Protection - Quantitative Analysis

Part B (Chapter IV) complements the qualitative analysis of Part A, with a quantitative investigation of the effects of different routes to dismissal regulation. My analysis starts with a review of transaction-costs theories of the employment relationship and an assessment of their implications with regard to the firm's dismissal decision. I then introduce a transaction-costs model of the firm's termination decision. One possible implication of this model is that dismissal litigation can have adverse effects, raising the total number of those discharged, whereas collective efforts to reduce mass-discharges are likely to reduce the number of terminations. These two hypothesis are successively tested. I first examine the possibility of adverse effects of increased litigation on the incidence of on permanent layoffs and layoff events a) for public sector employees, and b) for private sector, non-manufacturing employees. In both cases, albeit on a provisional level, a positive——i.e., adverse——relationship between the adoption and incidence of unjust dismissal litigation, and the incidence of permanent layoffs is identified.
The concluding section of Chapter IV focuses on the second hypothesis, namely that layoffs can be reduced in the context of a collective bargaining initiatives. The typical neoclassical assumption is that, although the unions can bargain over wages, the firm retains the right to decide on redundancies. Using a pooled regression analysis of state data on the manufacturing sector for the years 1975 to 1990, I document that--since the mid 1980s--union strength corresponded increasingly with lower layoffs, while the relationship between union strength and wage gains weakened.
NOTES:

1. This situation has been noted by several observers. A comparative account can be found in Peritt. See H. Peritt, Jr., Employee Dismissal: Law and Practice (New York: Matthew Bender, 1987, 2nd ed) at section 2.1.


3. See editorial by Alan Westin in Business Week, March 28 (1988) p. 68. Westin estimated that approximately 25,000 wrongful termination suits were pending in state courts in 1988, compared to approximately 200 in the late 1970s. My own estimate, based on a rough extrapolation of jury trials completed in California courts, would indicate an increase of unjust dismissal suits to about 30,000.


5. The Displacement Survey is a supplement of the Current Population Survey. It enquires whether respondents have, in the past five years lost a job "because of plant closing, an employer going out of business, a layoff from which there was no recall ..."


8. Mendelsohn discusses the increased prominence of unjust dismissal suits in legal practice, including the rise in the number of

9. This estimate is based on queries conducted with the Public Affairs Information System (PAIS CD-ROM) in 1994. Most articles identified were concerned with how employers can prevent lawsuits. Examples of such articles include J. G. Frierson, "How to Fire without Getting Burnt," in Personnel, vol 67, September, (1990) pp. 44-50; M. J. Keppler, "Halting Traffic on the Road to Wrongful Discharge - Avoiding Wrongful Discharge Suits," in Personnel, vol 67, March, (1990) pp. 48-56; L. Jenners, "Employment-At-Will Liability: How Protected are You," in Human Resource Focus, vol 71, no 3 (1994) p. 11 ff. Jenner recommends that employers "sanitize" the language of all written documents so that promises may not be construed from any of these documents. She also warns employers not to make any oral employment guarantees during conversations. Frierson recommends that employers reduce their exposure to lawsuits through several measures, including an interviewing and hiring strategy which eliminates potentially "troublesome" employees, explicit company policies and documents which emphasize the at-will nature of employment, and pay and promotions procedures which state that these company rules apply to all employees. Keppler suggests that employers adopt a proactive strategy which uses the company's employee handbook as a legal defence by identifying behavior that will and will not result in dismissal. In addition Keppler suggest that larger companies establish binding in house dispute resolution procedures to avoid litigation.


10. This model is discussed, e.g., in B. Okun, and R. Richardson, "Regional Income Inequality and Internal Population Migration," in Economic Development and Cultural Change (1961).


15. Grey's analysis exemplifies an intellectual tradition which dominates much of the pro employment at-will literature. This tradition typically attributes the success of economies solely to the "entrepreneurship." Unfortunately this literature is largely void of any positive definition of entrepreneurship. Typically it lists factors which contribute to the rise of entrepreneurship as well as those which hamper it are listed, while the sources of ideas and the pools from which "entrepreneurs" are recruited are not spelled out. As a common denominator the "entrepreneurship" argument against dismissal regulation stresses the need for the protection of managerial property rights, which are assumed to include the right to hire and fire at-will. See John Gray, Beyond the New Right (London: Routledge, 1993). References to the historical works of North (1981), Rosenberg & Birdsell (1986), and Landes (1970) are frequent and an "empirical" correlation between entrepreneurial activity and institutional arrangements which protect individuals individuals who hold property and allow them to act unconstrained is stressed. Both Gray and Becker (infra note 84) assume as proven the claims by Landes and others that "those economies have grown fastest which were freest" (Landes, 1970, p. 19). See D. North, Structure and Change in Economic History (New York: Norton, 1981); N. Rosenberg, and L. Birdzell, How the West Grew Rich (London: Tauris, 1986); D. Landes, The Unbound Prometheus (Cambridge: Cambridge University Press, 1970).


18. Epstein, supra note 12.


26. See Epstein, supra note 12.


32. See Gould, supra note 6, at p. 422-434. Gould advocates a system of compulsory arbitration while acknowledging the need to protect employees from abusive and criminal conduct of employers.

33. See, HLR Note, supra note 19, p. 528.

34. See H. Peritt, Jr., Employee Dismissal: Law and Practice (New York: Matthew Bender, 1987, 2nd ed); and Harvard Note, supra note 19, at pp. 527-528.

As far as the debate on the adequacy of existing legislation is concerned it is important to note, that the existing exemptions to employment-at-will only insufficiently addresses the problem of discharges based on employers' attempt to deprive workers from retrieving deferred earnings. ERISA regulations possibly come the closest to enforcing employee rights to deferred benefits against employer opportunism. The public policy exemption currently does not address this type of employer behavior, which in many cases neither violates statutory nor contractual employee rights. The implicit nature of contracts with non-linear wage curves and deferred benefits makes the application of actions based on the implied contract exemption or the covenant of good faith and fair dealing difficult, unless as broad an interpretation of these exemptions is adopted as in Huber v. Standard Insurance Co.


37. C. Mars, Cheats At Work (1982). The dubious example cited in the Harvard Note, supra note 19, discusses practices allegedly applied by British busdrivers in order to pick up as few passengers as possible and to earn an extra tea break. The example does not merit the reader's or anybody else's attention except for the fact that it exemplifies the type of "evidence" on which much of the literature on shirking is based. Remarkably enough the authors of the Harvard Note also decided that Mars' anecdote deserved a half page of their treatise.

38. See Cartier, supra note 36, pp. 185-187.

39. Although the "shirking" literature frequently takes recourse to sociological arguments, it tends to ignore the vast array of studies within the "sociology of work" which emphasize "non-rational" commitment of workers to their jobs or occupations. For an overview see E. Freidson, "Labors of Love in Theory and Practice: A Prospectus," in Erikson and Vallas eds., The Nature of Work (New Haven: Yale University Press, 1990).


41. The implications of the neoclassical model of the firms, as elaborated by Arrow, are examined in P. McNutt, "Legal Factors Affecting," in Burke ed., Enterprise and the Irish Economy (Dublin: Oak Tree Press, 1995).

42. See Arrow, id.; and F. Knight, Risk, Uncertainty and Profit (Boston: Houghton, 1921). The experiences of the 1990s in particular might prompt the cynic to say that the risks of economic hardship is allocated almost exclusively to the worker whereas the employer can ensure her or himself of continuous personal prosperity; the neoclassical model, of course, implies the opposite.

44. See Cartier, supra note 27, p. 1. The use of wages as incentives, of course, leads to efficiency wage arguments discussed in previous sections.


47. Hansman, *id.* p. 4.

48. Id. at pp. 5-9.


51. See Ricketts, *supra* note 45, chaps. 4 and 5, on the cost of contracting, including issues of asymmetric information, agency problems and issues of limited markets.


PART A

Institutional Determinants of Dismissals and Job Security
I am not speaking of conscious impartiality; but the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such nature that, when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish. This is one of the great difficulties presently with labor. Labor says: "Where are your impartial Judges? They all move in the same circles as the employers, and they are all educated and nursed in the same ideas as the employers? How can a labor man or a unionist get impartial justice?" It is very difficult ... to be sure that you have put yourself into a impartial position between disputants, one of your own class and one not of your class.

(Lord Justice Scrutton, Cambridge Law Jnl. 1921)

Chapter I

EMPLOYMENT TERMINATION AND THE LAW:

A HISTORICAL OVERVIEW OF COMMON LAW AND STATUTORY PROVISIONS

Introduction - The Legal Regulation of Dismissals in the US

The current US situation of a highly litigious workplace with weak explicit regulation, is the outcome of lengthy historical process.\textsuperscript{1} This chapter reviews the history of dismissal legislation in US labor-law and law-proper, as well as the development of dismissal regulation within the US collective bargaining system. Roughly since the 1940s the US workplace has been governed by two widely different rule-systems.\textsuperscript{2} First, there is a basic set of general regulations based on common law and state law that applies to all employees. Second, there is a set of statutes that governs the unionized or union-contract covered workplace, and regulates the range of issues to be arbitrated between unions and management.
Both, common law and statutory law restrict the right of the employer to permanently lay off and/or to dismiss workers in one way or another.\(^3\) In this chapter common law dismissal protection is examined separately from the employment protection afforded through the statutory framework of collective bargaining. This distinction is in part artificial, since, in practice, the common law and the collective bargaining components of employment protection are interrelated: collective agreements, such as concession bargaining accords, can protect workers from layoffs because such agreements have been given the status of common law contracts. (The Taft-Hartley amendments to the NLRA, for instance, assigned bargaining agreements the status of common law contracts enforceable by law). Similarly, workers covered by union contracts de jure retain most of the privileges of common dismissal protection, while procuring the right to take action for unfair labor practices against their employer or union.\(^4\)

We start our analysis with a review of the common law of employment termination. This discussion covers a time period from the early 19th century up until the 1920s. The key theme of this discussion is the departure of US dismissal regulation from the older English standards, which led to the adoption of a radical at-will dismissal regime. Initially the American colonies and the republic thereafter, adopted stringent English standards on dismissal; banning among others the dismissal without cause of an indefinite employee before a year was worked out. Under this regime, privately initiated unjust dismissal suits were not uncommon. By the late 19th century,
US analyses of the employment relationship started to increasingly diverge from older British standards; a process which culminated in the adoption of employment-at-will. Once adopted, employment-at-will, was applied uncompromisingly. The dismissal of employees, as a consequence, became the major weapon against labor demands and labor unrest.

The second section gives a rough overview of the evolution of statutory provisions which restrict employers right to terminate a worker's employment. The introduction of such statutory provisions started in the 1920s and 1930s, most notably with the passage of the National Labor Relations Act. Here we introduce our second theme. The adoption of dismissal regulations within the NLRA framework was the first major acknowledgment of the adverse effects of the at-will standard. With the NLRA, the legislator recognized, that as long as employers had the right to fire employees at-will, that public policy goals of the New Deal, such as industrial peace and the extension of orderly collective bargaining were unattainable. The focus of the analysis are the mid 1960s when the Supreme Court handed down several decisions which effectively reaffirmed the right of management to close branches and discharge employees without union interference. The key issue here is not only that the NLRA had virtually no impact on non-unionized workers, but also that when interpreting the NLRA the courts gradually reaffirmed the managerial prerogatives against union demands for involvement in termination matters. These rulings culminated in decisions which effectively forbade unions from bargaining over job security and/or instigating any industrial action
on these matters. What remained for unions to do was to offer concessions in order to prevent impending job less. On the whole job security remained largely outside the remit of unions.

1. **The Evolution of the Common Law of Employment Termination**

The broadest source of dismissal regulation in Anglo-American countries is the common law. Prior to the late 19th century, the common law of employment posed significant obstacles to the dismissal of employees. These limitations were by and large eliminated with the adoption of the employment at-will doctrine in the late 19th century USA. Whereas statutory restrictions on specific types of dismissals were strengthened in the postwar era, common law provisions played little role up until the late 1970s, when the first unjust dismissal suits created new, less formal, restrictions on employment termination. The following sections review the origins of common law dismissal restrictions, mainly because of their importance for recent doctrines of unjust dismissal.

1.1 **The Origins of Common Law Work-Place Protection**

The history of common law dismissal restrictions starts with the transposition of English law to the Americas. Many employment related cases in the first 150 years of the US represent a struggle with English custom and legal heritage. This situation changed dramatically in 1880, with the creation and dissemination of
employment-at-will, which at the time was tellingly referred to as the "American Rule."

1.1.1 Origins

The American concept of the employment contract originated from 18th and 19th century English legal doctrine. In the 18th century, English law viewed the employment of individuals as a special case of the common law contract; commonly known as the "Law of Master and Servant." This law set stringent limits on dismissals, as well as quits of employees. Specifically, the English Law of Master and Servant provided that, where there was no evidence to the contrary, an indefinite hiring was presumed to be for one year. In practice, this meant that the unspecified service of an employee could not, without the breach of an agreement, be terminated before the year had been worked out by the employee.\(^9\) (In reality it could, and often was terminated on the pretense of misconduct by the employee).

Blackstone's commentaries on the *Laws of England* (1765-69), the leading summary of English law, stated explicitly to this point,\(^{10}\)

If the hiring be general; without any particular time limit, the law constitutes it a hiring for one year; upon a principle of natural equity, that the servant shall serve and the master shall maintain him, throughout all the revolution of the respective seasons; as well as when there is work to be done as when there is not.

*(Commentaries, Vol 1. p. 425)*

Through custom and the legal endorsement of the one year rule, contracts of less than one year were deemed objectionable by most
occupational groups in preindustrial England. This was the case, even though prior contractual arrangements specifying a shorter contract could have been made. Prior to industrialization, shorter employment contacts were generally applied to those instances only where the "master" hired a "servant" or "servants" to complete a (single) specified task. In such cases the contract length typically equaled the time it took to complete the specified task, irrespective of whether such a time period was predetermined or left unspecified.¹¹

During the 18th and 19th century in particular, complications arose from numerous sources. In many cases, workers would not allow contracts to specify how long a specific task would take. Even if contracts made such specifications, either the "servant" or the "master" could argue that unforeseen factors (such as bad weather) prevented her or him from completing or, respectively, enforcing the contract. Not surprisingly, legal historians have suggested that suits involving the Law of Master and Servant were amongst the most frequent civil actions in the latter half of the 19th century.¹²

1.1.2 A Digression on Wrongful Discharge Litigation in 19th Century England

From the 1820s onwards, the contracts of masters with servants and workmen in England were subject to much statutory regulation, whereby summary jurisdiction of a penal nature was given to magistrates to enforce such contracts. Parliamentary Acts passed under George IV (1820-1830) and in the first decades of Queen
Victoria's rule (1837-1901) regulated contract length, notice requirements, as well as damages and compensation to be paid to the employee if contract obligations could or were not fulfilled. Partly due to the availability of these statutes, some employees sued their employers for common law breach of contract if their employment was prematurely terminated.\(^{13}\) Perhaps surprisingly, in the first half of the 19th century, many of these employees were able to recover substantial damages. During a period of about four decades--roughly from 1835 to 1875--these damage awards to employees, led to an upsurge in wrongful discharge suits.

In early 19th century wrongful discharge suits, the plaintiff typically had to prove that he was "ready and willing" to continue in the service of his master.\(^ {14}\) Once such proof was accepted by the court, and no credible evidence for misconduct of the employee was at hand, the courts provided several courses of action. Where wages were payable quarterly, a situation typical for clerical employment in these days, an employee could recover at once for the period he actually served (note: most suits involved male employees, hence the use of male pronouns).\(^ {15}\) From then on things became more complicated, with the courts disagreeing on when and under which circumstances to assign payments in excess to the above mentioned.

According to Chitty on Contracts (1857, 2nd edition), a leading 19th century legal textbook, Victorian courts typically held that the employee could not recover his whole wages--\(i.e.,\) wages for the full duration of the contract--until after the time at which, by the
contract, they would have accrued due.16 The key ruling to this effect was the case of Lilley v. Ellwin.17 In Lilley (1848), the court of Queen's Bench18 had decided that an employee was entitled to treat a wrongful dismissal as no dismissal at all.19 Once the contract period had expired--say after a year--the employee could then sue for the whole of the stipulated wages for the period in question.20 This, of course, provided for much greater damages, than a suit for time actually worked, which would have been available had the employee rescinded the contract immediately upon his unjust dismissal.21

The logic behind this approach was straightforward. Since the court considered an employee's readiness to serve during the rest of the term as equivalent in law to actual service (i.e., as "constructive service"), the employee could receive wages for the full contract period even though he might have served only for a short period.22 Lord Ellenborough, Chief Justice of King's Bench, had set the precedent for this interpretation in the earlier case of Gandell v. Potigny (1818). (Gandell did not actually establish the rule, but merely pointed to the possibility of the interpretation which was later given in Lilley). He stated,23

If the plaintiff was discharged without sufficient cause, I think this action [meaning payment of the full wage] is maintainable. Having served a part of the quarter, and being willing to serve the residue, in contemplation of law he may be considered to have served the whole. The defendant is therefore indebted to him for work and labor in sum sought to be recovered.

(Smith's Leading Cases, Volume 2, p. 32)
The notion of constructive service, hence allowed the courts to require employers to pay wages for long periods, and provided more substantial damages to the employee than would otherwise have been possible.

In 1853, the notion of constructive service, as established in Gandell and Lilley, was further extended. In the then landmark case of *Hochster v. De La Tour* (1853)—one of the most liberal decisions in a wrongful discharge suit of this time—the Court of Queen's Bench ruled that an employee could sue for the full wages over the whole contract length, before the contract expired or commenced.\(^{24}\) The details of the case are of some interest, since they reflect the narrow contract based reasoning which resulted in a perhaps inadvertent ruling which favored the employee: Hochster had signed a declaration with De La Tour that he would enter his service as a courier on June 1, 1852. He further agreed to travel with De La Tour for three months, at the rate of 10 shilling per month. The declaration stipulated that Hochster would be in employ for the contract period "until the time when [he] ... wrongfully refused to perform his duty." In early May, De La Tour contacted Hochster and informed him that he would not employ him. Hochster issued a writ for breach of contract on May 22, 1852. De La Tour's defense contended that Hochster could not sue until the 1st of June when the contract took effect, and could not receive damages before three months thereafter. The court decided that Hochster's action was justified and awarded him the wages for the three months in question, even though the employment never commenced.\(^{25}\)
Following Hochster, an employee who was wrongfully dismissed had three courses of action.\textsuperscript{26} First, he could treat the contract as rescinded, and sue immediately for the last period's wages, that is for services already performed. In this instance, recovery was limited to the period actually served, minus wages which had been already paid.\textsuperscript{27} Secondly, an employee could wait until the termination of the period for which he was hired, and then sue for his whole wages, say for a full year, relying on the doctrine of constructive service.\textsuperscript{28} Thirdly, an employee could, following Hochster, bring a special claim for breach of contract against his employer and, given that the circumstances favored this suit (i.e., the court considered the contract as "entire"), recover wages for the full contract period.\textsuperscript{29} Both indefinite and definite contract employees, mostly in white collar occupations, pursued such suits for breach of contract, typically trying to recover wages for a full year. Scottish courts in particular awarded these full-year damages to both groups of employees up until the 1880s.

Dissatisfied with the potentially employee friendly drift of these decisions, English courts of the latter half of the 19th century imposed restrictions on the ability of employees to recover damages for wrongful discharge.\textsuperscript{30} Although wrongfully discharged employees could still recover damages, such damages were now assessed with reference to a) the amount already earned in the service, and b) the time likely to elapse before the servant obtained another suitable post.\textsuperscript{31} The courts moreover demanded that a wrongfully dismissed
servant use "diligence" to seek another employment, and stipulated that the offer of a suitable post should be taken into account in assessing the damages. In addition, most English and Scottish courts held that no damages could be recovered for lateness in paying additional wages due to the dismissal, and that no compensation could be claimed for emotional injury involved in his wrongful dismissal.\textsuperscript{32}

Further restrictions on the right to recover damages for a wrongful discharge were imposed by the \textit{Conspiracy and Protection of Property Act} of 1875, which revoked previous Georgian and Victorian statutes. This act stated that a breach of contract constituted an offense punishable by summary jurisdiction, only in cases where such actions caused serious injury to property or human life. The \textit{Employers and Workmen Act} of the same year (implemented several years later) banished disputes over employment contracts to the county courts, which were entitled to assign damages of up to ten pounds only.\textsuperscript{33} Due to these measures, unjust dismissal suits, by the late 19th century, became increasingly marginalized.

1.2 \textbf{At-Will Employment: An American "Innovation"}

If the old Law of Master and Servant had been viewed as inappropriate in 19th century England, it was even more so in the United States. North American enterprises tended to operate on a shorter time-frame than their British counterparts. Businesses, especially those moving into new territories, were often short lived, while engineering tasks were frequently completed on a faster time
scale, involving more workers over a shorter time period than in Europe. Workers meanwhile often lacked the cohesion and organization which would have made regulated employment desirable, and which would have allowed them to press for longer contracts and more secure employment.

1.2.1 Early Revisions

Problems with the English rule became apparent during the first half of the 19th century, when the number of Americans employed by others in agricultural and nonagricultural pursuits increased markedly. Off the farm, between 1820 and 1850, the number of employees increased from about 800 thousand to slightly less than 3 million. Over the same period, the number of agricultural workers increased from over 2 million to 5 million. By 1850, on and off farms, the proportions of Americans employed by others--about one third in 1820--increased to about one half. In Eastern industrialized states the proportion was possibly close to three forths (Bureau of the Census: Historical Statistics form Colonial Times to 1970).

Initially American courts, when settling disputes between workers and employers, adhered to the English interpretation of the labor contract and/or contract law in general. W. W. Storey's Treatise on the Law of Contract (Boston, 1851), for instance, closely paraphrased Blackstone by saying that "where there is a general hiring, nothing being said as to its duration, and no stipulation as to payments being
made, which may govern its interpretation, the contract is said to be for a year.\textsuperscript{34} 

Although Storey's statement, with its emphasis on payment intervals, implied a potentially less stringent concept of the one year rule than that of Blackstone, most colonial courts held on to the old English standard. Adherence to this standard, created problems, both in cases where employers sued workers who quit, and in cases where employees sought compensation for being dismissed prematurely. A key issue before early American courts was whether to interpret contracts as "entire", allowing the injured party to recover the entire value of the contract, or whether the injured party was to recover on a quantum meruit basis. There is some evidence, that in the early 19th century US courts tended to systematically apply the doctrine of the "entire" contract to the detriment of employees. Such one-sided interpretations of contract rights typically took the form of the courts refusing any recovery at all to employees who had not completed the full spell of their contract. This approach was condoned and indeed advocated in several published treatises of the early to middle 19th century, such as Swift (1822), Sanders (1837), Storey (1851) and Parsons (1855). In his pathbreaking work, The Transformation of American Law, Morton Horwitz (1977) suggested that, as a result of the application of this doctrine, employees were at risk of losing everything if they left before the contract ended. Employers meanwhile had every inducement to create conditions near the end of term that would encourage laborers to quit.\textsuperscript{35}
One sided as many court decisions may have been, American courts also protected workers who were dismissed in violation of contractual agreements or the one year rule. Karsten (1990) reports that up until 1880, 41 state high-court cases were recorded, in which employers were found to have unjustly dismissed workers (which suggested that there was a much larger number of cases in lower courts). In each of these cases the state courts upheld awards to employees. The cases included plasterers in Maine and Kentucky, drivers and factory superintendents in Pennsylvania, ministers in Connecticut, mail carriers and agents in Illinois, ship stewards in California, hire hands in Vermont, Missouri, Minnesota and North Carolina, seamen and a railroad superintendent in New York, painters in Minnesota, lumber jacks and wood cutters in Ohio, Pennsylvania and Maine, overseers in Arkansas, Georgia and South Carolina, engineers in Missouri, salesmen in Maryland, riverboat pilots in Indiana, and share-croppers in Kentucky, Vermont, Pennsylvania and Massachusetts.36 In most of these cases, the employees were reimbursed on a quantum meruit basis for their wrongful dismissal. In ten cases, however, the respective employee was awarded the full wages for the entire contract period; some for a full year.

By the late 1800s, the law of employment in the US was in a state of confusion. If the same standard was applied to indefinite term employees as was in England, US employers who dismissed a worker, say before a year was worked out, would have faced considerable damages. Facing a host of cases brought forth by indefinite term employees, the courts, often within a single state, fought over how to treat claims
about employment duration and disagreed widely on notice and payment requirements.

Unwilling to award substantial damages for contract breaches, many courts rejected the English one-year-rule. The adoption of a shorter time period, however, meant that notions about the duration of employment contracts diverged beyond what was legally justifiable.

Early attempts at resolving the dilemma of the indefinite contract typically tried to hedge the matter by invoking issues of equity and custom. James Schouler's Treatise on the Law of Domestic Relations (1870), for instance, stated that,\textsuperscript{37}

If the hiring be general, without any particular time limited, the old law construes it into a year's hiring. But the equity of this rule applied only to such employment as the chance of seasons affected; as when the servant lived with the master or worked in agriculture. By custom, such contracts have become terminable in the case of domestic servants, upon one month's notice, or, what is equivalent, payment of a month's wages. Laborers are hired frequently by the day, and to hire by the week is not unusual. ... Custom modified this principle [meaning the one year rule], and the date and frequency of periodical payments are material circumstances in this case. \textit{(Treatise on the Law of Domestic Relations, pp. 606-607)}

Shouler's approach itself created new problems. If custom played a role in determining the length of the indefinite contract, new law suits could arise from different expectations with regard to local or occupational customs, leading, over time, to new obstacles to dismissal.
1.2.2 Wood's Rule

In his *Treatise on the Law of Master and Servant* published in 1877, Horace Gay Wood suggested a radical approach to the issue of dismissal, which flatly reversed the traditional assumptions of English law. Wood argued that, since no term of employment was specified in the typical indefinite-term employment contract, none should be implied by the courts. Said Wood,38

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at-will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, a week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even ...

(*A Treatise on the Law of Master and Servant*, at p. 272)

In Wood's view, all indefinite employment was "at-will", that is, either party could terminate employment at any time and for any reason.

Wood's rule quickly came to govern the workplace all over the US. Employment-at-will corresponded well to the demands of the growing US economy, as it allowed for a quick movement of scarce labor between jobs. Politically, the at-will doctrine complemented the spirit of *laissez faire*, since it provided for an employer dominated governance of the workplace, where the courts could summarily dismiss suits by indefinite-term employees. Based on the at-will doctrine, the courts could stay and did stay out of the employment relationship. Legally, the adoption of employment at-will as the governing principle of the
employment relationship was very much in line with the spirit of 19th century legal doctrine, in which, as Friedman (1985) argued, barriers to arms-length bargains in a free impersonal market were systematically removed. Legal scholars of the time typically welcomed the adoption of woods rule, arguing that the at-will doctrine was an integral component of an evolving comprehensive legal system based on the principles of "freedom of contract."39

Employment-at-will was applied to employees at the bottom, as well as at the top of the occupational status and wage scale. While initially limited to mid-level managerial and professional workers, the at-will doctrine came, within roughly three decades, to cover virtually every type of worker in every state of the union. Selznick (1969) argues that the adoption of the at-will contract in late 19th century America marked a crucial point in the establishment of managerial discretion in the workplace. With the adoption of the at-will contract, legal limits to the "authority of the employer, especially on the key issue of dismissal, were eliminated." The employer was now free to hire and fire, unconstrained by the legal requirement that he have a just-cause for rescinding a contract not yet expired. By denying any regulation with regard to the indefinite contract, the employer moreover could modify the terms of the contract at any time without notice. The employment contract hence became, as Selznick observed, "a legal device for guaranteeing to management the unilateral power to make rules and exercise discretion."40
Typical of the categorical use of Wood's rule, was the case of *Payne v. Western and Atlantic Railroad* (1884), in which a Tennessee court stated that,\(^41\)

All may dismiss their employee[s] at-will, be they many or few, for good cause, for no cause, or even for cause morally wrong without being guilty of legal wrong.  
(*Payne v. Western & Atl. Rrd*, pp. 519-520)

US legal history is rife with accounts of the most blatant abuses of human rights resulting from the unquestioning application of at-will rights. To name just one extreme example, in the case of *Comerford v. International Harvester* (1932), an employee was discharged because his wife refused to sleep with the man's supervisor.\(^42\) The husband's challenge was rejected by the court because the at-will status of the employee empowered the employer to discharge at any time, even for morally wrong reasons.

With the adoption of employment-at-will the US law of employment had effectively severed its ties to its older English or even more broadly, its European heritage. The employment relationship was now an essentially unregulated contractual association. Employment law essentially lost its prominence for the next three decades, until dissatisfaction with the *status quo* instigated a new initially predominantly academic debate. In this debate two principle themes mingled, the first was the need for the legal protection of the individual worker, and the other was the protection of collective bargaining rights. In the end, the legal option to be taken, aimed at establishing employment protection within the framework of union
organizing activities and collective bargaining. This choice, perhaps deliberately, left those outside unions under the remit of the at-will rule.

1.2.3 Critiques of At-Will Employment

By the beginning of the 20th century, progressive academics criticized the at-will conception, and argued vehemently for a restriction of the employer's right to fire. These criticisms took several forms. Some focused on the inappropriateness of the court's preoccupation with the "freedom of contracts" in general, while others focused on the inequality of contract partners and the need to rectify this situation through legislation.

Representative for the first approach, Roscoe Pound (Dean of Harvard Law School) provided a severe critique of the misapplication of legal formalisms on the employment relationship. He argued that, by the late 19th century, US courts had increasingly come to misuse the notion of "freedom of contract." Pound suggested that the detrimental reliance on the doctrine of freedom of contract in US labor law in particular, was due to the convergence of several factors. These included the nation's individualistic idea of justice, a mechanistic jurisprudence which deferred to fixed rules, the influence of 18th century philosophy on legal training, and the great vogue of the theory of natural rights. According to Pound, insistence on the principles of freedom of contract created serious obstacles to
the passage of necessary labor legislation. In his view, the latter involved issues of fact rather than principle, and could not be resolved by recourse to abstract principles. In his essay *Liberty of Contract* (1909) Pound argued that,\(^{43}\)

\[\ldots\text{ ordinarily constitutional questions are not questions of fact, whereas the question of the reasonableness of a labor statute--and indeed any statute under the police power--is after all, a question of fact based on an examination of the conditions sought to be remedied.}\]

*(Liberty of Contract, p. 457)*

In Pound's view, cases like *Frorer v. People* (1892)\(^ {44}\) and *Ramsay v. People* (1892)\(^ {45}\) were evidence for the courts' misconception of economic realities. In these two cases, the Illinois Supreme court had held void statutes forbidding the payment of wages in token money, which had been passed on the basis of the police powers rested in the state or county authorities.\(^ {46}\) Pound expressed his dismay at the courts sublime disregard of actuality. In the Frorer case, the Illinois supreme court had stated that "there is no inferior class other than those degraded by crime or other vicious indulgences of the passions, among our citizens," and declared that due process does not mean "a law passed for the purpose of working the wrong."\(^ {47}\)

Similarly, a Kansas court had overthrown a token money statute arguing that "freedom of action--liberty--is the cornerstone of our governmental fabric" and that the token money law classified the workmen "with the idiot, the lunatic, or the felon in the penitentiary." "As between persons *sui juris,*" the court had asked, "what right has the legislature to assume that one class has the need
of protection against another?" It is "our boast", the court concluded "that no class distinctions exist in this country."48

These attitudes, Pound argued, were symptomatic of a situation, where adherence to antiquated principles had come to prevent the creation of statutes which protected workers from the vicissitudes of the industrialized economy. Between 1889 and 1918 inclusive, the Supreme Court had, according to Warren (1926), decided 790 cases in which state statutes were attacked under the due process and equal protection clauses. Over 400 of these cases involved the use of police power. Over 50 cases were held wholly unconstitutional, of which 14 involved labor related issues, several of which touched on issues of employment contracts and discharge rights.49 Observing these developments, Pound and other progressive legal scholars were severe in their criticism, sometimes advocating the elimination of judicial review.

Despite the initial prowess of the debate, it soon died down, mostly because of the start of World War I. Apart from scattered decisions in favor of employees such as the 1918 Adams v. Dick case,50 which condoned that an employee could receive payments if he acted as an informer for the government, no major piece of legislation was passed which would have extended the contractual rights of employees. Pound's critique nevertheless had a profound impact. It had taught legal professionals to be critical of abstract and absolute concepts like the "freedom of contract." Pound, more than any other legal scholar, had shown that the holy cows of US law were perhaps not worth
preserving. As such, his critique became a necessary precondition to the acceptance of New Deal legislation by the courts.

The second set of arguments opposing the notion of at-will employment and, related, the state's non-interference in matters of dismissal, focused on differences between the employment contract and other common law contracts. Here the inadequacy of existing legal principles which was Pounds focus was not the major issue. Rather the arguments focused on the need to treat the employment contract different from other contracts. In one of the most prominent analyses of employment regulation, Principles of Labor Legislation (1916, 1st ed.), the authors Commons and Andrews argued that once slavery was abolished, the labor contract had to differ from any other contracts, in that restrictions on the sale of labor were imposed. Said Commons and Andrews,\textsuperscript{51}

\begin{quote}
Business contracts, if violated, are ground for damages... The labor contract also, if violated, is ground for damages, but for the court to order damages paid out of labor property would be to order the laborer to work out the debt. This is involuntary servitude.

(Principles of Labor Legislation, 4th ed., p. 505)
\end{quote}

Commons and Andrews suggested that the "peculiar relation" between a propertyless seller of himself, and a prosperous buyer, necessitated a legal conception of the labor contract different from other contracts, that is a "... legislation [which] goes behind the legal face of things and looks at the bargaining power which precedes the contact" (emphasis added, ditto).\textsuperscript{52}
Principles of Labor Legislation explicitly described the employment contract in terms of an exchange of property rights. Commons and Andrews argued that in a labor contract,\textsuperscript{53} 

... property and liberty change places and merge their meanings when industry changes from the agricultural stage of production for self to the modern stage of bargaining with others. The wage earners "property" becomes his right to seek an employer and acquire property in the form of wages ... The employers "property" is, in part, his right to seek laborers and acquire their services; his property in the sense of "liberty" is his right to ... discharge the laborer if the bargain is unsatisfactory. 

(ditto, p. 508)

In Commons' and Andrews' view, the right to discharge was to be restricted. It was to be constrained firstly through the qualification "if the bargain is unsatisfactory", which implied the need for a cause for discharge. In addition, Commons and Andrews suggested that regulatory interference by the state was required because of necessary public concern with the preservation of the employee's property--i.e., her or his labor power.

Commons' and Andrews' argument that "the liberty of both the employer and the employee to make a labor contract may be restricted and regulated, if it is found that the contract is injurious to the laborer", was an extension of the already established right of the state to exercise policy power (Holden v. Hardy, 1898). In Holden v. Hardy the Supreme Court had suggested that the "proprietors lay down the rules and the operators are practically constrained to obey them" because they "are induced by fear of discharge to conform to regulations which their judgment fairly exercised, would pronounce
detrimental to their health."54 Commons and Andrews argued that interference with the freedom to contract was legitimate primarily because, "the employers and their laborers do not stand upon an equality." As long as employment at-will governed the workplace, market mechanisms gave an insufficient protection to workers, or as Charles Warren had commented earlier, "inequality of bargaining power between employees and employer gave the latter the power to drive a harsh bargain."55 Commons and Andrews advocated that labor legislation address both issues of health and dismissal simultaneously; it had to allow police powers to protect workers from health hazards and it had to redress economic imbalances by providing workers with protection from unjust dismissals.56

While Commons and Andrews, like Pound, did not propose concrete legislation, they repeatedly stressed the logic and legitimacy of such restrictions, if the existing inequality of power disfavored the worker. Said Commons and Andrews,57

Inequality of bargaining power has long been a ground for legislative and judicial protection of the weaker party ... It was early conceded as a justification of usury laws, protecting the weak debtor against the strong creditor, latterly utility laws, protection the weak consumer, farmer, or shipper against the powerful corporation; and now it only needs the recognition of facts to justify labor legislation to protect the weak wage earner against the more powerful capitalist.

(ditto, p. 529)

This analysis of power asymmetries anticipated the economic and political nexus, on which the current system of exemptions from employment at-will, such as the public policy exemption, have been based. This was particularly obvious when Commons and Andrews
explored the compatibility of traditional common law doctrines with legal interference in the labor contract,\textsuperscript{58}

It is by recognizing this \textit{inequality of bargaining power}, coupled with a \textit{public purpose}, that the courts pass over, in any particular case, from the theory of class legislation to the theory of reasonable classification.  
(emphasis added, ditto, p. 529)

The political obstacles to the acknowledgment of such a public purpose, however, were formidable. Repeated attempts by state legislatures to protect workers from abusive discharges were struck down. In the end workers received such protection first, when it was recognized that excessive employer power hindered organizing efforts.

2. \textbf{Statutory Work-Place Protection - A General Overview}

In the 1920s and 1930s, increasing dissatisfaction with previous \textit{laissez faire} policies led to the enactment of statutes aimed at protecting workers. These statutes ruled illegal dismissals for certain causes. Before examining in some detail the impact of this legislation on union rights with regard to termination decisions, we will briefly discuss some of the key provisions in general. In this context we will note that even the most encompassing of the statutes, including the NLRA, provided only a limited and in some cases a tenuous protection from dismissals.
2.1 Emerging Legal Solutions?

The courts recognized the need to protect employees from arbitrary dismissals first with regard to collective bargaining. The employment-at-will rule, more or less unaltered from the Tennessee version, had remained firmly in place until the 1930s, when a series of state and federal laws were passed which protected specific categories of employees from dismissal who engaged in certain legally protected activities.

The National Labor Relations Act of 1935 protected workers whose discharge could be linked to their participation in legal organizing activity or the pursuit of industrial action. In 1938, the Fair Labor Standards Act prohibited the firing of workers on the basis of their filing a minimum wage or overtime claim. Both Acts were highly restrictive with regard to the type of dismissal which they prohibited; leading some labor economists to suggest that the dismissal protection effected through NLRB legislation was minimal. When the Supreme Court recognized for the first time the right of the National Labor Relations Board to protect union activity in Jones & Laughlin Steel Co. v. NLRB (1937), it expressly restricted the Board's power to reinstate workers to situations involving antiunion animus (the case is discussed in a different context in greater detail later on). Discharges for any other reasons did not fall under the Board's review, and hence could not legally be addressed within the framework of the new Act.
The amended version of section 7 of the NLRA stated that employees were protected from discipline and discharge. But this protection could only be invoked if the activity on which their dismissal was based, was "concerted." Even when it came to protecting the concerted activities of strikers, the courts frequently allowed for the indiscriminate dismissal of striking employees. In the then spectacular case of *NLRB v. Local Union No. 1229* (1953), for instance, the Supreme Court held that the discharge of striking employees of a television station did not constitute an unfair labor practice under the NLRA, because the employees had attacked the television station for its poor programming. Although employee complaints about programming could have been construed as a legitimate concern of an employee's with her or his reputation and employment prospects, the Supreme Court concluded that the employees has engaged in a deliberate effort to discredit the employer's business. This, said the court, represented "detrimental disloyalty" and a "just-cause" for discharge. Arguing that "there is no more elemental cause for discharge of an employee than disloyalty to his employer", sanctioned dismissals based on "insubordination, disobedience or disloyalty", even though the line between such "insubordination" and legitimate strike action was hard to draw. This situation essentially has continued until today. Strikers are still being replaced and face unemployment spells at a disproportionate rate. Recent legislative attempts at remedying this situation by prohibiting their permanent replacement, such as the *Workplace Fairness Act*, have--as before--been defeated in Congress.
In circumstances where there was no evidence for unfair conduct on the side of the unions, the courts have also been divided in their interpretation of protected activities. In 1981, the Appeals Court for the 6th Circuit approved of the NLRB's ruling that an employee's grievance aimed at getting the employer to comply with laws and regulations is a protected activity—and hence renders any dismissal of the employee illegal (see NLRB v. Lloyd A. Fry Co., 1981). The Appeals court for the 4th circuit had rejected this interpretation one year earlier (see Krispy Kreme Doughnut Co v. NLRB, 1980). In a more recent case, the Supreme Court narrowed the interpretation of concerted activity, by arguing that a single employee—in this case one refusing to drive an allegedly unsafe truck—is engaged in a concerted activity if, and only if, she or he is able to invoke a right contained in a collective bargaining agreement (NLRB v. City Disposal, 1984).

Apart from the requirement of a "concerted activity", the dismissal protection afforded through the NLRA regulation is effectively limited by matters of practical implementation. Gould (1986) has argued that, since NLRA protected cases involve contract interpretation, great scope is left to the arbitrator, who must determine whether a dismissal has been unjust. It is not unreasonable to assume that the process of arbitration, and in the end the decision whether unfair conduct was involved, will be influenced by factors which may be unrelated to the facts at hand.
Perhaps even more troublesome is the issue of delay in such actions. Even if a decision has been rendered by the Board in favor of a dismissed employee, action is typically not immediate. If the Board determines that a respondent has been unwilling to comply with its decision, say the payment of back wages to a discriminatorially discharged employee, it must file a petition in the courts of appeals for the district in which the case arose. Because of the great caseload, delays at each stage are likely. The industrial relations expert Kovach (1981) has estimated the time elapsing between an initial filing of a claim with the NLRB and the Board's final decision at over 200 days. Meanwhile, in many circuit courts, additional time may elapse before the court can hear the case. According to NLRB statistics, the processing of an appeal in the courts results in a median delay of 360 days. By the mid 1980s, dissatisfaction with the NLRA regime had become so severe that AFL-CIO president Lane Kirkland advocated the repeal of the NLRA. Since then, tensions between the Board and unions have lessened, particularly because of the removal of Reagan appointees from the Board.67

2.2 The Paradox of Expanding Legislation and Diminishing Protection

Over the period from 1950s onwards, additional legislation was passed to protect workers from discharge who filed occupational safety complaints, and later on, to protect those who reported environmental violations. In 1964, the Civil Rights Act triggered the passage of a host of laws which offered protection from termination for specific
categories of employees in the private sector. Today there are at least 22 different statutes of this type. For example, employees cannot lawfully be dismissed based on race, color, religion, national origin, age, sex, handicap, Vietnam-era veterans, or citizenship status (see Appendix A).

While the total array of US legislation appears impressive at first sight, legal analysts have frequently pointed at the permeability of individual pieces of legislation. Since, in many cases, similar factors as I have discussed with regard to the NLRA come into play, I will refrain from a detailed discussion of the problems associated with the implementation of each statute. Suffice it to say that, although state and federal protective legislation modified the at-will relationship for some groups of employees under certain circumstances, it did not alter the employment relationship for the vast majority of workers. In the most recent estimate, which is similar to that of St Antoine mentioned in the introduction, Grenig (1991) has suggested that, taking all prohibitions together including those of statutory nature and those tied to collective bargaining agreements, 66% of all employees in the US can be discharged from their jobs without any justification. This renders the majority of the working population unprotected; creating a situation which cannot be found in most other developed countries; including Austria, Belgium, Canada, France, Germany, Italy, Sweden, the UK, and even Mexico all of which require that discharges must be for good cause.
Perhaps equally important as the limited coverage of these provisions, is that even where statutory rights were created, their impact on curing the dismissal rights of employers was systematically circumscribed. The following sections will look in greater detail at the dismissal protection afforded through collective bargaining. The establishment of a legal framework for collective bargaining created opportunities for unions for establishing protective mechanisms for workers. This potential for such protection, I will argue, was over time gradually eroded in a lengthy process, in which the courts have consistently reaffirmed older doctrines of managerial prerogatives.


The passage of legislation protecting the organizing efforts, as well as the day to day activities of unions, not only altered the formal structure of the common law employment contract by protecting concerted activity. It also remapped the playing field upon which managerial demands were played out against union preferences. The parameters of employment termination were changed, both through the formalized impunity of workers who engaged in now legally protected activities, and through the creation of a new locus in which decisions about employment and dismissal were carried out. In the new locus of collective bargaining, complex decisions about plant structures, product lines, branch closures and subcontracting, as well as seemingly simple decisions about the dismissal or layoff of individual workers had to be negotiated between management and unions. So also had to be the subject matter of collective bargaining itself.
The following section will focus on this process of the assignment and definition of rights pertaining to employment termination. Together with the next chapter, this analysis will reveal a perhaps puzzling development: on the one hand the formal protection of specific groups of workers, such as the aged or disabled has expanded. On the other hand a de facto retrenchment of employee rights has characterized the organized workplace.

3.1 Collective Bargaining and Dismissal: The Origins

At the turn of the century, many US industrial relations scholars disputed the pro-legislative views forwarded, e.g., by Commons and Pound. They generally argued that the principal solution of the "labor problems of industrial societies", was to be sought in the collective action of workers rather than in improvements of the law. In 1911, Taussig (Professor of Economics, Harvard University) argued,\textsuperscript{71}

The workmen clearly gain by having their case in charge of chosen representatives, whether or not these be fellow employees; and collective bargaining and unionization up to this point surely bring no offsetting disadvantages to society. As to the immediate employees, there is often a real danger that he who presents a real danger, a demand, or a grievance will be "victimized." He will be discharged and perhaps blacklisted; very likely on some pretext, but in fact because "he has made trouble."

*(Principles of Economics, Vol 2., p. 285)*

Unionization, in Tausig's view, not only was of importance to wage bargaining, but it also was essential to the prevention of the
victimization and dismissal of employees. A similar view was expressed in the 1930s in the works of Albion Taylor (Professor of Political Economy and Dean of the School of Government, College of William and Mary). In his Labor Problems and Labor Law (1st edition, 1938), Taylor argued that, due to the expansion and centralization of management, the individual workers had been deprived of his ability to bargain. This allowed management to fix wages and dictate working conditions. Rather than remedying the conditions of inequality by legislation, Taylor argued, the state should now encourage workers to bargain collectively, both for wages and for the protection of their jobs. Said Taylor,72

Legally free to dispose of his services at any price he deems just, immediate necessity in the face of an oversupply of labor reduces that freedom to empty words. His [meaning the worker's] inferior bargaining position is not wholly due to economic inequality, but in part to a lack of knowledge of labor conditions, and a bargaining skill less effective than that of his employer. The injustices growing out of the individual bargaining burden affect not only the individual worker but the entire group to which he belongs. Unregulated competition resulting from individual bargaining tends to pull down the term of employment to the level of the weakest employer ...

(Labor Problems and Labor Law, p. 183)

Taylor's view that inequalities of labor were due to individual bargaining, echoed the opinions of some of the nation's leading judges. Judges Holmes and Field, then of the Massachusetts supreme court, had opposed bans on union activity arguing that union activity merely counterbalanced the combination of capitalists.73

By contrast to Holmes and Field, however, many courts had been unwilling to offer protection to those workers who were discharged for
union activity or for other questionable causes, such as complaints about health and safety matters. In theory, collective bargaining could serve to limit the power disequilibrium between the employer, who, as Holmes says "is free to discharge the worker, and the worker who depends on her job for her livelihood". In practice, however, the relationship between job security and collective action had remained largely antonymous. Long into the postwar years, workers who participated in collective action, be it as organizers or merely as strike participants, were likely to face retaliatory discharges; counting them amongst the most frequent job losers in the long run.74

The first congressional statute addressing issues of dismissal and organizing activity, the Erdman Act, prohibited the retaliatory discharge of union members.75 Passed by Congress in 1898, Section 10 of the Erdman Act made it a criminal offense to "... threaten an employee with discharge" or "after having discharged an employee, attempt or conspire to prevent such an employee from obtaining employment" because of her or his membership in a labor organization. In 1908, section 10 of the Erdman Act was declared a violation of the Fifth Amendment to the Constitution by the Supreme Court in the case of Adair v. United States (1908); rendering members of labor organizations again unprotected from retaliatory discharges.76
3.2 The NLRA, Managerial Prerogatives, and the Right to Discharge - Early Conflicts and Developments

Let us look now in greater detail at the dismissal protection by the statutes pertaining to collective bargaining, which we have previously mentioned. Unionized workers first received protection from retaliatory discharges in some of the Brandeis and Holmes Supreme Court decisions of the 1920s. The legislative protection of those engaging in organizing activity started in 1926 with the passage of the Railroad Labor Act (RLA), which, apart from requiring employers to bargain with union, prohibited employers from discriminating against union members. It applied originally to interstate railroads and related undertakings, but was amended to include airlines engaged in interstate commerce. The Norris La Guardia Act of 1932 gave some federal sanction to the right of labor unions to organize and strike. Specifically it prohibited federal courts from enforcing so called "yellow dog contracts", under which workers promised not to join a union or promised to discontinue union membership, often under threat of dismissal. The National Industrial Recovery Act (NRA) of 1933, a predecessor of the National Labor Relations Act sought to provide codes of "fair competition" and to fix wages and hours in industries subscribing to such codes. Title I of the act, which guarantied the right of employees to collective bargaining without interference or coercion, including the dismissal of employees, was declared unconstitutional in 1935.

The National Labor Relations Act (NLRA) of 1935, popularly known as the Wagner Act, included the reenactment of the previously
invalidated labor section of the NRA, as well as a number of additions.79 Primarily concerned with restricting employer activities against union organizing and bargaining efforts, the NLRA prohibited employers from a) "dominating or otherwise interfering with the formation of labor unions"; b) "interfering or restraining employees engaged in exercising their rights to organize and bargain collectively; c) "refusing to bargaining collectively with unions representing a company's employees." Sections 7 and 8 of the NLRA tied the legal protection of employees from retaliatory discharges to their right to organize. These sections also required employers not "to refuse to bargain collectively with the representatives of his employees" with regard to "rates of pay, wages and hours of employment, or other conditions of employment."80 The latter point--other conditions of employment--reflected an equivocal attitude of Congress with regard to the right of unions to be involved in layoff and dismissal decisions.

Despite the appearance of sweeping legislation, coverage under the NLRA's protective umbrella was narrow. Public employees at the federal, state, and local level, agricultural workers, domestic workers, and supervisory employees were and still are excluded.81 For those covered, statutory dismissal protection was relatively limited. Covered employees could typically not be dismissed if they were engaged in one of the categories of protected activity the courts had established. One key problem with the NLRA, however, was that it left unclear the unions' remit regard to bargaining for job security.
Collective bargaining for job security, as we shall see, therefore became a contentious issue.

3.2.1 The Origins of the Managerial Prerogative

American management was accustomed to the protection of its prerogatives. As early as 1880, the courts had felt the need to defend the right to manage. In the view of most courts the right to manage was as much a part of the free labor creed as was the right to work. "Free labor" required that both employers and individual workers were fully responsible for their decisions. Permitting workers to organize and successively influence managerial decisions was viewed as a danger to free economic competition. In State v. Glidden (189_), an outraged Connecticut judge stated, that once workers could influence managerial decision, no longer would the heads of industrial and commercial enterprises rise from the "ranks of the toilers, no longer could self-reliant ambitious men push to the fore."82 Unable to manage as they saw fit, businessmen would stop risking their capital, time and experience. "At best, the nation's business would be conducted by paternalistic enterprises, at worst anarchy pure and simple ..." would prevail.

In 1911, Taussig had already predicted that union demands for job security would clash with managements' insistence on "the right to manage." His Principles of Economics (1st edition, 1911) stated,83
Private ownership carries with it the seeds of conflict—the inevitable clash between those who employ and who are employed. Disguise it as we may, smooth over to our utmost, adjust where we can, there the conflict is, ever liable to break out. ... The private employer ... regards his business as his own, its methods of management as subject to his own judgment. It is almost invariably urged by him and his spokesman that the effective working of the business machine depends above all on unfettered freedom in the selection and tenure of employees. So long as this attitude prevails, the workman will feel in turn that he must retain his weapon of defense, the strike, even though it entail injury to a wide circle of persons. ... Even if employers were to consent to restrictions on their power of discharge, contests would remain, strikes would brew. And on the other hand discharge is but one of the matters in which employers absolute rule is to be questioned. Discharge is conspicuous because it is the outstanding weapon.

(Principles of Economics, Vol 2., p. 285)

As long as unions and their members had little formal protection through the law, management was easily able to maintain its dominance, if only by dismissing union members. Once NLRA legislation protected concerted action, this situation changed radically, and a clash between unions and management over dismissal rights was pre-programmed.

3.2.2 The Managerial Prerogative Endangered?

When President Trueman called the second National Labor Management Conference in 1945, labor and management representatives found themselves unable to agree on the boundaries of collective bargaining. Disagreement had arisen particularly with regard to management's right to make workers redundant, close and/or relocate branches. The statement of the management representative at the conference expressed the employers dismay over this matter,\(^{84}\)
Labor members of the Committee on Management's Rights to manage have been unwilling to any listing of specific management functions. Management members of the Committee conclude, therefore, that the labor members are convinced that the field of collective bargaining will, in all probability, continue to expand into the field of management.

The only possible end of such a philosophy would be the joint management of the enterprise. To this management members naturally cannot agree. Management has functions that must not and cannot be compromised to the public interest. If labor disputes are to be minimized ..., labor must agree that certain specific functions and responsibilities of management are not subject to collective bargaining.


In theory the evolving conflict about the appropriate limits of collective bargaining, and particularly the rights of labor to interfere with management's redundancy and dismissal decisions, was resolved by reference to such theoretical concepts as the residual rights doctrine. In practice a set of employer friendly court decisions and the decline of unions in the US settled the issue, first, in rough terms, during the first decade of NLRA rule, and then in greater detail over the following 3 decades.

3.2.3 The Residual Rights Doctrine

The notion of residual rights, a key doctrine in the 1960s and 1970s management literature, postulated that management rights were the result of an evolutionary process. The residual rights approach started with the premise that initially management possessed total freedom in ordering the affairs of the enterprise. This included total freedom with regard to whom to hire and dismiss and when to do so. Union demands and labor legislation encroached on this freedom. It followed that every time a manager made a contractual concession
and/or every time a labor law restricted management options, the original rights of management were reduced. What remained then were the residual rights, not specifically renounced by management or restricted by law. If, for instance, management renounced the right to dismiss according to productivity or any other performance criterion and agreed to dismiss according to seniority, seniority replaced management's previous decision criteria. Meanwhile other issues, such as how many workers could be dismissed in a specific time period, remained within the exclusive sphere of managerial decision making.

Adopting this view, many arbitration decisions applied a two stage strategy when deciding on the union's rights to influence termination decisions: if union representatives and management disagreed on whether an issue was within the managerial prerogative, previous contractual agreements as well as legal requirements had to be investigated. If no explicit statement restricting managements rights in the respective matter could be found in these sources, the issue typically had to be considered as falling within the managements remit. Since explicit renunciations of the rights to dismiss were rare, management was often free in its decisions on such matters. Because existing practices and informal agreements had no legal bearing, the residual rights doctrine, for the courts, offered little guidance with regard to the determination of unions' rights with regard to termination decisions. Here an alternative, and in many ways even more restrictive approach was taken.
3.2.4 Early NLRB and Court Decisions

The definition of managerial rights with regard to redundancies, discharges, layoffs, plant closings and relocations, by the courts, started immediately after the enactment of the NLRA. From the appointment of the Board in the Fall of 1935 until March 1939, the Board handled a total of 20,192 cases involving over 4.5 million workers. Of these cases 19,018, or four fifths were closed. Of the total cases closed, about 52% were decided by agreements, while the remainder were dismissed, withdrawn or closed in some other way before coming to the Board. About two thousand cases were strike cases, involving 356 thousand workers, of which 75% were settled and in which 227 thousand workers were reinstated after dismissal. An additional 15 thousand cases were decided in favor of workers alleging non-strike related discriminatory discharges, and resulted in the reinstatement of the respective workers.87 Between January 1 of 1938 and April 1 of 1939 alone, the Board heard 1,675 cases alleging discriminatory discharges and ordered the reinstatement and or compensation of 1,022 workers.

While the NLRB of the early years generally looked favorably upon workers whose discharge could in some way be linked to union activity and presented in part an effective instrument for the protection of striking workers, it also condoned a wide set of permissible grounds for dismissal. Many of these decisions effectively vindicated traditional assumptions about managerial prerogatives. Discharges were sustained by the NLRB in cases involving gross inefficiency of a
worker, incompetence, change in equipment, "ruckus and horseplay", absenteeism, brawling, cursing of the boss, and the violation of company rules.

Most importantly, discharges in the absence of employee misconduct were frequently declared permissible if there was no evidence for anti-union activity. This included discharges for lack of work, which were approved by the Board even in absence of union consultation, when anti-union bias could not be proven. Let us briefly look at some of the earliest cases, dealing with the question of termination without cause and discharge for economic reasons. In its Seagrave decision (1938), the Board set an important precedent for the preservation of employment-at-will within collective bargaining. Seagrave, an automotive equipment plant discharged an employee three weeks after he got his job. The foreman testified to the fact the employee's work was satisfactory. The worker, a CIO member, had previously been arrested for disorderly conduct during a strike and alleged that he was fired because of this previous involvement. (Specifically he charged that his foreman had received a black-list showing his name). The spokesman of the company explained that the polisher was hired because of a temporary emergency arising from the receipt of a special order, and that he was dismissed when the work on that order let up. The Board found no evidence for anti-union activity and declared the dismissal legal.

In the case of Sheba Ann Frocks (1938), thirty employees who had been dropped from the payroll of the Sheba garment plant, complained
to the Board alleging that their discharge was based on their CIO membership. Company officials testified that the layoffs took place because of a lack of work at the end of the regular production season. The Board accepted this explanation because the company retained over half of its CIO employees and discharged non-union employees as well (although not proportionally). In its conclusion, the Board stated that in the case of a dismissal for legitimate business reasons, such as slack work, no consultation with union members was required.

While NLRB decisions of the late 1930s, such cases as Seagrave and Sheba, delineated the space between dismissal protection and managerial prerogatives more or less by default, the courts tended to be more explicit in their definition of management rights thereafter. In *NLRB v. Jones & Laughlin Steel* (1937), a landmark case better known for its acceptance of the *National Labor Relations Act*, the Supreme Court stressed that although the act required bargaining, it did not "compel" agreement. For the Supreme Court, the NLRA was legal because, and only because, the act did not interfere with "the normal exercise of the right of the employer to select employees or to discharge them." Normal rights in the interpretation of the Supreme Court meant absolute rights to lay off workers as long as the employer's actions did not violate explicit NLRA statutes. With this judgment, the court highlighted that employment-at-will was still very much in place, with restrictions only affecting those discharges which were explicitly declared illegal in the NLRA. More importantly, it implied that no agreement sanctioned and protected by the act could
legally eliminate the right of employers to discharge workers for "legitimate" reasons.

One year later, in the little known, but nonetheless influential case of NLRA v. The Sands Manufacturing Co. (1938), a federal appeals court was even more explicit in condoning management's freedom to dismiss workers. In Sands, a collective agreement between the company and MESA, a labor union, was broken by the union. The company apparently bargained collectively with MESA. After two months, the company signed an agreement with another union, some of whose members were employed in order to replace MESA members. The NLRB ordered reinstatement of the MESA employees and requested the circuit court to enforce its order. The 6th circuit set aside the order and dismissed the petition to enforce. With respect to the termination of the employer-employee relationship the court stated,100

The statute [meaning the NLRA] does not interfere with the normal right of the employer to select or discharge his employees ... If employees violate their contract they may be discharged for that reason and this does not constitute a discrimination in regard to tenure of employment nor an unfair labor practice, nor does it continue a discharge because the employees are members of a union. ... [T]he statute does not provide that the relationship held in status quo under Title 29, Section 152(3) [meaning the prohibition of dismissals during strikes] shall continue in absence of wrongful conduct on the part of the employer and of rightful conduct on the part of the employees. If such were its meaning, the right of the employer to select, and discharge his employees ... would be cut off.

(The Obligations of Collective Bargaining, pp. 34-35)

The Sands decision was in many regards more radical and explicit than previous decisions. In Sands, the court concluded that, provided the employer had engaged in bargaining, NLRA legislation had to be interpreted so as not to otherwise constrain the employers' rights to
select and discharge employees. In other words, the court indicated that any action resulting from NLRA rules which would practically constrict the right of employers to discharge, after basic bargaining obligations were met, could be struck down.

While both the Jones & Laughlin and the Sands cases created new legal space for at-will discharges, the Supreme Court's 1942 Montgomery Ward decision aimed directly at defending management's rights with regard to discharge decisions. In its 1942 Montgomery Ward decision the US Supreme Court excluded from arbitrable grievances,\textsuperscript{101}

\[\ldots\] changes in business practice, the opening and closing of new units, the choice of personnel (subject, however to the seniority provision), the choice of merchandise to be sold, and other questions of a like nature not having to do directly and primarily with the day-to-day live of the employees and their relations with supervisors.

\textit{(Montgomery Ward & Co, War Labor Reports 4, p. 280)}\]

Although the Montgomery Ward decision supported traditional conceptions of management rights with respect to day to day arbitration, the issue was by no means resolved. On the one hand, the dividing line between a rational business decision to relocate a plant and one involving, say, the elimination of a unionized plant--an illegal antiunion activity--was still unclear. On the other hand, the Supreme Court's exclusion of changes in business practice from arbitrable grievances, merely prohibited unions from insisting on arbitration in these matters; and hence relieved management from the legal duty to discuss these matters in good faith. This did not mean
that union representatives could not bargain about these issues when contracts were negotiated, and nor did it imply that once management conceded to union involvement in these matters, this involvement was illegal or unenforceable.

3.3 The Right to Dismiss: Towards a Resolution

The latter issue, bargaining about management prerogatives was resolved, very much in favor of management, in the 1952 case of NLRB v. American National Insurance Group. In American National, the Supreme Court held that management could insist on bargaining on the basis of a management prerogative clause, under which the union was ousted from involvement in certain matters. In addition, the court rejected the Board's provision that employers were obligated to establish ongoing bargaining during the terms of the collective agreement on issues subject to defined managerial prerogatives. In the National Insurance case these matters included issues of discipline and work schedules; that is, it encompassed the renunciation of statutory rights with respect to mandatory bargaining. Many companies meanwhile insisted "only" on the type of management prerogatives listed in the Montgomery case, such as the freedom to decide on the closure of units. Haber (1956) reported that over 80% of the contracts signed in the building industries contained one or another form of a managerial rights clause. Most of these clauses explicitly prohibited bargaining over issues of job security.
The management literature generally welcomed the decision because companies were, following American National, increasingly unlikely to face NLRA proceedings if they refused to discuss issues of employment security. This was the case, not only when the company had gained past assurances that union representatives would respect such managerial prerogatives, but was also often considered implicit to bargaining agreements.\textsuperscript{103}

A further "clarification" of management rights in matters of dismissals and layoffs was made in the landmark case of Borg-Warner. In \textit{NLRB v. Wooster Division of Borg-Warner Co.} (1958) the Supreme Court held that there were three subjects of bargaining; mandatory, nonmandatory, and illegal.\textsuperscript{104} The obligation to bargain, specified in the NLRA, applied only to mandatory subjects. A nonmandatory subject was "permissive", meaning that it could be raised by either party. However, when a party insisted on a position regarding such an area to the point of impasse, it was acting illegally under the provisions of the Act.\textsuperscript{105} The latter point gave Borg-Warner the potential to eliminate a free choice of issues for collective bargaining. Although there was little specification as to what was a mandatory and a non-mandatory subject of bargaining, Borg-Warner played an important role in the preservation of managerial prerogatives with regard to redundancies and dismissals. This was the case for one simple reason. Under Borg-Warner, union demands for job security or employment guarantees could be repelled, if they—as the courts often argued—could not be reasonably classified as mandatory bargaining items. Some analyses, therefore, suggest that Borg-Warner played a
considerable role in preventing the inclusion of job security guarantees during the sixties.106

When determining what were mandatory and nonmandatory bargaining subjects, the NLRB and the courts of the 1950s and 1960s typically referred to the relevant NLRA section 9(a) which mandated bargaining for pay, wages, hours of employment, and other conditions of employment. Given these specifications, any issue involving pay and hours was obviously a mandatory bargaining item; requiring both parties to bargain in good faith or face sanctions through NLRB proceedings. More problematic was the clause including, "other conditions of employment." When issues like redundancies, mass layoffs and mass discharges were at stake, the courts and the Board usually interpreted "other conditions of employment" to mean that union involvement in decisions about which workers to be laid off or made redundant, was mandatory.107 To this effect union representatives were to be informed about planned manpower reductions. Union representatives were free to address issues related to discharges, make suggestions with regard to manpower relocation, or suggest alternative ways of cutting costs. If the company refused, unions, however could not insist on a settlement of the issue.

While strikes in these matters were not per se illegal, any protracted industrial action on non-mandatory manpower issues was likely to be declared an unfair labor practice by the NLRB or the courts.108 This left unions with few options if they wanted to influence a companies' manpower decisions. One way of dealing with
the problem was for unions to offer wage, hour, or other concessions, in return for management assurances not to push through planned layoffs. Alternatively, if there were grounds to link a redundancy decision to union avoidance or if there were agreements which limited say subcontracting, union representatives could seek action against the employer and thus delay or prevent dismissal action. We will examine the option of concession bargaining first, and then address attempts to use statutory rights to prevent redundancies.

3.4 Concession Bargaining as Pathway to Job Security?

In NLRB v. Wooster Div. of Borg Warner Co. (1958) the Supreme Court had ruled that a union violated its duty to bargain in good faith, when it induced a strike to force the employer to concede on a subject which was not "a term or condition of employment" (or in other words a managerial prerogative). In the view of most courts, the protected managerial prerogative included the right to make workers redundant for economic reasons. Roughly from 1960s onwards, therefore, exerting pressure through strikes or other measures, in order to prevent such terminations, had become increasingly unfeasible for unions.

During the late 1970 and the first half of the 1980s, however, redundancies became a matter of some urgency to many unions. An estimate by the Bureau of Labor Statistics reported that, between 1980 and 1984, approximately 2 million jobs were lost in manufacturing alone, of which slightly less than half were held by union members.
Some industries were hit particularly hard. Kochan et al. (1990) report that employment among the major auto producers and parts suppliers dropped from a December 1978 peak of 800,000 to about 490,000 in January 1983. In 1983, industry employment in the steel industry had dropped to 44 percent of peak 1979 levels. While planned redundancies in several firms reflected actual declines in profitability, Bluestone and Harrison (1982), presented some evidence that employment cuts were sometimes part and parcel of a concerted disinvestment strategy, often aimed at shedding "costly" union workers.

Given the limited options available, the union leadership of key manufacturing unions started granting concessionary modifications in either existing or new contracts from about 1981 onwards. Such concessions were no novelty to the US landscape of collective bargaining. During the depression of the late 1920s and early 1930s, wage concessions were widespread, causing the real weekly earnings of those employed in 1932 to fall by more than 20% below the 1928 levels. Instances of concession bargaining since the Depression, however, were confined to specific industries undergoing structural change, such as the shoemaking industry in the 1950s, or unionized meatpacking in the 1950s and 1960s. During the early 1960s, the NLRB as well as the national union leadership, typically looked unfavorably upon bargaining concessions, which were--perhaps correctly--viewed as a result of employer domination. From the mid 1960s onwards, several court decisions, prompted by the recognition that some companies tried to rid themselves of "costly" union labor,
took a more positive view of bargaining concessions. These views were soon adopted by the initially hostile NLRB. In its 1964 Coama Knitting Mills ruling, for instance, the Board concluded that it was "likely that the employer would wish some form of favorable union consideration in return for employing union labor." The Board further argued that any actual intrusion on the bargaining capacity "may well be so small as not to outweigh the benefits of a cooperative bargaining relations."\textsuperscript{116}

If the Board had no objection to concessionary modifications of existing contracts, the employers certainly did not. What followed in the early 1980s was a bonanza of concessions, in which union representatives, threatened by the employment loss of members, agreed to a host of wage, benefit, and work-rule concessions. Capelli and McKersie (1985) report that in the apparel, rubber, leather, metal, machinery, transportation equipment, and trucking sectors, between 30\% to 50\% of all unionized employees had to accord to some form concession.\textsuperscript{117} Capelli's 1982 analysis reveals that in the first half of that year alone, 210 concession bargaining agreements were reached. Of those 210 agreements, 98\% were triggered by threats of layoffs or plant closings, while 90\% percent of all plants involved had actually experienced layoffs.\textsuperscript{118}

Despite this strong link between concession bargaining and employment termination, evidence for a substantial, immediate effect of these agreements on job security is at best tenuous. McKersie and Capelli's study (1985) reports that between 1977 and 1981, 22 tire
plants signed concession bargaining agreements; 16 of these plants were closed, 1 was sold, and only 5 were still open in 1985. A Business Week poll of 1983, found that only 2% of the firms surveyed were willing to give unions explicit job guarantees in exchange for concessions. A greater willingness to give assurances was noted with regard to indirect measures, such as keeping plants open for the time being or maintaining production levels for a certain period.$^{119}$

The question of immediate effects, aside, the possibility of positive long term effects makes it difficult to assess the long term effects of these policies on employment terminations. In their 1985 analysis, McKersie and Capelli noted that concession agreements, in virtually all cases, expanded the range of issues over which the parties may negotiate. This may well have increased the influence of unions over business decisions that affect job security beyond what was originally intended by statutory law.

That concession bargaining—against initial predictions$^{120}$—has remained an important feature of the bargaining agenda of US unions, suggests that unions may have derived some real benefits from these agreements (see Appendix B). Engaging in concession agreements, may also have strengthened the unions' awareness of long term bargaining goals, as well as their tactical prowess in achieving them. Qualitative evidence, at least, appears to indicate that bargaining agreements have become increasingly specific with regard to job guarantees (see, e.g., the Bell agreements reported in Appendix B).
In this sense, some practices of concession bargaining may have opened new pathways to the collective regulation of termination decisions.

3.5 Unions and the Protection of the "Core of Managerial Control"

The other route of countering redundancy decisions for the unions, was to claim that the respective decision required the bargaining involvement of the union, or to claim that the decision was driven by the desire to destroy or weaken the bargaining unit, and hence illegal. Up until the mid 1960s, it was still largely unclear where the dividing line between the employers duty to inform a union of a plant or branch closing and mandatory union involvement was to be drawn. The 1964 case of Fireboard Paper Products v. NLRB brought some, albeit incomplete, clarification on issues of mandatory bargaining on partial plant closings and redundancies.\textsuperscript{121} In Fireboard, the company had subcontracted maintenance work. This subcontracting resulted in the destruction of the entire bargaining unit. Being of some importance to employer organizations, the case moved through several stages of appeal until it reached the Supreme Court. Deciding in favor of the union, the Supreme Court finally ordered the reinstatement of the maintenance workers and awarded a substantial back-pay to them.

Although representing a defeat for the company involved, the Fireboard decision posed severe limitations on the unions' ability to restrict layoffs. In deciding the case in favor of the unions, the
Supreme Court applied three principles. First whether the subject matter, a branch closing, was within the literal definition of conditions of employment. Secondly whether the negotiation of the subcontract would contribute to industrial peace in the company; and thirdly, whether the practice of the industry mandated negotiations about subcontracting. The last element—the nature of subcontracting—was of particular importance in the court's decision. Said Justice Stewart in a special concurring opinion, 122

This kind of subcontracting falls short of such larger entrepreneurial questions as what shall be produced, how capital shall be invested in fixed assets or what basic scope the enterprise shall be. In my view, the Court's opinion in this case has nothing to do with whether any of those larger issues could under any circumstances be considered subject of compulsory arbitration.

(Fireboard v. NLRB, 379 U.S. at p. 223)

Apart from highlighting the special nature of Fireboard's subcontracting decision, the court stressed the limits of mandatory bargaining regarding decisions involving job loss. Regarding this point, the court noted that the company's decision "did not alter the company's basic operation", as "the maintenance work still had to be performed in the plant." The company, moreover was not contemplating any capital investment because it was merely replacing its employees with others. Based on these facts, the court then concluded that its decision to order reinstatement would not significantly abridge the company's "freedom to manage the business."

The stipulation of conditions which minimized the impact upon the employers freedom to manage, provided a significant limitation of
union rights with regard to discharges and plant closings. If, and possibly only if, in a decision to dismiss workers a company's operation remained unchanged, and no investment was contemplated, was a decision to replace union labor subject to mandatory arbitration. Justice Stewart was particularly explicit about the restrictions he wanted to impose on union involvement in matters of job security. He noted that the court did not condone a situation where "every managerial decision which necessarily terminates an individual's employment is subject to the duty to bargain." Some decision that clearly affect "conditions of employment are excluded because of the nature of the managerial action." Many managerial decisions, according to Stewart, "affect job security yet cannot be subject to mandatory bargaining; many employer decisions may imperil, or terminate employment, yet are not within the scope of bargaining", including labor saving investments, the liquidation of assets, or decisions to close business. For Stewart these decisions "lie at the core of managerial control" and cannot be subject to mandatory bargaining. Particularly when investment was involved in a change of operations, the company, therefore remained free to close or partially close units without consulting union representatives.

Stewart's analysis suggested an implicit test,\textsuperscript{124} Decision concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions about employment, though the effect of the decision may make it necessary to terminate employment. (ditto, at p. 225)
In Stewart's view, thus "matters of capital", and decisions "fundamental to the basic direction of a corporate enterprise", had to be excluded from NLRA bargaining requirements.

The Fireboard decision indeed pointed in the direction which the courts would adopt in deciding on partial plant closings. Most post-Fireboard appellate court decisions denied mandatory union involvement in partial termination decisions. In NLRB v. Royal Plating & Polishing Co. (1965), for instance, an employer, faced with economic difficulties and the prospect of ouster by redevelopment authorities, closed one of its two plants, terminated the employees there and sold the plant machinery and equipment. (The capital was then used to erect a new plant on a greenfield site). The Board found failure to bargain, but the court of appeals reversed, reasoning that the decision was one to "recommit and reinvest funds in the business" and "involved a major change in the economic direction of the company." 125

Similarly, in the 1965 decision of NLRB v. Adams Dairy Inc., the 8th circuit decided with reference to Fireboard, that the dispute focused upon126

... a change in the capital structure of Adams Dairy which resulted in a partial liquidation and a recoup of capital investment. To require Adams Dairy to bargain about its decision would significantly abridge its freedom to manage its own affairs.


An perhaps even more far-reaching affirmation of managerial prerogatives was given in the case of General Motors v. NLRB (1971).127 In this case GM converted a self owned and operated retail
outlet into an independently owned outlet, to be operated by Trucks of Texas Incorporated. When Trucks informed the former GM employees that none would be retained, the union sought NLRB assistance. Again final judgment was given by the Supreme Court. While UAW contended that the transaction was akin to subcontracting, Justice Clark stated that the decision was fundamental to GM's business strategy and hence beyond the reach of mandatory consultation and bargaining requirements.

The 1981 Supreme Court decision of *NLRB v. First National Maintenance* finally drew a clear line between non-arbitrable and arbitrable components of plant closings. In First National a dispute arose between the employer and a newly certified union because of the employer's decision to terminate a service agreement with a nursing home. The appellate court of the 2nd circuit decided in favor of the union. The Supreme Court rejected the appellate court's position arguing that the court's standard—a weighing of the potential benefits of union involvement with the potential detriments—was not sufficiently precise. Justice Blackmun, writing for a majority of seven, argued strongly against union participation. Said Blackmun,

... the harm likely to be done to 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.  
*(NLRB v. First National Maint., 452 U.S. 666)*

The Court moreover suggested that, since it was unlikely that the union could make the company revise its decision, the delay would only
harm management's interest in speed, flexibility, and secrecy. Blackmun concluded that the decision to partially close a company, was not a subject of mandatory bargaining, but that the effects of this decision, including relocation allowance, retraining or severance pay, were bargaining issues (as they affected working conditions).

4. Conclusion

This section has sketched out a broad legislative and legal history of dismissal regulation in the US. Characteristic of the history of US labor law, is a strong commitment to the managerial prerogative with regard to employment termination. Throughout most of the period discussed, the courts have considered the dismissal of employees a matter of management and employers, and not as an issue in which the state or the unions should have a substantial say.

The preservation of the managerial prerogative, aspired to by the courts, at times became unacceptable. Following the depression, during the New Deal, it was seen as anachronistic, primarily because it prevented the "orderly" extension of collective bargaining which was seen as essential to the recovery of the economy. During the war, as well, the unabridged preservation of managerial "rights" was considered impractical, mainly because of the primacy of output and, related, industrial peace.

When, in the first two postwar unions challenged termination decisions, the courts faced the serious problem of interpreting the
new rights created by the NLRA under conditions of "normal" industrial practice. By postulating a duty to bargaining collectively, the NLRA had introduced a contradiction into US labor law, which at the time still recognized older notions of unrestricted managerial authority in business decisions. Faced with the issue of bargaining over terminations the Supreme Court in particular, based its decisions primarily on older notion of managerial rights to the surprise of many observers, openly reaffirmed the principles of the managerial prerogatives. As a consequence, the notion of joint union-employer law making, which many unions leaders and industrial relations specialists had believed in, became increasingly mythical.130

Blackmun, perhaps made his most telling point, when he introduced his decision in First National, by saying131

Congress stated ... that the scope of bargaining should be left, in the first instance, to the employers and trade unions, and in the second place, to skilled in the field ... subject to the review by the courts. Nonetheless, Congress had no expectation that the elected union representative would become an equal partner in the running of the business in which the union members are employed.
(emphasis added, NLRB v. First National Maint., 452 U.S. 666)

The problem with Blackmun's analysis was that it did not explain just how "unequal" the union representative and the manager were to be, although in the case of terminations, it appears that the courts wanted to permit as little union involvement as possible. In practice, following First National, the Supreme Court left it largely open whether plant relocations, plant sales, and automation required union consultation. Yet current doctrines have come to place severe
limitations on effective collective job protection, which have deterred unions from pushing this issue.

Legal doctrines on management rights since the inception of the NLRA, had evolved to severely circumscribe the unions' ability to bargaining for job security. These limitations, however, still left open plant-level measures of job protection, which the next chapter will explore in greater detail. There, I will argue that the very erection of formal barriers has led unions to seek job protection in plant-level measures.
NOTES:

Note: cross-references to sources in previous chapters are marked i-xx, meaning footnote xx of the introduction; or I-xy meaning footnote xy in chapter I.


2. Matters are complicated by the fact that neither of these rule sets is aimed specifically at regulating dismissals or even the employment relationship. The common law of employment, for instance, is by and large the by-product of contract law. Statutory provisions on dismissals, such as those contained in the NLRA, meanwhile, were the outgrowth of legislation whose stated policy goal was the extension of orderly collective bargaining.

3. Following the adoption of Wood's rule, the common law of employment ceased to place any relevant restrictions on the dismissal of employees, with the rare exception of cases, in which a written contract, promising unambiguously employment for a certain period, could be produced.

4. Chapter III discusses in some detail the issue of unjust dismissal litigation for union members. Union members, have only recently been provided with some of the unjust dismissal remedies previously available only to non-union employees.

5. The desire of common law courts to extend coverage of dismissal rules to as wide a group of employees as possible, has been demonstrated by recent US and UK court decisions aimed at upholding protective provisions for part-time employees, union members, and other previously excluded categories.

6. The English common law of employment which was initially adopted in the US, itself integrated older provisions which had originated from statutory law. See infra note 10.

7. The evolution of these doctrines is discussed in some detail in chapter III.

8. The recent rise of exemptions from at-will-employment led to the reinvention of unjust dismissal suits, which ironically were rather common both in the US and UK at the beginning of the 19th century.


10. Blackstone's analysis of the indefinite employment contract which became the accepted version in 19th century English courts, represents a combination of previous legal doctrines and legislative acts, including the Statute of Artificers of 1562 (5 Elizabeth, c. 4), and later 18th century legislation which undermined some of the older guild rules supported by the Elizabethan act (such as the Master and Servant Act of 1747 and its amendments of 1765, 6 George 3, c. 25). The Statute of Artificers required that nohirings were to be down for less than a year, and forbade dismissals before the end of a servant's term unless sufficient cause had been shown before two justices of the Peace. See Sir William Blackstone, *Commentaries on the Laws of England*, vol 1, p. 425 (London, 1765-69).

It is perhaps worth noting that Blackstone's language, particularly his references to "natural equity", and mutual obligations suggest a "moral economy" of fair play which hardly matches the record of the period. The legal record of 18th and early 19th century England displays a more ruthless picture of the employment relationship. Workers who injured themselves were typically responsible for their own medical and living costs until fit to resume work. English agricultural workers and servants—at the discretion of magistrate courts—were often subject to rather arbitrary, and legally enforced cuffings, threats, which could be imposed by their masters for signs of insubordination, inattention, immorality or sloth. Brief unexcused absences could result in dismissal and forfeiture of their of all wages.

While employers who terminated an employee prematurely and wrongfully faced civil proceedings in which financial damages were awarded to the injured party only, workers who quit committed a "criminal act." Following already severe sanctions in older statutes (see above, same note), the Master and Servants Act (4 George 4, c. 34) of 1824 criminalized breaches of a labor contracts. Employees who quit their jobs before the year or the contractually specified period was worked out were typically fined and/or arrested. Until 1875, when this law was terminated, approximately 2,000 agricultural workers had been convicted and imprisoned each year for leaving or threatening to leave their employees or for "sulky" behavior at work. See D. Morgan, *Harvesters and Harvesting, 1840-1900: A study in the Rural Proletariat*, London: Croom Helm, 1982, at pp. 124-126 and pp. 131-133. See Whittle v. Frankland (1862), 2B & S 49, 121 E.R. 993, K.B. for an example of a collier whose one month imprisonment for quitting was upheld by the high court of King's Bench.

These day-to-day practices are generally not covered in the legal literature of time, which limits itself often to the dealings between employees of urban, often professional employees of medium to high social status and their employees. This limitation does not reduce the relevance of the recorded cases, as it was the written decisions of the English high courts which were imported into colonial and American Law.

The majority of legal handbooks covering this period and its laws, indicate that the use of the "one-year-rule" against those quitting employment was limited to servants and agricultural laborers
(where feudal ties were the strongest and the employer was assigned disciplinary rights over some groups of workers). For other occupations, the one-year-rule represented above all a protection against premature dismissal. Most legal treatises accordingly discuss the "one-year-rule" in the context of an employer prematurely or wrongfully dismissing employees.

11. Early 19th century English courts held a general hiring, if unexplained to be a hiring for a year, sometimes even if evidence to the contrary could be construed from the contract; see Bayley v. Rimmell (1836). In Beeston v. Collier (1827), 4 Bing. 309, the court stated that, since there was no evidence of a custom to the contrary, the hiring of a clerk had to be for a year; even though the contract specified a notice period for termination.

The fourth edition of R. Burn, Justice of the Peace and Parish Officer (ca. 1790, first published in 1743, London), one of the first attempts to define the "servant", includes among those who should be covered by principles of natural equity (i.e. the one year rule) "laborers, journeymen, artificers, and other workmen." Odgers, supra note 9, suggests that during the mid to latter half of the century English courts had become more lenient in the interpretation of the one year rule. Many judges then argued that there was no inflexible rule that a hiring was for a year, and recommended that the question of a yearly hiring had to be considered in connection with the circumstances of each particular case [statements to this affect appear for the first time in the cases Baxter v. Nurse (1844), 6 M. & G. 935; and Dow v. Pinto (1854), 9 Ex. 327]. Following this notion, Victorian courts took the payment of wages at shorter than a year's interval as evidence for the inapplicability of the one year rule [see Baxter v. Nurse]. Similarly regional and occupational tradition were taken to provide evidence against the application of the one year rule [see Metzner v. Bolton (1864), 9 Ex. 518].

In the case of domestic servants in particular, Victorian courts construed a general hiring—i.e., a hiring without any engagement as to the length of a service—to be terminable by one month's notice, or the payment of a month's wages on the part of the employer; and by a month's notice on the part of the servant [see Fawcett v. Cash (1854), 5 B & Ad. 904; Turner v. Mason (1845); and Mout v. Halliday (1898) 1 Q. B. at p. 130]. Contracts of domestic servants were also deemed legally terminable if notice was given by either party at the end of the first month of at any time during the first fortnight [see George v. Davies (1911) 2 K. B. 445].

The courts typically resisted the application of such restrictive practices to "upper tier" servants such as private tutors, farm bailiffs, stewards and house keepers, whose indefinite contract was interpreted (following later editions of Blackstone) as for one year. In Reeston v. Collier, 4 Bing. 309 (1827) a justice stated of a [minor] clerk that "it would be, indeed, extraordinary, if a party in his station of life could be turned off at a month's notice, like a cook or scullion."

12. Other major groups of litigation in 19th century England included the Law of Conveyancing, Cases in Equity, and the Law of Wills. One of the complications arose in cases in which the worker/contractor was prevented from completing the work by "natural causes" or the conduct of the other party. In this context English courts established an important precedent which favored the position of employees. In the 1671 case of Peeters v. Opie, 85 E. R. 1144, the
court of King's Bench ruled that an act of prevention warranted recovery of the full price of the contract independent of the work actually done.

The inadequacies of the one-year-rule became blatantly obvious during the industrial revolution. In the early 18th century, the operatives in the English textile factories (such as Arkwright) tried to have their employees sign contracts for three to six months. Skilled operators typically refused such contracts and in many cases were able to obtain contracts for three to five years duration (with wage increases to be negotiated). With regard to the one-year-rule, Kahn-Freund suggests that the "yearly hire common to agriculture was very early extended too far beyond agricultural work conditions which it did not fit at all." See O. Kahn-Freund, (1977) "Blackstone's Neglected Child: The Contract of Employment," Law Quarterly Review, p. 509.

While some industrial managers were able to replace the "long-hire" with piece rate and shorter term contracts, the tradition of the one-year-role represented an obstacle to the transformation of the labor contract, particularly in traditional craft occupations such as the building trades. On the evolution of different contract forms see, e.g., P. S. Atiyah, The Rise and Fall of Freedom of Contract (Oxford: Oxford University Press, 1979). The conflict between industrial management and the older concepts of the labor contract are covered in S. Pollard (1965) The Genius of Management: A Study of the Industrial Revolution in Great Britain, Cambridge: Harvard University Press, 1965; and S. Jacoby, supra note 1.

13. The relevant Acts include 4 George 4, c. 34 also known as the Master and Servants Act of 1824; 30 & 31 Victoria c. 141 also known as Master and Servants Act of 1867. The term "wrongful discharge" has been used by the English courts in the context of employment from about 1790 onwards. Explicit mention of the "wrongful discharge" of a "servant" was probably made first in Martyn v. Hind (1776, 1779) 1 Doug, 142. The notion of a wrongful dismissal or discharge per se however is older. It originates from the common law of contract where it was used to describe an illegal acts by a contract party which terminated the obligations of the promisor; see, e.g., Brewster v. Kitchell (1678) 1 Ld. Raym. for an early example of such a definition.

English law originally did not require a master to state his grounds for dismissing a servant; be it on a definite contract before the contract period expired, or a indefinite hiring before the customary period (typically a year) was worked out. But the just-cause standard was implied. If a servant alleged insufficient cause in court the master was expected to prove a sufficient unpardoned cause for the dismissal. In Ridgway v. Hungerford Market Co. (1825), 3 A. & E. 171, 4 N. & M. 797, Lord Denman stated to this effect: "It is not, in my opinion, necessary that a master having good ground for dismissal, should either state that ground, or be acted upon it in dismissing his servant. It is sufficient that the master has a justifiable cause for dismissing his servant. Suppose a master intended to dismiss his servant without sufficient cause and the servant learning this, grossly insults his master, surely this would entitle the master to dismiss the servant. ... It is sufficient for the master to show (in answer to an action by the servant for his wages) that a good ground for dismissal exists." See also Mercer v. Whall (1845), 5 A. and E.Q.B. 447; Baillie v. Kell, 4. Bing. N. C. 638 (1838). In cases where dismissal of a servant involved slander by
the master, the courts typically did not allow the master to keep secret the precise grounds for a dismissal and/or justify the dismissal after the fact. Said Lord Deas in Watson v. Burnett (1862), 24 D. 497: "The servant is entitled to know the cause of her dismissal. Sometimes it may be so clear that the servant must know the reason as to render the statement superfluous. But the masters position may be prejudiced and made unsafe if he assigns no reason." A later doctrine expressed by Lord Denman considerably weakened plaintiff's (servant's) position as it allowed master to dismiss a servant for an act which might not have been sufficient if previous pardoned acts of misconduct could be used to construe "a continued course of misconduct."

14. For high court rulings to this effect see Wilkinson v. Gaston (1846) 9 Q. B. 137; and Wallis v. Warren (1849) 4 Exch. 361.

15. The key ruling on this principle is Planche v. Colburn (1831) 8 Bing. 14. The case is commented on in J. W. Smith, A Selection of Leading Cases on Various Branches of the Law (London: William Maxwell, 1856, 4th ed.) vol 2, at p. 32-38. For a general account of this principle see Batt, supra note 9, at pp. 192; and Sutton, supra note 9, at pp. 253-255.

16. Gandell v. Pontigny (1816) 4 Camp. 375. See the Comments in Batt, supra note 9, at p. 186, and 192. There is some indication that Scottish courts tended to treat such Claims more generously. W. Campbell, Treatise on Master and Servant, Employer and Workman, and Master ad Apprenticer According to the Laws of Scotland (Edinburgh: T & T Clark, 1881, 3rd ed.), for instance, states that in the absence of prior agreements "the amount of damages to which a servant is entitled on wrongful dismissal is generally limited to the wages at the end of the agreement, (and in case of servants whom the master is bound to lodge and feed) to board wages till that period also." Scottish courts, while in principle more willing to award damages for the entire year to workers who were unjustly dismissed, often made some deductions in order to subject the master to such damages only which "in the whole circumstances of the case appear reasonable." In Innes v. Brand (1 June 1796) Hume's MS, lect. the master of a ship, an indefinite contract employee, was allowed board and wages for ten months. In Jackson v. Aitchison (15 Jan. 1790) Campbell p. 164, an indefinite term clerk to a postmaster, who was tuned away after a few weeks work on "weak and frivolous pretense" was awarded six months' wages. A similar judgment was given in Campbell v. Fyfe (1851) 13 D. 1041 in connection with a newspaper editor. In Maclean v. Fyfe (4 Feb 1813) F.C., the court found a gardener, engaged by the year, who was dismissed after 9 days entitled to the full years' wages. Wages and board for a year were also awarded to a farm overseer for a whole year who was dismissed improperly without warning at the start of a new term; see Finlayson v. McKenzie (1829) 7 S. 717. In Anderson v. Wishart (1818) 1 Mur. 429 and 442 a farm overseer, hired yearly at 42 pounds and allowances was improperly dismissed at the end of term without sufficient warning and the jury gave him 95 pounds. In Morrison v. Allardyce (27 June 1823) 2 S. 434, a domestic servant dismissed without due notice was awarded wages and board wages for the ensuing half year. See also the similar judgments in Gunn v. Ramsay (1801) Hum. Dec. 384 involving a cook; Thomson v. Douglas (1807) Hum. Dec. 392.
17. See Lilley v. Ellwin (1848) 11 Q. B. 742. The cases is commented on in Smith, supra note 15, vol 2, at p. 34.

18. For those unfamiliar with the English court system, the following facts are perhaps worth noting. By the Judicature Acts of 1873 and 1875, the courts of original jurisdiction and of intermediate appeal were reorganized and consolidated into the Supreme court of judicature, with two subdivisions, the High Court of justice, and the Court of Appeal. The high Court of Justice had five divisions viz., the Queen's Bench division, the Common Pleas division, the Exchequer division, the Chancery division, and the Probate, Divorce and Admiralty division. Prior to that, additional divisions existed such as the courts for Privy Council Appeals, Chancery Appeal Cases, Crown Cases Reserved, Equity cases, and separate divisions for Admiralty and Ecclesiastical cases, and Probate and Divorce cases.

The reference system for older English cases is relatively complicated as they are listed by court and court reporter (a person or periodical). Since 1865 Law Reports were published by the Incorporated Council of Law Reporting in monthly parts, paged in different series, by courts and divisions. Several legal reference manuals can be used to date, and trace pre and post 1865 cases on this basis. In 1900 the English Reports, Full Reprint published 100,000 of the most important reports covering the period from 1378 to 1865. Cases between 1785 and 1865 can also be found in the Revised Reports. The use of the reprints is not without drawbacks, as reliance on these collections typically makes impossible the analysis of contemporary comments and cross references, as are available for instance in Smith, supra note 15. So far as possible, I have avoided the use of the reprint, as I was interested in the interpretation of a case at a the respective time. For the analysis of pre 1900 English and American cases I have relied heavily on F. C. Hicks, Materials and Methods of Legal Research Several, With a Bibliographical Manual (Rochester: The Lawyer's Cooperative Publishing Company, 1923). For more recent US cases, I have relied on reference works such as M. L. Cohen, Legal Research (St. Paul: West, 1987). Most of the analysis of more recent cases was conducted with resources available on the Internet and particularly the Lexis-Nexis systems. Access to Lexis and library resources were provided by the Glasgow and Dundee law schools.

19. Relevant cases containing statements to this effect include Smith v. Hayward (1837), 7 A. & E. 544; Broxam v. Wagstaffe (1841) 5 Jur. 845; Archard v. Horner (1828) 3 C. & P. 349; Fewings v. Tisdal (1847) 1 Exch. 295. See Odgers, supra note 9, at pp. 902-903.

The court's finding that a wrongful dismissal did not represent a dismissal in law and hence could be ignored by the employee, should not be misinterpreted as an "employee-friendly" position. Rather this ruling originated from the general interpretation of the common law contract, which implied that, say, a merchant, could ignore a contract partners wrongful termination of the contract, and proceed as if the contract was still in effect. English common law judges of the mid 19th century often superimposed principles that had been established primarily in commercial law on the employment relationship. Later cases, by contrast, tended to reflect more politicized views.

20. The principle underlying a suit for the whole amount of wages is also referred to as indebitatus assumpsit, that is an action for the implied promise to complete the contract.
21. Quantum meruit stands for the implied contract which obliges the employer to pay a reasonable sum for work already done. See Planche v. Colburn (1831), 8 Bing. 14.

22. On cases applying the doctrine of constructive service see Gandell v. Pontigny (1816) 4 Camp. 375; and Collins v. Price, 5 Bingh. 132; Smith v. Kingsford, 3 Scott 279. Later decisions, arriving at similar interpretation using the "totality of circumstances principle" include O'Neil v. Armstrong (1895) 2 W. B. 418; 34 Digest 81, 599; Brace v. Calder (1895) 2 Q. B. 253; 34 digest 99, 739; Re Rubel Bronze Co. and Vos. (1918) 1 K. B. 315: 34 Digest 71, 496.

23. Gandell involved a suit for a quarter's salary, whereas Lilley involved the payment of a year's wage. See Gandell v. Pontigny (1816) 4 Camp. 375. Lord Ellenborough's (Chief Justice at King's/Queen's Bench, 1802-1818) statement is cited in Smith, supra note 15, vol 2, p. 34.

At the turn of the 18th century cases were reported in which the same of breach of the "entire" contract was applied to the employee. These cases follow Cutter v. Powell (1795) 6 T.R. 320. The denial of wages in Cutter did not involve a quit but rather the peculiar circumstances of an employee who had signed a promissory note for a payment at the end of a sea journey, during which he died. The suit for wages by his widow was denied. Judgments similar to Cutter were applied to some workers, who were accordingly denied the payment of any wages at all upon quitting (viz. the right to recover on a quantum meruit). There is some indication that these decisions did reflect a particular notion of obligation, rather than a general doctrine on dismissals. This is obvious among others in the fact that these decisions were almost exclusively applied to servants and farm laborers. In the case of Spain v. Arnott (1817) 2 Stark. 256, 171 E. R. 411 E.X., for instance, Lord Ellenborough ruled that a farm servant who had only a few months remaining on an annual contract had no claim to a "farthing of wages." The decision was grossly unjust by today's standards: the servant had just completed several hours of work and was sitting down for dinner and refused his master's order to walk a mile immediately to fetch a horse. Lord Ellenborough's decision to refuse quantum meruit recovery, however, was based not a breach of contract but his conception of the specific duty of servants, whose rights and duties Ellenborough perceived as fundamentally different from those of say clerical employees.

pp. 33-38 would have made it clear that contract theory was at the
time almost exclusively understood in terms of employer obligations
(rather than an instrument of disciplining quitting employees; for
which statutory law provided other means).

The issue became a mute point in 1870, with the passage of
the Apportionment Act (33 & 34 Vict. c. 35). Section 2 of this act
stipulated that "All rents, annuities, dividends, and other periodical
payments in the nature of income (whether reserved and made payable
under an instrument of writing or otherwise) shall ... be considered
as accruing from day to day, and shall be apportionable in respect of
time accordingly." See Batt, supra note 9, p. 193.

is commented on in Smith, supra note 15, vol 2, at p. 33. It is
important to note that Hochster, like other rulings on contract
length, typically did not apply to menial servants. The employment of
the latter could be terminated provided the servant was paid one
month's wages [see Gordon v. Potter (1859), 1 F. & F. 644]. Cdgers,
supra note 9, at p. 895 lists various limitations in the compensation
of domestic and menial servants, including the exclusion of any
compensation for lost board wages.

A similar ruling as in Hochster was adopted in several Scottish
cases of the 1870s. In Cameron v. Fletcher (1872) 10 M. 301, a
gamekeeper who was engaged from end of March to end of March, was
improperly dismissed in July. He was found entitled to 40 pound in
wages for the year, although the employer pleaded that he had only
been out of employ for a couple of weeks. Lord Benholme argued that:
"There was one strong case of a man who was deprived of his salary by
the firm which employed him ceasing to exists. ... [B]ut the contract
came to an end without any fault of the master ... That cannot be said
of the present case. There was culpa here ... I am not able to say
that, as wages alone, the pursuer would be entitled to the whole
year's earnings. But the defender [sic] does not justify his
dismissal, and we may affirm the judgement of the sheriff as to
damages. Looking at the whole circumstances under which this man was
thrown out of employment, and may be supposed to have suffered injury,
he is entitled to damages for the dismissal, which was a violation of the
... contract." Similar judgments were given in Bentinck v.
Macpherson (1869) 6 S.L.R. 376; and Ross v. Pender (1874) 1 R. 352.

25. The court's contention that Hochster could sue for wages for
the entire period was based primarily on its perception of an analogy
to other instances where it had typically permitted action before the
day the breach of the contract actually occurred. Chief Justice Lord
Campbell stated to this effect: "The defendant's counsel very
powerfully contended that, if the plaintiff was not contended to
dissolve the contract and to abandon all remedy upon it, he was bound
to be ready and willing to perform it till the day when the actual
employment as courier in the service of the defendant should was to
begin, an that there could be no breach of the agreement till the day
for doing the act has arrived. But it cannot be laid down as a
universal rule... [that] no action can be brought for a breach of the
argument till the day for doing the act has arrived. If a man
promises to marry a women on a future day and before that day marries
another women he is instantly liable for breach of promise of
marriage: Short v. Stone (1846). If a man contracts to execute a
lease on and from a future day for a certain term, and, before the day
he sells and delivers them to another, he is immediately liable to an
action at the suit of the person with whom he first contracted to sell and deliver them: Bowell v. Parsons (1808)."

It appears however, that Lord Campbell tried to specifically make this contract doctrine work in the context of employment. Analyses which place Hochster merely in the context of the theory of frustration of contracts, and attached little significance to its terms of employment law therefore are perhaps mistaken (the case is still cited in some modern English textbooks on contract under this heading). Older legal material such as Smith's L.C., supra note 15, conveys a contemporary view which placed Hochster very much into the context of the specific circumstances of an employment contract. Hochster, accordingly, is the culmination of a series of judgments, particularly Gandell (to which Lord Campbell explicitly refers) which sought to penalize the wrongful discharge of employees. The specific focus of this judgment on the labor contract becomes particularly clear in the latter part of Lord Campbell judgement, where he discusses the advantages of the Gandell-Hochster approach. Campbell states: "But it is surely much more rational, and more for the benefit of defendants, that the plaintiff should be at liberty to consider himself absorbed from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle, and laying out money in preparations which must be useless, he is at liberty to seek service under another employer ..." Hochster is reprinted in All E.R. Rep. 12. See also Smith, supra note 15.

26. These courses of action are described both in Sutton, supra note 9, at p. 253; and Smith, supra note 15, at p. 35.

27. See Planche v. Colburn (1831) 8 Bing. 14; 34 Digest 108, 811; and Archard v. Horner (1829) 3 C. & P. 349.

28. See Gandell v. Pontigny (1816) 4 Camp. 375; and Cclins v. Price, 5 Bingh. 132; Smith v. Kingsford, 3 Scott 279.

29. Apart from Hochster, see Pagani v. Gandolfi, 2 C. & P. 370. Probably the highest recorded award of this period appears in the context case of Hartland v. Exchange Bank (1866) 14 L. T. 863. Hartland, a bank manager, engaged for three years at a yearly salary of 1000 pounds was discharged during the first year. Judge Willis instructed the jury as follows: "The jury ought take only the salary into account not the commission. Next they ought not give the salary for two years and eight months, 2800 pounds, nor anything like that sum. They must reduce the amount by the probabilities of the plaintiff getting other employment to fill up his time." The verdict gave the plaintiff 880 pounds. The annual wage of sailor at that time was less than 20 pounds.

30. See Odgers, supra note 9, at p. 903. Pollock mentions that during the last two decades of the 19th century the Hochster rule "was unwelcome to some of the judges." See F. Pollock, The Principles of Contract (London: Stevens, 1942) at pp. 221-222.

31. See Beckham v. Drake (1847-9) 2 H. L. C. 579.

32. On the diligence standard and the role of job offers see Beckham, id.; Reid v. Explosives Co. (1887) 1 Q. B. D. 264; and Brace v. Calder (1895) 2 Q. B. 253. English high courts rejected

It is perhaps worth noting at this point that Scots Law of the master and servant, like Scots law in general, differed from English law, predominantly because of its Roman Law origins, which encouraged a "principle" rather than precedent based approach.

33. The Conspiracy and Protection of Property Act also abolished the rule by which it was a criminal offense for the worker to quit, but not for the employer, to break the contract. Legally this act equalized the legal status of a worker and her/his employer. On the Conspiracy and Protection of Property Act see 38 & 39 Vict. c. 86 (1874/75). On the Employers and Workmen Act see 38 & 39 Vict. c. 90, s. 3 (1875). See Odgers, supra note 9, at p. 887-888.

34. Despite his hedging Storey cites only a single case in which the payment of wages raised the presumption of hiring for that period. See W. Storey, A Treatise on the Law of Contracts (Boston, 1851) at p. 1041.

In the colonial period English precedents were binding. Although there was a reaction against English precedents after 1776, lawyers and judges continued in large measure to rely on them way into the late 19th century. Even in the late 19th century, after the enormous development of US case law, English cases continued to be cited in great numbers in US decision, particularly in such traditional common law fields as contract. A survey by the Boston Book Company in 1894 showed that among the reports cited by judges in 44 states, the order of preference in citation was as follows: first their own respective state reports, second US Supreme Court reports, and third English reports (with reports of other US states and other sources following). See Hicks, supra note 19, at p. 92.

Some legal analyses have emphasized the reluctance of American Courts to employ the traditional standards of the English Master and Servant relationship. They emphasize the transformation of the Law of Master and Servant into a general law of employment during the colonial period up until the first 50 years of the republic. See, e.g., the particularly detailed analysis by C. Tomlins, Law, Labor and Ideology in the Early American Republic (Cambridge: Cambridge University Press, 1993) pp. 223-294. Tomlins stresses that American courts typically denied employers the control of employees outside of the service to be rendered (p. 227) and applied traditional servant doctrines to youth only. Although Tomlins acknowledges that "representing employment relations in voluntarist language ... mystified the ... existence of power" (pp. 269-270), he suggest that by the mid 1800s a legal transformation had taken place which broadened the master and servant relationship through general contractual principles arriving at a "generic law of Master and Servant" (p. 255). Tomlins appears to mistake fashionable republican claims about the elimination of servitude and the abandonment of statutory provisions and feudal rules, as evidence for a substantive change in the employment relationship. (Be it noted: Most of these feudal remnants had been eliminated anyway by that time in English law, either through the application of doctrines of contract in court decisions or specific acts of repeal). A finer distinction is drawn in R. Steinfeld, The Invention of Free Labor: The Employment Relation in English and American Law, 1350-1870 (Chapel Hill: University of North Carolina Press, 1990).
Having surveyed some of the primary sources at hand, I have come to a view akin to critical legal scholars, (see, e.g., infra note 36) which suggests that the notion of a fundamental transformation of the English Master and Servant law through the American courts is based on taxonomic differences in the description of the employment relationship, rather than substantive changes in the rights of employees. This seems to be particularly the case with regard to the issues of dismissal and job security investigated here, which in that sense confirms the critical legal studies view of a much fuller adoption of English law in the US with no or very little "democratization" of legal relationships taking place.

35. See M. Horwitz, The Transformation of American Law, 1780-1860 (Cambridge: Harvard University Press, 1978) at pp. 186-187. The first recorded case applying the "entire" contract case in this sense was McMillan & McMillan v. Vanderlip, 12 Johns. (N.Y.) 165 (1815). Mr Vanderlip had entered into an agreement with Messieurs J. and A. McMillan to spin Yarn for 10 and 1/2 months at 3 ct per run. After 3 months and 845 runs, he quit and sought to recover the value of the work he had rendered the McMillans. McMillan appealed against a trial court's judgement which awarded Vanderlip damages on a quantum meruit basis. Citing the older English "precedent" of Cutter v. Powell (1795) 6 T.R. 320, Justice Ambrose of the appellate court reversed the award. Arguing that Vanderlip "would have been more profitable to his employer in the latter part of the term," Ambrose drew an analogy to farm servants whose labor is more profitable during the summer months and concluded that it would be unconscionable to allow the employee to work out part of his contract and receive payment for it. Ambrose's citation of Cutter was essentially mistaken, as Cutter involved the special case of sailor who had received a promissory note rather than having signed an employment contract. Nevertheless a host of American decision followed Ambrose's judgement, often citing Cutter; see, e.g., Jennings v. Camp, 13 Jons. 94 (N.Y.) 1816; Lewis v. Esther, 2 Cranch CC 423, 15 Fed. Cases 482, # 8 (1823); Stark v. Parker, 19 Mass. (2 Pick.) 267 (1824). The "entire" contract interpretation was fiercely defended in early American legal treatises including Z. Swift, Digest of the Laws of the State of Connecticut (New Haven, 1822); J. S. Sanders, The Law of Pleading and Evidence in Civil Actions (Philadelphia, 1837, 3rd ed.); T. Parsons, jr. The Law Contracts (New York, 1855, 1st ed).

The Ambrose decision was opposed by several "progressive" judges as early as the 1830s. In 1834 Justice Parker of the New Hampshire supreme court broke new ground in the case of Britton v. Turner, 6 N.H. 481 (1834), which established quantum meruit as a general principle. Karsten, supra note 23, discusses the adoption of the Britton doctrine which gradually came to replace the "entire" contract views.

36. The fact that all of the cases resulted in awards, does not indicate that workers were generally successful in their unjust dismissal suits and/or that courts were particularly sympathetic to such litigation. Since cases which employers were not found to have dismissed workers without cause often were disposed in pretrial hearings we cannot estimate the success rate of such suits. The state high-court cases in which workers were compensated on a quantum meruit basis include, Adams v. Hill, 16 Me (4 Shep.) 215 (1839); Chamberlain v. McCullister & Sanders, 6 Dana. (36 Ky.) 352 (1838); Steward v. Walker, 14 Pa. 293 (1850); Green v. Hulet, 22 Vt. 188
(1850); Williams v. Anderson, 9 Minn. R. 50 (1864); Madden v. Porterfield, 53 N.C. 166 (1860); Williams v. Chicago Coal Co, 60 Ill. 149 (1871); Colburn v. Woodsworth, 31 Barbour (N.Y.) 381 (1860); Mackabin v. Clarkston, 5 Minn. R. 247 (1860); Newman v. McGregor, 5 Hammond (Ohio) 349 (1832); Alexander v. Hoffman, 5 Watts & S (PA) 382 (1843); Wright v. Morris, 15 Ark. 444 (1855); Meade v. Rutledge, 4 Tex. 44 (1853); Hassell v. Nutt, 14 Tex. 260 (1855); Nations v. Cudd, 22 Tex. 550 (1858); Gordon v. Brewster, 7 Wis. 355 (1858); Rogers v. Parham, 8 Ga. 190 (1850); Cox v. Adams, 1 Nott & McCord (S.C.) 284 (1818); Rankin v. Darnell, 11 B. Monroe (50 Ky.) 30 (1850); Swift v. Harriman, 30 Vt. 607 (1858); Williams v. Bemis, 108 Mass. 91 (1871); Given v. Charron, 15 Md. 502 (1860); Jenkins v. Long & Byrne, 8 Md. 132 (1855); Rick v. Yates, Adm. 5 Ind. 115 (1854); Cf. Howard v. Day, 61 N.Y. 362 (1875); Bull v. Schuberth, 2 Md. 38 (1852). See Karsten, supra note 23, at pp. 250-251.

Cases in which the defendants were awarded the full wage for the contract include, Nears v. Harbert, 25 Mos. 352 (1857); King & Graham v. Steiren, 44 Pa. St. 99 (1862); Webster v. Wade, 19 Cal. 291 (1861); Lawrence v. Gulliver, 38 Me 582 (1854); Hoyt v. the Wildfire, 3 Johns. (N.Y.) 518 (1808); Costigan v. Mohawk & Hudson Rrld., 2 Denio (N.Y.) 609 (1846); Whitney v. Brooklyn, 5 Ct. 405 (1824); Hoy v. Gronoble, 34 Pa. St. 9 (1859); Walworth v. Pool, 9 Ark. 394 (1849).

New York courts enforced the 1 year rule and awarded damages for the entire contract period up until the 1890s. See, e.g., Bleecker v. Johnson, 51 How. 380 (1876) involving the case of a clerk paid $1,500 p.a.; Tucker v. Philadelphia & R. Coal & Iron Co., 53 Hun. 138, 6 N.Y.S. 1134 (1889) involving a sales agent paid $4,500; Douglass v. Merchants' Insur. Co., 118 N.Y. 484, 23 N.E. 806 (1890) involving a corporate officer; Adams v. Fitzpatrick, 125 N.Y. 124, 26 N.E. 143 (1891) involving a clerical employee paid $3,000. The average recorded NY (white male) wage was $1,500.

37. In addition to his qualifications of the one-year-rule for indefinite employees, Schouler lists a range of offenses which entitle the employer to dismiss irrespective of contractual obligations. These include, "first, willful disobedience of a lawful order; second, gross moral misconduct; third habitual negligence in business, or other serious detriment to the master's interest" (Schouler, p. 612). Given these specifications the employers' right to fire, at least in theory, was subject to fairly stringent limitations. Specifying these cases for just dismissals could provide grounds for challenging unjust dismissals; a situation which many American courts at the time considered undesirable. Schouler marks an intermediate stage in which adherence to English principles is still relatively strong. Later texts typically give a less stringent treatment of just grounds for dismissal. Compare J. Schouler, Treatise on the Law of Domestic Relations; Embracing Husband and Wife, Parent and Child, Guardian and Ward, Infancy, and Master and Servant (Boston: Little, Brown, and Company, 1870) with W. Tiffany, Handbook on the Law of Persons and Domestic Relations (St Paul: West Publishing, 1896).

Generous interpretations of the breach of contract, as in Hochster, were not well received in American legal treatises. The doctrine of Hochster and particularly its application to employment were severely criticized early on. Pollock, supra note 30, at p. 221 notes that the popular American treatise Williston on Contracts (ca. 1910) "severely criticizes Hochster v. De la Tour." The Hochster
doctrine was applied relatively late in US law, specifically in *Roehm v. Horst* (1900) 178 U.S. 1. when it was recognized only subject to restrictive qualifications.


Little is known about Wood. Feinman reports that Wood was a practising Albany lawyer (but not a member of the New York State Bar) and a prolific writer of legal treatises. In addition to his work on master and servant, Wood edited and authored treatises on nuisances, tort, and evidence among authors. Apart from his own work the only reference to Wood's person appears in *11 Albany Law Journal* p. 410, June 26, (1875), saying: "Mr Wood obtained an excellent reputation as a learned, accurate and original law author ... To bring order, simplicity and symmetry out of conflicting decisions was the work of a genius."

The question of what impelled Wood to state the American rule is even more difficult to discern. Wood was not a contract theorist. His work in the field consisted of case collections. In fact, Wood grounds his view on employment not in notions of freedom of contract (as did later views), but rather on examples of previous American cases. There is some consensus that his analysis of these cases was off the mark. Wood, for instance, states incorrectly that no American courts in recent years had approved the English rule and that the American rule was already applied "inflexibly" in the US.

39. There are four principal explanations for the spread of the at-will doctrine. First, the dissemination of the rule is seen as part of a general spread of the doctrine of freedom of contract during the laissez faire years of the US. See, e.g., Lawrence M. Friedman, *A History of American Law* (New York: Simon & Schuster, 1985, 2nd ed.), particularly chap. IX, at pp. 532-536. For a more detailed analysis see *Contract Law in America: A Social and Economic Case Study*, by the same author. Friedman speaks of the "golden age of contract" to mark the preoccupation of 19th century US courts with the interpretation of contracts, the elimination of previous feudalistic and moralistic restrictions on contracting, and the focus of the courts on the freedom of contract. Second, some analyses argue that the at-will rule was a holdover in perception from the master and servant relation within a changing social and economic context. See, e.g., Selznick, *infra* note 40, at pp. 134-136. Thirdly, it has been argued that the at-will rule emerged as response to attempts by newly important groups of upper-tier white collar employees to assert their position in the capitalist system. Employment at-will reasserted the distinction between owners and non-owners of capital. See Feinman, *supra* note 38, p. 132. Jacoby, *supra* note 1, finally, attributes the adoption of at-will terminability by US courts to the weakness of trade unionism and white vs blue collar status distinctions in the US.

40. Selznick argues that, by following Wood's rule, the law did not treat the conditions of employment as the outcome of free bargaining and mutual assent but rather consented to unequal terms:
although contractual theory ostensibly gave full discretion to the parties in defining the nature and scope of authority, "it imported into the employment contract a set of implied terms reserving full authority of direction and control to the employer. Once the contract was defined as an employment contract, the master and servant model was brought into play. The natural and inevitable authority of the master could then be invoked, for that authority had already been established as the defining characteristics of the master-servant relation. In this way, the continuing master-servant imagery lent a legal foundation to managerial prerogative." See P. Selznic, Law, Society, and Industrial Justice, (Washington: Russell Sage Foundations, 1969) at pp. 134-137. Selznic's analysis is still groundbreaking. Recent contributions to the legal analysis of have in part resurrected Selznic's interpretation of employment-at-will.

41. See Payne v. Western & A.R.R. Co. (Tenn, 1884), 81 Tenn 507. Initially, during the last twenty years of the 19th century, the at-will rule coexisted with other interpretations of the indefinite contract, such as a) the one year rule, b) the analyses of circumstances to determine intended duration, and c) the rule that dismissal was possible with each payment period. Evidence suggests that by the turn of the century, the application of rules other than the at-will rule became increasingly rare. The courts then ignored evidence in support of employees, such as that the employee had moved long distances to obtain a job [Odom v. Bush, 125 Ga. 184, 1906] or had ten or more years' employment [Martin v. N.Y. Life Insurance Co., 148 N.Y. 117, 1895; Greer v. Arlington Mills Mfg. Co., 2 Penn. (Del.) 581, 1899].

Apart from its uncompromising statements of the principle, Payne is of some significance to legal historians. Originally it was believed that Wood's rule was adopted first in the New York case of Martin v. New York Life Insurance Co., 148 N.Y. 117, 42 N.E. 416 (1895). Martin was head of NYL's real estate department at annual salary of $10,000. On being discharged he sued alleging that his indefinite contract was for one year, relying on the New York case of Adams v. Fitzpatrick 125 N.Y. 124, 26 N.E. 143 (1891). The trial court granted judgement to Martin but the general court reversed and appeals upheld the reversal. The appeals court stated the "new" twofold rule that an indefinite hiring was at-will and that a statement of a yearly rate did not imply that the contract was for this duration. The unanimous court concluded that its decision was deliberately adopted "to settle differences of opinion which had prevailed in the lower courts." The earlier case of Payne casts doubt on older analysis which suggested that the American rule spread in the Northeast and was applied initially to managerial employees only.

42. See Comerford v. International Harvester Co., 235 Ala 376 (Ala, 1932), 178 So 894 (1932). The widespread and reckless application of Wood's rule is discussed in Heshizer, supra note 54. It is perhaps worth noting that Wood himself had not intended the at-will rule to be applied mechanically. He stated that the rule applied "unless from the language of the contract itself it is evident that the intent of the parties was, that it should, at all events, continue for a certain period, or until the happening of a certain contingency." Interestingly, the most frequently cited passage of Wood's treatise was his perhaps misleading statement that "For us the rule is inflexible..."

44. See Frorer v. People, 31 N.E. 395 (1892).

45. See Ramsey v. People, 142 Ill. 380; 32 N.E. 364 (1892).

46. For some time, US State and District courts struck down all statutes forbidding token money. The other token money cases commented upon by Pound include: State v. Loomis, 22 S.W. 350 (1893) and State v. Haun, 59 Pac. 340, 346 (1899).

47. See Frorer, supra note 44, at p. 398-399.

48. See State v. Haun, supra note 46, at p. 352. The ideological roots of the courts' opposition to employment regulation have been discussed in greater detail elsewhere. Essentially, judicial analyses of the type used in the token money cases was based on the Jacksonian assumption that America lacked permanent social classes. In a recent article on the Law of Industrial Disputes, Daniel Ernst cites a 1884 editorial in the Philadelphia record, which expresses this belief concisely: "This is the country of the workmen, ... in it there are no classes except good and bad. Even the capitalists are only workingmen who display superior energy and intelligence. Most have once been hired or were the sons of men who started their lives as employees. So it must always be unless our workingmen degrade themselves and pull away the ladder upon which they are to rise by classifying themselves as a sort of inferior part of the whole." See D. Ernst, "Free Labor, the Consumer Interest and The Law of Industrial Disputes, 1885-1990," in The American Journal of Legal History, vol 36, no. 1 (1992) pp. 19-37, at p. 24.

49. Data are from Charles Warren, The Supreme Court in United States History (Boston: Little, Brown & Co., 1926) at chap. II. Based on the general principle that the powers of government could not be used for the benefit of one citizen against another, courts throughout the United States regularly voided legislation that seemed to transfer property rights from one citizen to another. Such opposition was usually based on the doctrine of vested rights which stated that once a right to property had vested in an individual, that right could not be divested except in a judicial proceeding, either as a punishment for a crime or because in a civil case someone proved a superior claim. Up until the turn of the century there was general agreement in the courts on this doctrine, which the constitutional historian Corwin described as "the basic doctrine of American Law." See E. S. Corwin, "The Basic Doctrine of American Constitutional Law," in Michigan Law Review, vol 12 (1914) pp. 147-176. By the mid 1910s, however, this consensus eroded. Louis Boudin's Government by Judiciary (New York: William Godwin, Jr., 1932) reports that, during a national legal conference, a prominent groups of northeastern law professors protested against the theory that what was due process in 1789 was due process in 1914. While such protest against the court's reluctance to allow progressive legislation was widespread, the reformers' demands were usually moderate. The 1914 conference group, for instance, argued that the court "should not read into the fundamental law of the State any limitations that stand in the way of
the progress of the law towards better social justice within the limits of established institutions."

50. See Adams v. Dick, 103 Misc. 259 (Sup. Ct., N.Y. Co. 1918). This case may well have been the predecessor of New York's postwar whistleblower statute (New York Labor Law, section 740(2)c) which prohibits discrimination and retaliation. By allowing employees to receive rewards for informing government agencies about their employer's misconduct, the court had created an essentially contradictory setup. While the decision was meant to encourage employees to whistleblow, the employers' right to dismiss the worker for any reason, eroded the very incentive the decision sought to establish.


52. Id. at p. 503.

53. Id. at p. 528.

54. See Holden v. Hardy, 109 U.S. 366 (1898). In Holden the Supreme Court upheld a statute for an eight hour day applying to underground mines. The court had previously struck down similar labor legislation on due process grounds. Anticipating criticism for endorsing "class legislation", the court stated that it had not failed to recognize that the law is a progressive science; and that restriction for certain classes had become no longer necessary (presumably a reference to English trades laws) "certain other classes of persons, particularly those engaged in dangerous or unhealthful employments, have been found to need additional protection." Law, the courts said, must "adapt itself to new conditions of society" (385-387).

55. Warren, like the writers of the Holden opinion, objected to the belief that market force would compensate for work related dangers. See Charles Warren, "Volenti Non Fit Injuria in Actions of Negligence," in Harvard Law Review, vol 8 (1895) pp. 457-466. Such market based arguments against labor legislation were developed in the context of the Fellow-Servant Doctrine of the mid 1800s. The leading American opinion on the fellow servant rule was given by chief justice Shaw (Massachusetts) in the case of Farwell v. Boston and Worcester Railroad, 4 Metc. 49 (1842). In Farwell, Shaw denied the liability of the employer in cases where one employee caused injuries to another. According to Shaw's ruling and similar opinions, employer liability was impractical firstly because "the safety of each will be more effectually secured, than could be done by resort to the common employer indemnity", (p. 59) and secondly, because wages were adjusted to the risk employers assumed.

56. Commons, supra note 51, at pp. 528-529. A point similar to that of Commons and Andrews was made in Professor Prosser's prominent Handbook of the Law of Torts (St. Paul, 1941). Prosser argued that 19th century legal doctrines on labor, including employment-at-will, were based on an intentionally constructed mythical conception of the
labor market which allowed judges to consistently favor employers. He describes this myth as follows: "The cornerstone of the common law edifice" on employment law "was the economic theory that there was complete mobility of labor, that the supply of work was unlimited, and that the workman was an entirely free agent, under no compulsion to enter into the employment" (p. 506).

57. Commons, supra note 51, at p. 529.

58. Id. at p. 529.

59. This point has been convincingly argued in William B. Gould's, Primer on American Labor Law (Cambridge: MIT Press, 1986) at pp. 61-75, and pp. 95-104. This is not to say that existing NLRA rules have not been exploited by employees with mixed motives. In the infamous Weigand case an employee who was repeatedly under the influence, slept on the job, encouraged other employees to drink etc. . . ., was sacked after he joined a union. The NLRB and the appeals court found that the discharge was due to union activity, although Weigand's employer was able to prove that his supervisors had repeatedly demanded his dismissal. See Edward G. Budd Mfg. Co. v. NLRB, 138 F. 2d 86, 90 (3rd Cir. 1943).

60. See NLRB v. Jones & Laughlin Steel Co., 301 US 1 (US S.Ct., 1937). The Supreme Court, at the time of the NLRA, had struck down a number of New Deal reform acts, including sections of the National Industrial Recovery Act. But by a 5-4 vote it upheld the constitutionality of the NLRA in Jones & Laughlin. This coincided with Roosevelt's attempt to enlarge the court in order to push through reform legislation. Jones was declared constitutional because Justice Holmes, previously a staunch opponent of New Deal legislation, joined the majority in declaring the act constitutional. His conduct in this case entered anecdotal history as the well known "switch in time that saved the nine."

61. Gould, supra note 59, at pp. 95-96, argues that the continued emphasis on the "concerted" nature of employee activities is part of the historical legacy of the NLRA. The NLRA was not primarily about employee rights, but rather about industrial peace. Public policy in 1936 was declared to be "to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstruction when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by 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 of other mutual aid or protection." Cited from B. J. Taylor, and F. Whitney, Labor Relations Law (New York: West Publ. 1971) at. p. 217.

62. NLRB v. Local Union No. 1229, 346 U.S. 464 (1953). Although many commentators considered the Local 1229 decision scandalous, successive decisions were based on this interpretation. Legislation prohibiting the replacement of strikers was introduced under the title Workplace Fairness Act in the fall of 1992. The Workplace Fairness Act (S. 55) was submitted to congress in summer 1993 and successively rejected by Republicans with the help of abstaining Democrats.
63. See NLRB v. Lloyd A. Fry Co., 651 F. 2d 442 (6th Cir. 1981); and Krispy Kreme Doughnut Corp. v. NLRB, 635 F. 2d (4th Cir. 1980). The two cases (Lloyd and KK Doughnut) are of some significance with regard to dismissal legislation. An unambiguous commitment to the Lloyd decision could have created a de facto whistleblower protection for all unionized employees, as the Lloyd ruling interpreted all employee activities protesting the violation of state and federal statutes as protected activity, thus exempting the respective employees from dismissal. However several court decisions de facto reversed the Lloyd ruling.


65. Concern with the practical deficiencies of the NLRA--particularly delays in the administrative process--gave the impetus to a Labor Law Reform Bill, under the Carter Administration in 1978. The reform bill, which focused on the expediting the administrative process, was defeated, or more accurately, it was not voted upon its merits because of a filibuster in the senate.

66. See Gould, supra note 59, at p. 142.

67. This data is reported in K. Kovach, Readings and Cases in Contemporary Labor Relations (Lanham: University Press of America, 1981) at pp. 135-142. The great delays involved in the NLRA related disputes have been used by employers to perpetuate unfair labor practices. An infamous example of the ineffectiveness of the Board's enforcement apparatus have been the continued violations brought about by J.P. Steven Co. Steven has been involved in over a decade of litigation with the NLRB, in which the company has persistently violated its obligation to bargain and act fairly with its employees and the union representatives that represent them. Kovach discusses various reform measures proposed in order to deal with defects of current legislation, which have not been included in my review as they are highly technical.


68. See Mendelsohn, supra note i-8, at p. 3.


71. All quotes are from the 3rd edition which was published in December 1921. See F.W. Taussig, Principles of Economics (New York: Macmillan, 1911, 1st edition; 1921, 3rd edition) at p. 293-294. The term "labor problems of industrial societies", can be found in John A. Fitch, The Causes of Industrial Unrest, (New York: Harper Bros., 1924). Fitch identifies individualized bargaining as a prime cause of industrial unrest, but his analysis also remains critical of collectivist approaches. In terms of the analysis presented here, both Taussig's and Fitch's positions lie somewhere between the legalistic approaches of protecting workers from dismissals and abuse advocated by Commons and Pound, and the collective approaches advocated by Taylor.

72. Taylor wrote several contributions on this issue. See Albion G. Taylor, Labor Problems and Labor Law, (New York: Prentice Hall Inc., 1940) at pp. 182-183. Labor Policies of the National Association of Manufacturers (Urbana: University of Illinois Press, 1927) by the same author, takes a similar line of argument: Taylor uses the experience of collective bargaining as an exemplar for collectively bargained workplace regulation, and discusses the stabilization of employment achieved via arbitration mechanisms. Taylor's view counters an older tradition of social reformers who vehemently opposed collective solutions to labor problems. William Graham Sumner, for instance, argued that the problem of how this "wage-class" was to conduct itself, was not a "class question" ... "but the most distinctly individual question that can be raised." See W. G. Sumner, "Industrial War," in Forum, vol 2, (1886, Sept.).

73. See Vegelhahn v. Guntner, 167 Mass. 92, 44 N.E. 1077 (1896). Holmes' opinion in Vegelhahn is part of a set of court decision which have come to be known as the Massachusetts doctrine. The Massachusetts doctrine on trade unions and conspiracy dates back to Justice Shaw's decision in Commonwealth v. Hunt, 4 Metc. 111 (1842). In Hunt, the Boston Journeymen Bootmakers Society stood accused of criminal conspiracy because it had forced an employer to fire a worker who had refused to become a union member. Overruling an earlier decision, Shaw decided in favor of the union arguing that the union's actions were "perfectly justifiable" in light of its goals to further the welfare of its members.

Massachusetts cases following Hunt generally held that strike action, depending on the legality of purpose and actions taken. If an association had done nothing which fell within any established category of tort or crime, the harm it inflicted on the plaintiff in the pursuit of economic gain was not actionable but was justified as competition. While many Massachusetts decisions did not condone strikes by "monopolistic" unions, they declared some industrial action legal, including those resulting from discharges of union members or the contracting out of work. For other decisions following the Massachusetts doctrine see, e.g., Bowen v. Matheson, 96 Mass, 499 (1867); Carew v. Rutherford, 106 Mass, 1 (1870); Plant v. Woods, 176 Mass. 92 (1900); Pickett v. Walsh, 192 Mass. 572 (1906). A more liberal approach was taken by the New York state supreme court around the same period. New York decisions typically stated that unions causing harm to others while in pursuit of gain were behaving lawfully unless they conducted specific tortious or criminal acts such as assault or trespass. As long as unions refrained from specific transgressions of this sort, New York decisions declared them to be within the law as they found it to be; leaving the creation of new
controls the proper branch the legislature. By contrast to Massachusetts decisions, decisions following the so called New York doctrine refused to scrutinize the purposes of union activity. See, e.g., Curran v. Galen, 152 N.Y. 33 (1897); National Protective Assn. v. Cumming, 170 N.Y. 315 (1902); Jacobs v. Cohen, 183 N.Y. 207 (1905). For a detailed review of the Massachusetts and New York doctrines see Charles O. Gregory, Labor and the Law (New York: W.W. Norton & Co., 1946) chp. 2 and 3, at pp. 31-83.

74. Some of the strikes in which in excess of 1,000 workers were permanently dismissed include the Homestead strike of 1892, the Pullman strike of 1894, and the steel strike of 1919-20 which involved approximately 365,000 workers and resulted in over 10,000 permanent discharges. Particularly notable was the Boston police strike of 1919, in which the policemen struck for the right to organize with an AFL affiliate, and which resulted in the permanent discharge of more than one third of the police force. Joel I. Seidman's, The Yellow Dog Contract (1932) gives a detailed contemporary analysis of employers' union avoidance strategies, including employer tactics of retaliatory dismissals and the black listing of employees; suggesting overall that those willing to defend organizing interest were likely to be marginalized.

75. See Taylor, supra note 72, at pp. 188. Some state legislatures had prohibited employers from discharging employees on the ground that they were members of registered labor organizations. Virtually all of these state statutes were eliminated through judicial review, once the Supreme Court declared the Erdman Act void in Adair, see infra note 76.

76. See Adair v. United States, 208 U.S. 161, 28 S.Ct. 277 (1908). Paradoxically American courts were very eager to protect workers whose discharge was caused by unions, say in the context of closed shop policies. Ernst, supra note 48, at p. 29, cites an alarmed Connecticut judge, who upon reviewing a closed job discharge, stated, that such actions "were contrary to the genius of our people and to the fundamental principle of our government." Unless retrained by law, unions would be given the power to "unauthorized and irresponsible tribunals" which could ruin an independent worker, who "branded by the peculiarly offensive epithets adopted, must exist ostracized, socially and industrially, so far as his former associates are concerned. Freedom of will under such circumstances cannot be expected."

Levy reports that between 1806 and 1842, the date of Shaw's "Hunt" decision, at least a dozen decisions involving union led discharges resulted in the conviction of union leaders; see Leonard Levy, The Law of the Commonwealth and Chief Justice Shaw (Cambridge: Harvard University Press, 1957), at p. 185. Although Shaw's decision, had declared industrial action legal which was based on an employers unwillingness to discharge an employee who refused to join the union, the courts typically ruled in favour of discharged employees. In the case of Berry v. Donovan, 188 Mass 353 (1905) a union cauccd the discharge of a worker who was unwilling to join the union. The Massachusetts court concluded that the contract for the closed shop was unlawful and ordered the union to pay substantial money damages to the worker. Similar decision are said to have continued into the late 1930s. See Gregory, supra note 73.
77. Justices Brandeis and Holmes were opponents of the abuse of temporary injunctions by employers in order to break strikes. The major statements regarding these matters can be found in their opinions to *Duplex Printing Press v. Deering*, 254 U.S. 443 (1921) and *Coronado Coal Company v. United Mine Workers*, 268 U.S. 295 (1925).

78. The RLA entailed elaborate dispute resolution mechanisms administered for the most part by the National Mediation Board (NMB). Provisions for extensive mandatory and voluntary arbitration procedures under the RLA were created in the interest of minimizing work stoppages in the transportation sector, believed to be vital to the national interest. While in part modelled on the RLA, the dispute resolution mechanisms of the NLRA were less encompassing.

The *Norris La Guardia Act* effectively forbade federal court judges from issuing injunctions or granting damages in cases of interference with anti-union contracts. The act sought to restore the protection given by the *Clayton Act* of 1918, which, by interpretation in the federal courts, was rendered inapplicable. For the text of the NLGA see 29 U.S.C.A. 103 (1932). The more radical protection of organized and organizing workers provided in the *National Industrial Recovery Act* of the same year was pronounced unconstitutional by the Supreme Court, as were sections 7 and 8 of the *National Labor Relations Act* of 1935. The NLRA eventually was declared constitutional in *NLRB v. Jones & Laughlin Steel Corporation*, 301 US 1, 57 S.Ct. 615 (1937). *De facto* enforcement of the section 7 & 8 rules started in 1934, with the formation of the first Labor Relations Board, formed under NIRA legislation.

79. See *National Labor Relations Act*, (49 Stat. 499) (Washington: USGPO, 1935), at section 7 and 8 (1-5). Although the phrase referring to "pay, wages and other conditions of employment" has, on passage of the Act, been read as limiting the scope of bargaining, it provides virtually no guidance with regard to the separation of managerial prerogatives and issues subject to mandatory or voluntary bargaining. For a detailed analysis of NLRA's ambiguities with regard to scope of mandatory bargaining and managerial prerogatives see James B. Atleson, *supra* note i-4, at chap. 7. With the NLRB being primarily concerned with employer misconduct, Congress tried to counterbalance the NLRA with the *Taft Hartley Act* of 1947, which placed limitations on union conduct. In 1959, with the Landrum Griffin Act, Congress enacted legislation to deal with internal union affairs, with employee rights in union representation being the main issue (for a more detailed analysis of the issues at stake see *Vaca v. Sipes*, *infra* note 187).

80. NLRA, *id.* at section 8(5) and section 9(a). Initially, most political leaders assumed that the purpose of the NLRA was to insure union organizing activity free from employer interference, as well as good faith bargaining thereafter between the employer and the selected bargaining committee--and nothing more. This interpretation was partly affirmed by the Supreme Court; specifically the "celebrated" case of *NLRB v. Fansteel Metallurgical Co.*, 306 U.S. 240 (1939). Following employer discouragement of union organization, the Fansteel workers started a sit-down strike, seizing the plant and proposing to hold it until the manager dealt fairly with them. When the sit-down ended, the employer took back some of the strikers, but refused their old jobs to some others. All of the strikers who had been denied reemployment filed charges with the NLRB, which ordered reinstatement.
The majority of the Supreme Court refused to enforce the order, declaring that the Board had gone too far when it required an employer to take back into his shop men who had, by their "highhanded proceeding without shadow of legal right forfeited any claim to continued employment." Despite managerial hopes, decisions like that in Fansteel remained an isolated incidents. Where evidence for discrimination against striking employees was available, the courts typically decided in favour of reinstatement. See e.g. NLRB v. Jones & Laughlin Steel Co., 301 US 1 (1937) or NLRB v. Newark Morning Ledger Co., 120 F. 2d 262 (C.C.A. 3d, 1941) cert. denied. 314 U.S. 693 (1941).

81. Gould, supra note 59, at p. 37 suggests that there was no logical basis for the exclusion of these groups. Essentially their exclusion from NLRA protection resulted from their lack of political clout when the NLRA was enacted. An extension of coverage took place in 1974, when employees in non-profit health care institutions were included due to and extension of the definition of employer to non-profit enterprises. The 1994 Supreme Court decision in NLRB v. Health Care & Retirement Co. of America again restricted NLRA coverage by declaring that nurses who directed less skilled employees are to be considered supervisors, and hence were no longer protected by the Act.

82. State v. Glidden (189_) 55 Conn. 46, 72-73. The case is cited in Ernst, supra note 48, at p. 31.

83. See Taussig, supra note 71.

84. See President's National Labor Management Conference, vol 3, doc. 125 II/13 (November 29, 1945) at p. 47.

85. For a detailed analysis of the residual rights doctrine, see Elkouri & Elkouri, How Arbitration Works (Washington: Bureau of National Affairs, 3rd ed. 1973) at pp. 412-550,


It perhaps worth reminding ourselves that prior to the establishment NLRB jurisdiction, the courts only reluctantly enforced the contractual rights of employees emerging from collective bargaining agreements. In the not untypical case of Hudson v. Cincinnati, N.O. & T.P. Ry., 152 Ky 711, 154 S.W. 47 (1913) an employee was fired and tried to use the grievance procedure specified in his collective bargaining agreement. When the supervisor refused to give Hudson a hearing, he sued on the contract for wages due. The court rejected his claim arguing that the employee's name was not explicitly included in the agreement, that there was no evidence that the union had acted as his client; nor was there evidence that the plaintiff had ratified the agreement when he took the job. The court concluded that the collective bargaining agreement was no more than "a memorandum of rates of pay and regulation ... which acquires legal
force because people make [individual] contracts in reference to it." The union's role was merely "to induce employers to establish usage in respect to wages and working conditions ... leaving it to its members each to determine for himself whether or not or for what length of time he will contract in reference to such usages."

88. See, e.g., Indianapolis Glove Co.--C-251; February 11, 1938; 5 NLRB. No. 34.

89. See, e.g., Douglas Aircraft Co. Inc.--C-268-269; April 20, 1938; 6 NLRB. No. 108.

90. See, e.g., Uxbridge Worsted Co. Inc.--C-131; April 21, 1938; 6 NLRB. No. 109.

91. See, e.g., American Radiator Co.--C-444; June 24, 1938; 7 NLRB No. 132.; and General Industries Co.--C-30; April 30, 1936; 1 NLRB. at p. 678.

92. See, e.g., Empire Furniture Co.--C-305 and R0-386; April 26, 1938: 6 NLRB. No. 124.

93. See, e.g., Harlan Fuel Co.--C-489; July 5, 1938; 8 NLRB. No. 3.

94. See, e.g., T. W. Hepler--C-349; May 19, 1938; 7 NLRB. No. 34.

95. See, e.g., Cleveland Chair Co.--C-18; June 4, 1936; 1 NLRB. at p. 892.


97. See, e.g., Sheba Ann Frocks, Inc.--C-186; February 1, 1938; 5 NLRB. No. 5.

98. See Gould, supra note 59, at introduction. Justice Holmes (writing for the majority) stressed the constitutionality of the NLRA stating that "in the present application the statute goes no further than to safeguard the right of employees of self organization and to select representatives of their own choosing, for collective bargaining or other mutual protection without restraint or coercion by their employer. That is a fundamental right. Employees have as clear a right to organize and select their employees for lawful purposes as the respondent has to organize its business and to select its own officers and agents."

99. See Gould, supra note 59, at pp. 45-46. The court's narrow view of the NLRA in NLRB v. Jones & Laughlin Steel Co., 301 US 1 (1937) was echoed in the views of several prominent arbitrators. Shulman, chief arbitrator between Ford and the UAW, for instance argued that the NLRA conferred no substantial rights upon labor. It merely presented a "bare legal framework" to facilitate the private ordering by management and labor. See E. Shulman, "Reason, Contract,


101. *NLRB v. Montgomery Ward & Co., War Labor Reports,* vol 4, (1942). In Montgomery Ward the NLRB decided that the company had not bargained in good faith because it was unwilling to discuss its business decisions. The appeals court decided that NLRB's order should be set aside because a trial examiner failed to grant a fair hearing. In a further stage of appeals, the Supreme Court passed the decision that arbitrable grievances should not include the cited list.


Several prominent industrial relations scholars opposed the view that the courts or the government should define arbitrable issues. A. Cox and J. Dunlop, "Regulation of Collective Bargaining by the NLRB," in *Harvard Law Review* vol 63 (1950) p. 389 ff. argued that the original intent of the NLRA was concern "with organization for bargaining--not with the scope of ensuing negotiations nor with the procedures though which they are carried on." Cox and Dunlop suggested that the regulation of subjects for bargaining should be avoided as it allowed parties to block negotiations, by refusing to discuss certain matters. Along similar lines Clark Kerr (see, *e.g.,* his "Industrial Relations and the Liberal Pluralist," in *Industrial Relations Research Association Proceedings,* vol 7, 1954) argued that the government had gone to far in interfering with industrial relations. Kerr suggested that the NLRA was designed to reduce strike action, and had become obsolete now that conditions had changed and a stable industrial relations system was in place.


105. Borg Warner was perhaps the most significant blow against union involvement in termination decisions. In Borg Warner, the supreme court held that employees loose the protection of section 7 when they exert pressure upon the employer concerning an item which is
thought not directly to touch the employment relationship, but rather to be a "management prerogative."

106. See Atleson, supra note i-4, at pp. 120-124. The principle that there was no requirement to bargaining over such decisions, but that union representatives had to be informed about the effects of a plant closing, was established in NLRB v. Darlington Manufacturing Co., 397 F.2d 760 (4th Cir.) cert. denied, 393 U.S. 1023 (1965).

107. See Gould, supra note 59, at p. 118.

108. Id. at p. 113-114. Gould discusses the problems involved in fact finding with regard to this issue.

109. Id. at pp. 114-115. Gould describes this instance. A perhaps interesting interruption in the Supreme Court's move towards a restriction of union rights with regard to discharge occurred in United States Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960), better known for the courts deference to collective bargaining agreements. In US Steelworkers the union filed a grievance when the company subcontracted maintenance work. The company refused to arbitrate, relying on an ambiguous management rights clause. The court decided in favour of arbitration arguing that "doubts should be resolved in favour of coverage."

110. Although concession bargaining is of some importance to the topic discussed in this thesis, the analysis of this topic has been kept relatively brief. The reason for this is that several detailed analyses are already available. Instead of summarizing these studies, an attempt was made to conduct a partially original analysis which places concession bargaining within the context of the parameters established by statutory law. On concession bargaining see, e.g., T. Kochan, H. Katz, and R. Mckersie, The Transformation of American Industrial Relations (New York: Basic Books, 1986) particularly chp. 5; and P. Capelli and R. Mckersie, "Labor and the Crisis in Collective Bargaining," pp. 227-53, in Kochan ed., Challenges and Choices Facing American Labor (Cambridge, MA: MIT Press).

111. These data are reported in P. Flaim, and E. Sehgal, "Displaced Workers of 1979-83," in Monthly Labor Review (1985) pp. 3-16.

112. See Kochan, supra note 110, at p. 115.


115. On concessions in the shoemaking industry, see G. Shultz, and C. Myers, "Union Wage Decisions and Employment," in American

117. These data refer to the years from 1981 to 1982, see Capelli, supra note 110.

118. For the whole year of 1982, the BNA reported a total of 450 cases; see Kochan, supra note 110.

119. The Business Week survey is reported in Capelli, supra note 110. A total of 42% of all employers stated that they would be willing to give temporary job guaranties.

120. Richard Posten, a discussant of the Capelli paper, claimed that concession bargaining activity had already tapered off in 1983 and predicted that there would be little such activity in the future.


122. Id. at p. 225.

123. Id. at p. 223.

124. Id. at p. 225.

125. NLRB v. Royal Plating and Polishing Co., 350 F.2d 191 (3rd cir. 1965) 425. The case is discussed in R. Gorman, Basic Text on Labor Law, Unionization and Collective Bargaining (St. Paul: West Publishing, 1976). Although rejecting the need to bargain about the closure, the court held that the employer was obligated to bargain about the effects or impact of the closing, such as severance pay, seniority and pensions.


127. General Motors Co. v. NLRB, 191 NLRB 951 (1971). General Motors was preceded by the similar—and perhaps less dramatic—case of Morrison Cafeterias Consol. Inc. v. NLRB, 431 F.2d 254 (8th Cir. 1970). In Morrison, the employer, a chain of cafeterias, closed down a cafeteria promptly after a union election victory, and dealt directly with the ousted employees on questions of transfer and transportation to other cafeterias locations. The Board, and a confirming appeals court, found the shutdown not in violation of the NLRA, since "there was lacking an intention to chill unionism at cafeterias other than the one closed." See Gorman, supra note 114.


129. Id. at pp. 677-78.

130. The expectation of "joint law making" was stated, e.g., in Shulman, supra note 99.

The problem to be solved, either as a matter of theory or
as a matter of practical necessity, is at bottom always
the same. How can the right of combined action be
curtailed without depriving individual liberty of half its
value; how can it be left unrestricted without destroying
either the liberty of individual citizens, or the power of
Government?

(Dicey, Law and Public Opinion in England, 1919)

Chapter II

UNIONS AND PLANT LEVEL DISMISSAL PROTECTION:

THE PROBLEMS AND CONFLICTS OF THE "LOCAL" APPROACH

Introduction - The Role of Plant Level Practices

During the postwar period, legal provisions came to place
formidable obstacles on the unions' ability to ensure the job security
of their members. This encouraged unions to engage in alternative,
plant level techniques to protect member's jobs at plant level. Over
time, additional conflicts have arisen from these strategies. These
sections analyze the characteristics and problems of the plant level
approach to dismissal restriction. Chronologically, there is some
overlap with the previous section, as our analysis of plant-level
approaches to job security concentrates on the period from the 1940s
to the late 1960s. Thematically, however, we move from open contests
over the unions' remit in matters of employment terminations, to
hidden conflicts over dismissal control. These conflicts, take place
in a legal gray zone which fall, as we shall see, largely beyond the
remit of the courts.
This key theme of this chapter hence is one of the key components of the US exceptionalism of dismissal protection, namely the strong American tradition of plant-level dismissal regulation. By contrast to older views which claimed that US unions adopted a "business unionism" unconcerned with job security, we argue that the unions engaged in a host of initiatives aimed at protecting the jobs of employees. Rather than taking a legislative route, however, these initiatives focused on local plant level initiatives. The very success of these plant level initiatives or hidden challenges against managerial authority, prevented unions from engaging in open challenges in the legislative and political arena. When during the 1980s in particular union densities declined this strategy proved damaging. With low collective contract coverage much less plant level dismissal could be provided, while the alternative route to legislative initiatives was fenced off, both by the lack of strength of unions and shifts in the political economy which disfavored labor.

1. Early Plant Based Approaches to Job Security

Following the establishment of a legal framework for union organizing activity in the 1940s, much of the US union leadership maintained a surprisingly ambiguous attitude towards the protection of employees from dismissal. On the one hand, most unions pressed for the inclusion of clauses that prohibited the discharge of employees except for "good-cause" in collective bargaining agreements, and by the 1960s, dismissals in most unionized industries were effectively
governed by the seniority principle. On the other hand, unions showed little interest in the extension of individual employment rights, such as the right to pursue a wrongful discharge claim outside the framework of collective bargaining. The following sections, discuss how unions proceeded in securing jobs in a largely adverse legal environment, and--using this information--speculate about the absence of more formal dismissal regulations.

With hindsight some analyses have argued, that US unions could have challenged the preservation of the managerial prerogative with regard to dismissals and plant closings, and considering the stakes involved, should have made a restriction of managerial prerogatives a prerequisite for their political support.¹ This argument, in part, is based on evidence of proposals and initiatives to restrict terminations at plant level and the, perhaps questionable assumption, that these initiatives could have been extended to broader policies.

1.1 Early Proposals

Proposals for the restriction of dismissals, and the compensation of those dismissed on the plant level, were discussed throughout the thirties. At that time some companies provided arrangements where workers would be guarantied minimum levels of employment.² One proposal, by Sumner Slichter, proposed a national system of "dismissal wages" (see his Lines of Action, Adaption and Control, 1932).³ Slichter urged the federal Government to encourage firms to establish reserves for the payment of dismissal wages, by permitting
corporations to count part of their contributions to these reserves as a credit on their federal income tax. In one proposal, Slichter suggested specifically that a credit be allowed on the corporate income tax of as much as 50% or more of the amount contributed to such a fund. (Tax losses incurred through the scheme were assumed to be offset by lower expenses on unemployment benefits). Unions, in Slichter's proposals, would play a key role in supervising the fund's operation, and would be able to articulate the preference of members in the use of the fund.

Slichter and Taylor, who argued a similar point, justified the establishment of such subsidies on grounds that they could provide compensation for those workers who were victimized by "automation and labor saving devices." Both suggested that the institution of such a fund was likely to reduce union opposition to such developments. Taylor (1940), moreover argued that since technological change was subsidized by the patent system, it was only fair to subsidize those who bore the costs of these investments. He speculated that "laborers" would enjoy a greater sense of job security, because the dismissal wage would provide an incentive to reduce layoffs. Said Taylor,

The plan for preventing the displacement of men through a dismissal wage is commendable in that it provides a strong incentive to retain, transfer, and retrain workers. 
(Labor Problems and Labor Law, p. 236)

A more radical approach to the reduction of dismissal was proposed in the early writings of Commons, specifically his Trade
Unionism and Labor Problems (1905). Commons proposed that instead of paying into a fund, employers should be induced to retain employees under penalty of a tax. This tax was to be fixed at a certain amount per day for each person dismissed, and was to be operated for either a stipulated period of time or even until reemployment.  

2.2 Legal Responses

The imposition of penalties for dismissals on specific plants, perhaps surprisingly, was not uncommon in the post World War I period. Commons and Andrews (1936) document that, after the war legislation was enacted in some European countries, compelling the employment of ex-soldiers and banning the dismissal of employees in certain plants. In 1915, the Illinois and Pennsylvania legislatures passed acts to regularize employment. At this time restrictions on terminations for large plants were considered, but apparently few concrete measures were undertaken due to US involvement in the First World War.

New York's 1921 Act in Relation to Labor--written to accommodate organized labor's new political role--declared the regularization of employment the express public policy goal of the state. Section 530 stated to this effect,

As a guide to the interpretation and application of this article, the public policy of this state is declared as follows: Economic insecurity due to unemployment is a serious menace to the health, welfare, and morale of the people of this state. (An Act in Relation to Labor, Constituting chapter thirty-one of the consolidated laws of the state of New York, section 350)
In its sections on implementation, however, this policy mandate was merely interpreted to authorize the commissioner of labor to investigate the causes of job insecurity. Section 531 of the act explained, ⁹

One of the purposes of this article to promote the regularization of employment in enterprises, industries, localities, and the state ... the commissioner may employ experts and may carry on and publish the results of any investigations or research which he deems relevant, whether or not directly related to the other purposes and specific provisions of this article. Also, to this end, the commissioner shall undertake investigations of technological developments in industry in order to obtain information necessary for evaluating the effects of such developments on the geographical, industrial, and occupational employment patterns of the state. The commissioner shall also undertake investigations of occupational training needs of workers unemployed because of technological developments... (ditto, section 351)

Since no budget authority was given to the commissioner to authorize actual measures to "regularize" employment, the act in the end reduced that state's commitment to employment stability to a duty to investigate the problem of job loss.

The labor acts of other states were even less explicit in mandating the goal of regularizing employment or any measures to do so. The well known labor acts of the states of California (ca. 1930) and Wyoming (1933) both failed to mention any duty of the state with regard to protecting employees from job loss. ¹⁰ The amended labor statute of the state of Utah (ca. 1930, amended in 1969) included the provision of "regular income for the employee" in the state's policy goals, but again failed to make any specific recommendations. ¹¹ Overall, most prewar labor legislation stopped short of its original intentions.
1.3 Employment Termination, Job Security and Welfare Capitalism

Contrary to the official reluctance to implement measures to protect workers who were dismissed or laid off, private schemes to this effect were put into place by some large manufacturing firms from the mid 1930s onwards. The history of US welfare capitalism provides several instances in which unionized companies gave employment guarantees or set aside funds in order to support temporarily dismissed workers. Taylor (1940), reported that during the mid thirties several large manufacturing companies and associations had established dismissal funds and/or given employment guarantees. These included the Dennison Manufacturing Co, Procter & Gamble, and General Electric Co.\textsuperscript{12} The largest among these plans was that of the National Electrical Manufacturers' Association. This plan, like that of some smaller companies, essentially prohibited the permanent layoff of male full-time employees and guarantied employment for a specified number of weeks per year. Some companies, including Procter & Gamble of Cincinnati, Fels & Co. of Philadelphia, both soap manufacturers, and the canner Conserve Co. of Indianapolis, experimented with full-time employment guarantees; apparently aimed at attracting scarce skilled workers and reducing turnover. The William Wrigley Jr. company had instituted a plan of private employment assurance, which provided that workers temporarily laid off were to receive from 60\% to 80\% of their wages for periods varying from 16 to 28 weeks, depending on their length of service. In 1940 this plan, which included a guarantee not
to lay off workers permanently, covered over 2,000 workers. The B.F. Goodrich company tried to avoid the dismissal of employees during downturns by providing a voluntary early retirement plan for 21,000 workers. Goodrich had intended that this plan would allow the company to reduce its workforce in downturns without laying off younger full-time workers. These measures, perhaps surprisingly, were instituted in a period when the collective strength of unions had declined. When unions had gained strength during and after World War II, many observers expected the rapid introduction of similar plans throughout the nation..

2. **Union Growth and Termination Rights: A Paradox?**

In 1945 over 14 million Americans, about 21% of the workforce, belonged to labor unions, following 12 years of continued union growth. Both the American Federation of Labor and the recently founded Congress of Industrial Organizations had established a substantial presence, principally among manufacturing, mining, and construction workers in the Northeast and the Midwest. Undoubtedly, this membership translated into political leverage with regard to national affairs. The war and postwar years had brought clear advantages to unions, primarily in terms of the massive increase in union membership and influence. The prospects for union friendly legislation looked bright, especially when compared to the union-decline and the state's support for managements' interests between 1920 and 1933. Labor unions had gained from their inclusion in the New Deal coalition, and this position was strengthened during wartime,
when the emphasis on output led federal authorities to encourage worker representation. Organizing activities and collective bargaining were supported by the passage of the NIRA and the NLRA, as well as the activities of the National Defense Mediation Board and the War Labor Board. Wartime expansion of employment particularly in heavy industry, and the spread of union security arrangements had sustained membership growth which, coupled with automatic deductions of union dues from paypockets, meanwhile had augmented the unions' financial resources.

Despite this increase in strength, union attempts to extract employment guarantees were the exception rather than the rule. As early as 1937, some economists questioned the wisdom of a union policy which engaged in narrow wage bargaining and left other matters, including job security, to ad hoc policies created on the shop floor. In his General Economics (1937), Broadus Mitchell (of Johns Hopkins) stated,

American Unions have been more intent upon protecting wages than upon advancing them; they have been defensive rather than offensive in their tactics. They have cherished little idea of social change in behalf of the worker; the have been content to bargain within and accepted wage range. Particularly in the [recent] past they have clung to the "make work policy" or the "lump of work theory." That is they have believed that there is only so much work to be done and that it must be made to last by restriction of output of the worker, by going slow on the job. (General Economics, p. 442)

The few cases reported in which a union pressed a large company for a mixed system of employment guarantees and a dismissal fund, included a 1945 attempt by UAW to force General Motors to set aside
money for such purposes. Knowing that GM had made huge profits which, due to government wage controls could not be used for wage increases, UAW representatives demanded that GM create a fund for workers who could not be provided with a 48 hour work week. The fund was to purchase war bonds, which after the war, would be used to supplement the income of workers who were put on short time work or permanently laid off. General Motors refused discussing the UAW plan and submitted the issue to arbitration. The arbitration board agreed with GM that the union's demand was "essentially a profit sharing plan and is beyond the powers ... to adjudicate." UAW made no further attempt to pursue the plan at GM or elsewhere for some time.14 (Some UAW firms established supplementary unemployment funds in the early 1960s, which were however aimed at maintaining the income of members rather than at preventing layoffs). Other unions, such as the International Ladies Garment Workers Union, required employees to contribute relatively small sums to union health and recreation funds.15 Overall, as Levenstein (1946) perhaps correctly reported, mainstream unions stayed away from the contentious issues of dismissal protection up until the seventies.

Labor historians have often asked why the financial and numerical strength of unions, in the first two postwar decades, did not translate into a greater impact of unions on job security.16 In the UK, the ascend of the Labor government, which brought a dramatic increase the influence of the unions on national politics, led to the passage of a comprehensive system of dismissal protection and compensation. The Redundancy Payments Act of 1965 provided monetary
compensation for workers with two or more years of service who were made redundant. Additional legislation passed under a Labor government in 1971 (as part of a new Industrial Relations Act), gave all employees with two continuous years of service the right to complain to an industrial tribunal if they perceived their dismissal or layoff to be unjust. In Germany, the first Social Democratic government of the Weimar republic established short-time work schemes, as well as industrial tribunals in which employees could challenge their dismissal. After the war, all employees (except those on contingent contracts) with more than one year service were given the right to challenge their dismissal in a local labor court, while redundancies in establishments with more than ten employees were subject to codetermination and social plan requirements.

US labor unions did struggle to obtain job security for their members, and in some cases for non members, particularly in industries where union representation was strong. But their struggle was characterized by a commitment to plant level rather than broad legislative initiatives. The conventional view notes perhaps correctly that US unions of the 50s, 60s, and 70s showed a genuine disinterest in the advancement of comprehensive legislative protection for the worker from dismissal, along the lines of European legislation. A singular focus on the lack of legislative initiatives, however neglects the role of plant level initiatives which benefited union members as well as all other workers covered by a collective bargaining agreements.
Some analyses have suggested that union leaders had come to recognize that an expansion of the legal protection of workers would reduce the attractiveness of union membership, as unions monopolized these services. Such claims are obviously hard to verify. A more credible, and for that matter a more verifiable hypothesis is that US unions adapted to their environment and devised fundamentally different strategic approaches to the problems of job security. In the anti-socialist mood of the time, and with the presence of an--in labor matters--essentially conservative judiciary, plant level bargaining presented evidently a viable alternative to legislative initiatives. Just how forceful these strategies could become, will become apparent in the next section.

2.1 Dismissal Protection Through the Backdoor - Proactive Strategies

In terms of bargaining practice, the job security of union members was an important agenda point amongst unions in the immediate postwar years. Unions feared that massive job losses and possibly a new depression would follow the dismembering of the war economy. The intensity of unions' attempts to secure employment during this period are reflected throughout the legislative history of postwar labor relations. Particularly outstanding are two major acts; the Lea or Anti Petrillo Act (1946, whose constitutionality was upheld by the Supreme Court in 1947), and section 8 of the Taft Hartley Act of 1947. We will briefly explore the union practices which led to the passage of these acts.
2.1.1 A Change of Scenery

In the forties several union leaders had expressed a clear acknowledgment of managerial prerogatives with regard to manpower decisions and discharge rights. In *Organized Labor and Production* (1940), Phillip Murray (Leader of the Steel Workers' Organizing Committee) and Morris Cooke, both of the CIO stated,\(^{20}\)

> To relieve the boss or the management from proper responsibility for making success of the enterprise is about the last thing any group of employees--organized or unorganized--would consider workable or desirable. The Unions are on record in numerous instances as recognizing in the last analysis that management has to manage, if any concern is to be a success financially or in any other way.

*(Organized Labor and Production, p. 84)*

When in 1959 several employer associations led by the Association of American Railroads announced their "Great Featherbedding Fight", things appeared to look very different from the union leaders' past promise of abstinence from managerial discharge decisions. During the immediate postwar years, unions in several industries had successfully secured the continued employment of their members beyond the desires of management.

2.1.2 Job Control

In some cases efforts to secure the continued employment of union members involved wild-cat and sit-down strikes. Aleine Austin's *Labor History* (1949) cites a union song which epitomizes the sit-down
as the workers' infallible prescription for all complaints; particularly the discharge of union members. Composed by Maurice Sugar in the 1930s, this song, which is said to have been widely popular among Michigan auto workers, reads, 21

When they tie the can to a union man,
Sit down! Sit down!
When they give him the sack they'll take him back,
Sit down! Sit down!
When the speed-up comes, just twiddle your thumbs,
Sit down! Sit down!
When the boss won't talk don't take a walk,
Sit down! Sit down!

Apart from relatively crude tactics involving wild cat strikes and sitdowns, unions secured the employment of their members through more systematic and sophisticated uses of the collective bargaining apparatus. One strategy, the tactic of featherbedding, involved the formal expansion of employment beyond the desire of management through the use and negotiation of work rules and job classifications. 22 According to figures from the Association of American Railroad Carriers, cited in Fortune Magazine, the carriers were paying approximately 200,000 employees in engine and train services approximately $500 million more "than they should." This amount roughly equaled the wage bill for an additional 60,000 railroad employees. Amongst those employed against the will of managers were about 35,000 to 40,000 railroad firemen, costing approximately $200 million, who had, according to management spokespersons become obsolete due to diesel conversions. The editorial in the March 1960 edition of Fortune Magazine states to this effect,
Some $80 million is wasted through excess crew laws, interpretative rulings, and collective bargaining agreements that compel our carriers to employ more people for similar work in some places than others. (Fortune Magazine, vol 63, March 1960, p. 152)

These claims about the extent and cost of featherbedding are, of course, hard to verify. Even though some union leaders have admitted to such practices, we should probably remain critical of these statements. Whether we believe management claims or not, the wide discussion of the phenomenon suggests that some unions provided considerable job security for their members through the use of their bargaining power. What labor legislation, the NLRB, and the courts had made impossible--job security guarantees for union members--apparently had now become an issue of plant and industry specific bargaining agreements.

In 1961, William Gomberg (Professor at the Wharton School) identified the policies involved in featherbedding as "an assertion of property rights." In an article published in the Annals of the American Academy of Political Science, Gomberg suggested that in absence of job guarantees, collective bargaining provided unions with an opportunity to assert "group control" over the production process. Gomberg stressed the importance of work rules, arguing that

Many of the work rules define an emerging property right of the worker in his job. For example, a jurisdictional claim of a yard worker that he and he alone can handle a train in the yard and the corresponding claim of a road worker that he and he alone can handle a train on a road, stem from a property right of each craft in the particular job area ... It would be silly and pointless to deny that work in many cases could be performed more cheaply if these property rights and the penalties for their violation did not exist. In a democracy, other values than those of productivity receive equivalent attention from the community.
Contrary to Gomberg's view, job control unionism, however, was hardly considered legitimate by the members of Congress and the US political establishment.

2.1.3 The State Fights Back

The union's apparent success in exerting control over employment decisions was challenged by legislative action as early as 1946. Statutory attempts to curb union control over jobs typically combined measures to limit "excess" employment with aggressive legislation against so-called "labor racketeering."

Amongst the more limited attacks against unions' control over manpower was the Lea Act of 1946. This act, also known as Anti-Petrillo Act (in dubious honor of the head of the Federation of Musicians), was passed as an amendment to the Federal Communication Act of 1934. Aimed at the featherbedding practices of the Federation, it declared illegal any action of unions to compel radio firms to, a) employ unnecessary men, b) pay for musicians' services not actually rendered, and c) refrain from educational broadcasting or the broadcasting of foreign programs (both practices were opposed by the unions on grounds of detrimental effects on musicians' earnings).24

The provisions of the Lea Act were supposed to be implemented in a series of court prosecutions. Despite hopes that these prosecutions would provide a decisive strike against the policies of the Musicians
union, as well as unions engaged in similar policies, the results were disappointing to its sponsors.

In United States v. Petrillo, the Supreme Court reversed a decision of a District Court which had held the Lea Act unconstitutional. The District court had argued that "the definition of the numbers of workers who were necessary was so vague a criterion that to define as a criminal act its violation constituted a breach of the Fifth Amendment." Despite its defense of the act, the Supreme Court, however, was unable to convict Mr Petrillo. While acknowledging the illegality of Petrillo's actions, the Supreme Court stated that,

... there are many factors that might be considered in determining how many employees are needed for a job ... Certainly an employer's statements as to the number of employees are needed on a job is not conclusive as to that question. ... It cannot be permissible for a court to sit judgment ... as to how the licensee should run his business ... For a court or jury to tell a licensee how many employees he ought to think he needs might be just as tyrannical ... as for a labor union to tell him. (U.S. v. Petrillo, 34 L.R.R.M., p. 2367)

The wording of the Petrillo decision reflected an intriguing dilemma. In trying to protect employers from union attempts to increase employment and prevent terminations in the broadcasting industry, the court faced the two options of either accepting the employers statement--and face accusations of bias--or to get actively involved in managerial decisions. Preserving managerial prerogatives through legal proceedings was a difficult, if not an impossible mission. If the court had accepted employer claims on overstaffing point blank, it would have given employers a powerful weapon against
unions; possibly one that would have allowed them to undo much of the progress of the past years. Unions then would have faced criminal charges as soon as an employer claimed that s/he was forced to employ an excessive number of workers. This was clearly unacceptable. And since fact finding through the courts was equally difficult, the court essentially refrained from enforcing the act.27

Despite its limited focus on the broadcasting industry, contemporary accounts suggest that the act played a cautioning role upon union leaders, who now had to reckon with a Congress willing to eliminate one of the "fruits" of collective bargaining. Not untypical for the times, the section on the Lea Act in Applied Economics, a widely read textbook of the period, concluded with the statement that28

The constitutionality of the Lea Act was upheld by the Supreme Court ... Some specific applications of the law may subsequently be declared unconstitutional, but the broad principle has been validated. Further legislation against "featherbedding" is likely to be forthcoming.

(Applied Economics, p. 219)

Another, no more successful legislative attempt to reduce union influence on employment and termination decisions, the Hobbs Anti Racketeering Law, was passed at the end of same year (1946).29 The Hobbs Law--an amendment to the 1934 Federal Anti-Racketeering Act--provided for the punishment of union members who interfered by robbery, extortion, or other violent means (defined as those causing fear of injury to the victim) with interstate commerce.30 While broad in its scope, the law was primarily placed against the alleged
practices of the Teamster trucking union. Farmers had complained that in delivering produce to New York City they had to pay fees, equivalent to a day's pay for a union driver, for the privilege. The unions, in denying responsibility for any violent acts, suggested that in the past, the International Brotherhood of Teamsters had required any truck carrying produce to take on an additional driver when entering New York City. The new truck driver would then take the truck to its destination, unload it, and return it to its origin; which obviously left the original truck driver with little or nothing to do. Ironically, the Supreme Court overruled the convictions gained under this law against the New York teamsters in United States v. Local 807, on the grounds that the offer to perform the work did not constitute a "terrorist act." 31

In enforcing the Lea act, the courts had difficulty in defining what "necessary labor" was. The Hobbs Law posed a new dilemma in that except in the most blatant cases of racketeering, it was difficult to define and prove the abuse of collective bargaining rights. Effectively the Hobbs Law did little to curb union inferences with hiring and layoff decisions. Commenting on United States v. General Laborers Union, 32 a case in which an injunction was placed on a union which forced contractors to take on additional construction workers who had been laid off for some time, Gomberg concluded, 33
Had the union confined itself to the strike sanction without the use of threatening language or implied violent acts, the court would probably not have interfered with the union's operation. To all intents and purposes, the Hobbs Copeland Act offers little interference in collective bargaining over work rules or alleged feather bedding. (Featherbedding: An Assertion of Property Rights, p. 120)

The third major legislative piece aimed at reducing union inference with employment decisions was section 8(b)(6) of the Taft Hartley Act. In section 8(b)(6), the Taft Hartley amendment to the NLRA declared it an unfair labor practice for a union "... to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other things of value, in the nature of an exaction for services which are not performed or not to be performed." 34

Facing essentially identical problems as in the case of the Lea Act, the Supreme Court rendered the application of section 8(b)(6) of the Taft Hartley Act useless in its judgment in American Newspaper Publishers Association v. NLRB (1953) 35 and NLRB v. Gamble Enterprise (1953). 36 In American Newspaper, the publisher had taken action against the International Typographical Union, which insisted on resetting all of the material it received as molds or mats from other newspapers, who had already set up advertising material. By mutual agreement this so called "bogus" was set in odd hours and days when no other work was available. Investigating the Newspaper Publisher Associations' claim that this practice constituted an unfair labor practice under the Taft Hartley amendments, Justice Burton writing for
the majority, took a much broader analysis than government officials had anticipated.\textsuperscript{37}

Where the work is done by an employee with the employers' consent, a labor organization's demand that the employee be compensated for time being spent in doing the disputed work does not become an unfair labor practice. Section 8(b)(6) leaves to collective bargaining the determination what, if any work, including \textit{bona fide} "make work" shall be included in compensable services.

\textit{(American Newspaper v. NLRB, 31 L.R.R. 37, p. 1)}

Even more explicit was Burton's statement for the majority in the \textit{Gamble} case. In \textit{Gamble}, the Musician's union had demanded that whenever a "name band" was employed, a local band had to stand by to play for intermissions. Said Burton,\textsuperscript{38}

\begin{quote}
Payments for standing by ... are not payments for services performed, but when an employer receives a \textit{bona fide} offer of competent services, it remains for the employer through free and fair negotiation to determine whether such an offer shall be accepted.
\end{quote}

\textit{(Featherbedding: An Assertion of Property Rights, p. 442)}

While the court had resolved the dilemma of judging managerial prerogatives in the "Lea cases" by handing down an essentially ambiguous judgment, it returned the ball to the field of collective bargaining in dealing with section 8(b)(6) of the Taft Hartley Act. In both instances the courts proved reluctant to engage in technical judgments on manpower needs. Unwilling to investigate and/or substitute disputed management claims, and equally unwilling to accept management claims at face value, the courts responded to the challenges posed by section 8(b)(6) with retreat.\textsuperscript{39} If management claims on necessary manpower were not credible, the courts could not
enforce them and consecutively had to rely on the power balance of bargaining to settle them.

Ironically the Supreme Court had now come to defend the integrity of the very collective bargaining system, which it had previously so staunchly opposed. In doing so it affirmed the legality of a gray zone of bargaining for job security which the unions had gradually established. Discussions about crew size, job classifications, work rules and similar issues which as "conditions of employment" were mandatory bargaining items, had become a partial substitute for the bargaining for job security, which court decisions such as Fireboard and First National had forestalled. Ultimately there was little the employers or the courts could do to constrain this job control unionism. For employers to act against it was difficult because such measures could easily violate the duty to bargain in good faith, or to refrain from unfair labor practices. For the courts, meanwhile, the legal restriction of such practices was not feasible, because they lacked the expertise, or the impartial umpire necessary to judge manpower matters.

Unable to achieve recognition of union demands for job security in key labor cases, and excluded from formal manpower decisions, unions now could influence termination decisions by controlling the production process on the plant level. At least during the first two postwar decades, the US union structure was better suited to affect job security on the micro-level of plant bargaining, than it was in gaining broad legislative protection. Constraining terminations
through work rules on the plant level, became an idiosyncrasy of the US collective bargaining system. Whether the possibility of job control on the plant levels, prevented unions from engaging in broader efforts to restrict terminations is perhaps a convincing, albeit difficult to prove, proposition. Perhaps tellingly, in some industries unions have maintained restrictive work practices over the long run. Allen (1986), reports that in 1976, 21% of union workers were covered by bargaining agreements which specified "crew size" (9% in manufacturing). Featherbedding suits, after laying dormant for twenty years, also became important again in the seventies, when the first wave of mass layoffs hit the US manufacturing economy; an indication of the persistence of these policies.40

2.2 Dismissal Protection through Arbitration - Retroactive Strategies

While the practice of featherbedding reflected largely a proactive attempt at preventing terminations by controlling workloads, unions of the early postwar decades also took formal retroactive measures to enhance individual job security. These retroactive measures were primarily implemented through the grievance arbitration process, and involved the systematic prevention, delay, and control of the dismissal of individual workers or groups of workers.

During World War II and the immediate postwar years, managerial authority over disciplinary matters was still comprehensive. Although the War Labor Relations Board held that disciplinary matters
were subject to arbitration, it generally supported managements' authority to take prompt action, including suspending or removing an employee from a job pending investigation. Many labor agreements contained a long list of grounds for discharge, typically including: the violation of company rules, failures to meet work standards, incompetence, the violation of the collective bargaining contract (including the instigation or participation in a strike or slowdown in violation of the agreement), excessive absenteeism, intoxication, dishonesty, insubordination, wage garnishments, and fighting on company property. In cases in which a collective bargaining agreement did not include a full clause preventing discharge without just-cause—something that was still quite frequent before 1950—management tended to maintain substantial control over discharges. In 1945, Ullman and Freidin, two influential members of the War Labor Relations Board, had still stated that "arrangements have never been directed whereby the unions' approval must be sought before discipline can be meted out." By the mid fifties this situation had changed dramatically. Formal grievance procedures had become widespread, particularly in unionized plants. A 1963 survey of southern companies reported that 54% of all non-union firms had formal procedures, while 97% of union plants provided for such arrangements. Most collective bargaining contracts contained the general statement that an employee could be discharged only for "just-cause." The critical interpretation of just-cause was accomplished through industrial practice and court decisions; with the union pushing for an increased control over
initially very broad notions of just-cause. In 1972, Sloan and Witney's *Labor Relations*, a leading textbook on labor relations concluded that the largest percentage of arbitration cases involved discharges, and observed that this was due to the fact that the unions' acceptance of permissible causes had diminished.

In the fifties and sixties most unions insisted that, rather than listing one or more specific grounds for discharge, collective bargaining agreements should distinguish between causes for immediate discharge, and employee offenses which would require only a warning. A large number of bargaining agreements then specified, usually on demand of union representatives, elaborate procedures for the discharge of union members or those covered by a collective bargaining agreement. Frequently, unions ensured that a lesser form of discipline be agreed upon, even though the employer had grounds for discharge. Labor agreements typically provided that a discharge case had priority over all other cases in the grievance procedure. In addition, many agreements waived the first steps in the grievance procedure and started a discharge case the top of the procedural ladder; thus ensuring that high level union representatives would be involved in the proceedings. The effectiveness of these policies was obvious: a 1959 survey of published arbitration awards showed that the penalty imposed by management was lowered in 20% of all disciplinary and in 36% of all discharge cases. The dismissal-reducing effects of these policies were later confirmed in quantitative studies.

Freeman (1980) concluded, in an analysis using PSID and NLS panel data, that trade unionism was "associated with significantly greater
job tenure and conversely with significantly lower probabilities of separation." Freeman's study explicitly attributed the reduction in the number of dismissals to grievance systems, or more broadly the "industrial jurisprudence mode of operation" (rather than monopoly effects of unions, as previous studies had done).44

Observing this process, Philip Selznick's influential Law, Society and Industrial Justice (1969) concluded that the elaboration of formal rules, which had taken place from post 1945 onwards, had both created and fulfilled expectations regarding the consistency and fairness of managerial action. For Selznick, as for many other industrial relations scholars of that time, the increased formalization of industrial relations represented a commitment to industrial justice. Workers now expected that management would not act in a discriminatory and arbitrary manner. Discipline would still be exercised, but the rules according to which it would be meted out, would follow predictable standards. Selznick argued that because "the rule is double edged, limiting the rule maker and the potential offender", the formalization of American industrial relations had become "a major source of self-restraint." Personnel policies, while guided by managerial interests accepted certain limits on managerial action, or as Selznick stated, "motivated by a concern for efficiency, managers [were] ... impelled to temper their own authority."45

The remit of discharge arbitration, however, typically only extended to individual workers or small groups of workers who were accused of some form of misconduct. It rarely extended to discharges
for economic reason or permanent layoffs. For this type of terminations, an additional set of rules, embodied in the seniority system, came to play a key role.

Seniority rules with regard to promotion, layoffs, and rehire, represented the core of personnel policies on redundancies. According to Selznick almost all collective bargaining contacts he surveyed around 1965 included seniority provision, which, had been "... fairly readily granted, at least with respect to the regulation of layoffs." The management literature of the immediate postwar years encouraged the adoption of the seniority standards on two grounds. Firstly, conceding to the seniority rule was deemed rational because of the absence of other adequate rules. Applying seniority to temporary or permanent terminations, said Selznick, provided for "objective criteria that [c]ould ... be applied easily, [and] systematically."

Secondly, the seniority rule was assumed to have beneficial effects on employee morale. Seniority, as an "impersonal standard" was expected to "minimize discrimination and favoritism in matters affecting a worker's job" and hence provided a key component in the maintenance of "sound labor-management relations."46

Typically, the use of the seniority principle was accompanied by a heavy reliance on layoffs. Medoff (1979) concluded, on the basis of data from 1958 to 1971, that labor adjustment in US manufacturing took a "substantially different form under unionism than in nonunion settings." In union firms, layoffs were much more important than wage cuts, reductions in hours, and discharges as compared to similar
nonunion firms. Medoff further observed that laid off union members typically returned to their previous jobs after only a short spell of unemployment. He concluded that because of the subsidies through the unemployment insurance system, union firms were able to provide greater protection from permanent termination, than nonunion firms did.

This benign view of layoffs, however, applied largely to the period before 1980. From the early 1980s onwards, layoffs increasingly became the route to permanent job loss. In 1982, for instance, 6.2 million workers were on layoff, of which 4.1 million--over 66%--resulted in permanent job loss. In 1989, of about 570 thousand workers experiencing layoffs in excess 30 days, 360 thousand had lost their jobs by 1990. Interestingly the number of those on layoff for over 30 days in manufacturing--about 270 thousand--was smaller than the number of jobs lost in manufacturing during the same period (about 330 thousand).47

Today, we would view seniority and layoff policies perhaps more critically. For management, the adoption of the seniority rule was not primarily about providing a sense of security to employees, rather it was seen as a means of facilitating layoffs. Terminations were redistributed through seniority rules, but they were not necessarily reduced by them. By formalizing the procedure through which workers whose employment was to be terminated were chosen, seniority arrangements helped management to distract workers from the actual job insecurity they experienced. The decision to permanently lay off
workers, which was in effect solely management's doing, through the adoption of the abstract, formal standard of seniority, was given the status of a semi-legal ruling. As long as the number of permanent layoffs stayed relatively small, any criticism of such a decision, could therefore be repelled by employers and union representatives, as showing a lack of solidarity or disrespect for established customs. In addition, assurances about recall could further temper opposition to termination decisions.

Selznick's view of the legalization of industrial relations, was perhaps overly positive. Workplace governance was not about creating and implementing rights, it was about finding the most convenient means of pursuing managerial agendas under given circumstances. Many of the cases reported in industrial relations textbooks and case-data bases indeed convey a different picture from the rule-based process described by Selznick. Industrial "justice" was often a misnomer for bargaining for job security. Fighting dismissals, where apparent just-cause grounds for discharge were involved, always constituted a portion of the total cases going to arbitration. Conversely, amongst those cases in which management claimed a just-cause for dismissals, a certain fraction revealed other motives, including the desire to rid the plant of trouble-makers. In the mid sixties in particular, many instances were reported, in which management used "good-cause" discharge grounds in order to deal with unruly workers, or even in order to move along redundancies expeditiously.
While management often tinkered with the application of "just" discharge causes, unions creatively used the grievance system to forestall "bogus" discharges as well as dismissals for previously acknowledged causes. This, in part, provided unions with a chance to bolster dismissal protection beyond what the actual letter of the agreement would have permitted. Industrial practice as well as arbitrators acknowledged that just-causes for discharge and even plans for redundancies were to be discounted, if the workers had earlier voiced complaints about employer conduct. Labor relations text books and case collections are rife with incidents in which disciplinary proceedings including discharges were held off through employee grievances: grievances about safety and health issues have been cited to justify the violation of company rules, failure to meet standards, insubordination or even wild cat strikes. Company production standards and manning have been criticized in the grievance process when management complained about low productivity or incompetence. Automation and the introduction of new machinery have often been cited as causes of slowdowns, and in some cases absenteeism.

The nature of the arbitration process itself supported such a "reinterpretation" of arbitrable issues. Once a case had gone to arbitration, the arbitrators were typically concerned with the quality of proof that management or union representatives provided, and hence tended to be critical of employer claims if they were countered by union statements about inadequate working conditions. Union representatives were further helped by what industrial relations lawyers have referred to as the "cardinal rule" of the arbitration
process: the rule that a discharge "must stand or fall upon the reason
given at the time of the discharge."49

That grievances occurred before or while management undertook
disciplinary measures or proposed terminations for economic reasons,
did not and does not derogate the legitimacy of these grievances.
Since it is unreasonable to expect workers to perform faultlessly if
working conditions are inadequate, the boundary between a "legitimate
grievance" and a "makeshift grievance" is necessarily a fuzzy one. In
this sense "creative" uses of the grievance system illustrate the
limits of fact finding within the grievance system, rather than
"unethical" conduct by union representatives.50 On the whole, there
seems to be little point in trying to identify whether one or the
other side abused the grievance system for one or the another purpose.
What is important to note is that the grievance mechanisms established
in the first postwar decades provided an important instrument to
unions in fighting dismissals and securing the jobs of their members.

How important a union's capacity of bringing forward grievances
with respect to planned terminations really was, became obvious in the
late 1960s when the first major automatization wave swept through US
industry. In this period, the arbitration apparatus often became the
pillar of job security. The following case illustrates the point.
During the sixties some companies had negotiated maximum attrition
clauses--a nonmandatory bargaining item--with certain small occupation
groups. One such agreement between Southern Pacific Railroad and the
Order of Railroad Telegraphers placed an upper limit of 2% on the
number of jobs that could be abolished for any reason in a given year (not including attrition by natural causes such as retirement or voluntary quits). Surveying this and other agreements in a study for the Bureau of Labor Statistics, Bok and Kossoris (1963) observed that,51

If they [meaning the employers] are bound to follow attrition by agreement, temptation may arise to hasten departure of employees by imposing onerous working conditions or otherwise make the job less attractive. Further controversy may result if the agreement does not answer such questions as to whether employee must agree to transfer or to accept more demanding positions and assignment in order to remain on the payroll.

*(Methods of Adjusting to Automation, p. 5)*

This case, perhaps more than any other instance cited here, market a blurring of different types of dismissals and instruments for their regulation. Grievance procedures, which were meant to prevent the unjust dismissal of individual workers became important not because employers wanted to rid the company of one or several troublesome workers, but rather because of an economic consideration, or more specifically because automatization had decreased the need for these workers. In this, as in other cases where no attrition quotas were imposed, grievances played an important role in preventing employers from undermining the limited job security provided in the bargaining agreement. In other words, the grievance process was transformed into an general enforcement mechanism which could be used against the manpower plans of employers as well as for the enforcement of just-cause provisions.
2.3 The Law and Arbitration - Two Complementary Systems?

Despite the bargaining strength of unions and their recourse to the grievance process, many companies in the 60s and 70s remained firmly in control of termination decisions, forcing unions into a reactive and defensive position. The companies' control over dismissal matters was helped by several state court and federal courts decisions. Some court decisions of the 60s and 70s rejected custom (McKinney v. Armco Steel Co., 1967) and oral promises of permanency (Justice v. Stanley Aviation Co., 1974) as a basis for limiting the employer's power to dismiss. In addition some courts construed statements such as "employment shall be so long as the employee lives" or "as long as business is profitable" so as not to restrict the employer's power of discharge (Geib v. Alan Wood Stell Co., 1976). 52

If protecting workers from discharges was difficult, union representatives in the sixties and seventies tried to maximize their influence in these matters. By 1941, bargaining agreements commonly contained clauses formally specifying the number, duties, and rights of job stewards. Moreover, many early agreements incorporated shop floor representation into the contractual relationship between union and company. That shopfloor relations fell within the orbit of union representation was a claim enunciated by every industrial union, although it took highly centralized unions like the Steel Workers Organizing Committee (of the CIO) to put the plan fully into effect.
In many cases the use of these committees in regulating labor relations of a plant was extensive. An article in Industrial Relations of 1962 cites the case of a company of over 2000 employees, which spent approximately $300,000 in wages each year paid to stewards for the handling of grievances. A host of job stewards processed approximately 1,500 grievances every year, and were each paid almost $275 for each written grievance.\textsuperscript{53} While initially relying on the in-house grievance process, unions during the seventies brought an increasing number of cases before the NLRB. From 1965 to 1980, the number of cases in which the NLRB offered reinstatement to workers roughly doubled with approximately twice the number of workers, about 10,000, being reinstated in 1980 (see Table II(1)).\textsuperscript{54} Over the same period employer charges against unions (and from 1967 onwards worker charges) also increased at a similar proportion; indicating an increase in litigiousness of both parties rather than an increased ability of unions to protect of individual workers. Increasingly, plant level arbitration had to rely on the back-up of the Board and the courts, but this back-up was a double edge sword, which could strike against unions as well.

3. The Tide Turns

In part the union's increased reliance on NLRB decisions reflected the adoption of more aggressive, and more sophisticated management tactics. According to George Strauss (Professor of Industrial Relations at Berkeley), the management of many large companies had started adjusting to the challenge of union interference
by adopting new strategies in the sixties. One of these strategies—relevant with regard to the right to discharge—was to deny concessions between contract negotiations and to make disputed issues part of the bargaining process. Many managers saw the elimination of flexibility in arbitration, and the movement away from a problem solving attitude as a key prerequisite to the reconquest of managerial prerogatives. Strauss (1962) quotes one personnel manager as saying,55

[Before my time] the union made all its gains through "creeping"—establishing all the precedents they could. Now, we make the contract creep for us. If nothing prevents us from changing a condition in our favor we will change it ... Now I have a feeling of health. I am captain of the ship ... [Six months after I took over] the union chairman blew his stack. He felt things had been taken away from him day by day.

(The Shifting Power Balance in the Plant, p.75)

The picture that emerges from a review of industrial relations literature on management control during the sixties and seventies, is that the unions inroads on managerial prerogatives were short lived. Using job control (as in case of featherbedding) or the grievance system, as a tool of restricting the termination of union members became increasingly difficult by the late sixties; with difficulties arising from two sources, the increased sophistication of personnel management policies, and increasingly, a decline in union densities and profit margins in key industries.56 Since plant level bargaining had become a major feature in ensuring the job security of individual workers, the combined effects of both developments on the unions' ability to secure jobs had to be disastrous.
3.1 Union Densities and Termination Protection

In the first three postwar decades, unions had by and large sustained the spectacular gains they made since the 1930s; although the earlier momentum had diminished. In the early 1980s, however, absolute numbers of union members started to fall rapidly. Total union membership had risen, though unsteadily, from 14.3 million at the end of the war to 16.8 million in 1955 and 19.3 million in 1970, with the fastest growth occurring during the economic upswings of the early 1950s and the late 1960s. As a proportion of the total labor force, union membership peaked at 25.5% in 1953, remained fairly stable throughout the 1960s, but declined to around 20% in the late 1970s. As a percentage of non-agricultural employment, the highest postwar union density occurred in 1945, at approximately 35.5%; in 1955 the proportion was 33.2% declining to approximately 27.4% in 1970. By 1990 union members represented only 16.1% of the nonfarm labor force, which was about equal to the level of the mid thirties.

Within the overall trend, there were contrasting tendencies within different sectors. Leo Troy (1986) estimated that in 1945 the highest union densities were in construction, mining and transport, primarily the railroads. From 1945 onwards union densities declined consistently in the construction and mining industries; with rates falling in the latter sector from 83% in 1947 to 36% in the mid sixties, and to 15% in the mid eighties. The most spectacular growth during the thirties had occurred in manufacturing, where union densities peaked in 1953. Over the next two decades union densities
in manufacturing followed a fluctuating but downward course, dropping rapidly during the 1980s, when the manufacturing sector became the main source of the absolute fall in union membership. According to Troy's estimates, union densities in manufacturing fell from approximately 40% in 1947, to 32% in 1980, and 25% in 1985. Union densities in the transport sector followed a similar course. The centers of union expansion of the thirties hence accounted for most of the unions decline. The principal growth sector of the unions after the war meanwhile was the public sector, where according to Troy union densities rose from 12% to 39% between 1947 and 1975.\textsuperscript{60}

Job security in the public sector tended to be relatively high, with the exception of a brief period in the early eighties when federal and local budget cuts led to a wave of layoffs. In the manufacturing sector, by contrast, employment loss had been dramatic. From the late fifties onwards, productivity gains reduced the number of blue collar industrial workers particularly in the old heavy industries, which tended to strike against union strongholds. This process accelerated, when declining US exports and a crisis in consumer demand triggered massive layoffs in the late 1970s and early 1980s. The steelworkers union, for instance lost over half of its members in the decade up to 1980.\textsuperscript{61} Fast growing sectors, such as the electronics industry meanwhile, were characterized by low levels of union organization. Firms like IBM operated extensive corporate welfare systems virtually without union representation. Meanwhile, union advances in the service sector were very slow; in 1947 unions
accounted for 9% of service workers, three decades later barely 14% of full time workers in the service sector were union members.62

By tying efforts to stabilize job security, and more general the enforcement of individual employment rights to plant level bargaining, unions had played a dangerous card. As employment protection had become primarily a matter of bargaining, rather than a matter of regulation and law, a decline in unionization had to have devastating consequences for individual employment rights. At the very time when union strength was most needed to secure member's jobs, the union power bases in key industries virtually collapsed.

4. The Problems of Plant Level Dismissal Restrictions

Apart from these practical problems, the unions' attempts at securing job stability through plant level bargaining had extracted a substantial political price. In order for grievances to be an effective weapon for the unions, workers had to be unified in their demands. Requiring employees to act with one voice often meant that individual demands had to be sacrificed in favor of union control over discontent.

4.1 Collective versus Individual Employment Rights

Ronald Radosh's widely read book American Labor and Foreign Policy (1969) discusses how in the first postwar decade the unions increasingly seized control over discontent. He cites the case of a
worker, who upon being asked what changes major unions had undergone between the 1930s and 1950s, stated that,\textsuperscript{63}

When I was a kid, if somebody asked me to define a grievance, I'd say it was something we don't like. Today a grievance is something not in accordance with standards of arbitration. We're even told what the hell to be dissatisfied with these days. \textit{(American Labor and Foreign Policy, p. 313-314)}

Just how antagonistic the relationship between individual employment rights and grievance arbitration was, became dramatically obvious in a set of court cases starting in the late sixties. In these cases the courts tried to establish individual grievance rights against union representatives; usually prompted by allegations by an individual worker or several workers that unions had not represented them fairly in a discharge case.

4.1.1 Initial Approaches: Unconstrained Arbitration on Dismissals

Typical of the problems arising from the plant based dismissal protection established by unions and employers in the 1960s, was the case of \textit{Union News Co v. Hildreth} (1962). Union News involved the blatantly unjust discharge of a lunch counter employee who had worked for the company for over 10 years.\textsuperscript{64} Ms Gladys Hildreth, together with 5 other workers, was "temporarily" laid off by the company, who alleged that money had disappeared from the counter. Upon replacement of the 5 employees with temporary workers, no cash disappeared. One month later the replacement workers were made permanent, and the five
workers on layoff, including Ms Hildreth, were dismissed. Ms Hildreth met with union officials in order to convince them that her discharge was unjust, but the union representative decided not to process her discharge. Subsequent to her discharge an office girl, who counted the money received at the counter, was found to be embezzling those funds and was discharged for it. Ms Hildreth was awarded damages in a jury trial but this decision was reversed by the appeals court. The appeals court stated that,

By virtue of the union's authority as exclusive bargaining representative the union and the company can mutually conclude, as a part of the bargaining process, that the circumstances shown by the evidence provided just-cause for the layoff and discharge of the plaintiff ... Unless such bilateral decisions, made in good faith, and after unhurried consideration be sustained in court, the bargaining process is a mirage, without the efficacy contemplated by the philosophy of the law which makes its use compulsory.

(Union News Co. v. Hildreth, 295 F. 2d 658)

Concluding that the union and employer had correctly construed the just-cause standard with regard to the case, the appeals judge concluded,

We consider that the union was acting in the collective interest of those who by law and contract the union was charged with protecting. Under the philosophy of collective responsibility an employer who bargains in good faith should be entitled to rely upon the promises and agreement of the union's representatives with whom he must deal ... The collective bargaining process should be carried on between parties who can mutually respect and rely upon the authority of each other.

(ditto)

The Supreme Court denied certiorari to review a decision brought by an appeals court, arising from the same group discharge as the
Hildreth case, in *Simmons v. Union News Co.* Justice Black, with Justice Warren concurring, wrote an opinion dissenting from this denial of the certiorari. Using uncommonly strong language, Black argued that the court had permitted a new type of biased in-group justice to arise from the grievance system. He said,

This case points up with great emphasis the kind of injustice that can occur to an individual employee when the employer and the union have such power over the employee's claim for breach of contract. Here no one has claimed from the beginning to the end of the Hildreth lawsuit or this lawsuit [meaning the Simmons suit] that either of these individuals was guilty of any kind of misconduct justifying their discharge ... There is no evidence that respondent has ever been dissatisfied with their work before the company became disappointed with its lunch counter about a year prior to discharges. Yet both were discharged for "just-cause", as determined not by a court but by an agreement of the company and the union ... There has been a sacrifice of the rights of a group of employees based on the belief that some of them might possibly have been guilty of misconduct ... I cannot believe that those who passed the act [meaning the NLRA] intended to give the union the right to negotiate away alleged breaches of contract.

(*Simmons v. Union News Co.*, 382 U.S. 86 S.Ct. 165)

A union's misuse of arbitration rights, in Black's view, had deprived an employee from the remedies against unjust dismissal, the unionized workplace was supposed to provide. But there was no easy solution. Remedies for unjust dismissal *per se*, were only available in the unionized workplace. The enforcement of the enhanced just-cause rights of employees had rested on the plant level union representatives, who in this case had failed to follow expected standards of justice.
4.1.2 Establishing the Limits of Arbitration on Dismissals

The courts' rulings in Hildreth and Simmons clearly represented an unsatisfactory situation. Workers who were formally granted just-cause rights could be dismissed if unions and management agreed on the termination. Once such an agreement was reached, workers had very little legal recourse, no matter how serious the violation of their rights was.

Dissatisfied with the denial of justice arising from the previous cases, including Hildreth and Simmons, the landmark case of Vaca v. Sipes (1967) affirmed the right of individual workers to sue employers directly for breach of contract. This was granted with a host of restrictions. In Vaca, Benjamin Owens, a union member, alleged that he had been discharged for his employment at Swift & Co, a Kansas City Meatpacking Plant, in violation of the collective bargaining agreement then in force between Swift and the Union. Mr Owens also alleged that the union had "arbitrarily, capriciously and without just or reasonable reason or cause" refused to take his grievance with Swift to arbitration under the fifth step of the bargaining agreement's grievance procedures.

A brief account of the case will help illustrate the issue at hand: In mid 1959 Owens, a long term high blood pressure patient, entered a hospital on sick leave from Swift. After a long period of rest during which his blood pressure was reduced, Benjamin Owens was certified to be fit to resume his work at the meat packing plant.
Swift's company doctor examined Owens upon his return and concluded that Swift was unfit for work. After securing a second opinion from an outside physician, Owens returned to the plant and resumed work on January 1960. Two days later, when the doctor discovered Owens' return, he was discharged on the grounds of bad health. Owens' challenge to the discharge was pursued by his union representatives at the lower level. The union then refused to pursue the matter at a higher level, where local and regional union representative would have been involved. No reasons for this refusal were given by the union.

The case of Owens, while less spectacular than the Hildreth case, dramatized the tension between individual and collective interests and highlighted the dangers of the union employer centered system of dismissal protection; namely the danger of employers and union leaders acting indifferently or even conspiring against workers who have little standing in a plant. (In the case of Mr Owens because of his long absence from work; most of the new union officials allegedly did not know him). The Supreme Court's solution to this problem was at best tangled, and at worst indecisive.

While the Supreme Court failed to establish any wrong doing by the union with regard to its duty of fair representation, and attributed all damages to the employer, the case, in principle, established the liability of unions in tort. Writing for the majority Justice White, argued that--while collective arbitration placed an obligation on the employer to seek adjudication through the grievance
process--the grievance apparatus could not establish final and exclusive adjudication. Said White, 70

[I]f the wrongfully discharged employee himself resorts to the courts before grievance procedures have been fully exhausted, the employer may well defend on the ground that the exclusive remedies provided in the contract have not been exhausted ... For this reason it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement ... However because these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. (Vaca v. Sipes, 386 U.S., 87 S.Ct. 93)

Questioning the appropriateness of the NLRA's focus on collective rights, White further argued, 71

We think that [one] situation when the employee may seek judicial enforcement of his contractual rights arises, as is true here, if the union has sole power under the contract to invoke the higher stages of the grievance procedure, and if, as is alleged here the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's refusal to process the grievance ...

To leave the employee remediless in such circumstances would, in our opinion, be of great injustice. We cannot believe that Congress in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract. (ditto)

In dealing with employee claims of violation of the duty of fair representation, the Courts faced a serious dilemma--not unlike the problem they faced with regard to judging staffing levels in the "Lea cases." Just as the courts did not want to be second guessing arbitrators, they also did not want the individual employment rights of unionized workers to fall short of those of workers without
recourse to grievance arbitration. The solution was sought in a two
stage process in which the employee first had to exhaust contractual
remedies. Then, provided she could prove that the union breached its
duty of fair representation, the employee could bring direct action
against the employer for breach of contractual rights.

Justice White believed that neither the complete access to law
suits against employers nor the requirement that unions process all
grievances at all levels would be practically feasible. He stated
with regard to the latter approach, 72

If the individual employee could compel arbitration of his
grievance regardless of its merit, the settlement machinery
provided by the contract would be substantially undermined, thus
destroying the employers' confidence in the unions' authority and
returning the individual to the vagaries of independent and
unsystematic negotiation. Moreover under such a rule, a
significantly greater number of grievances would proceed.
(ditto)

Observing a fundamental tension between the preservation of
individual employment rights, and the functioning of the established
grievance system, the court put its weight in favor of the arbitration
system. 73

This emphasis on the integrity of the existing arbitration system
and the consensus between employer and unions rather than individual
employment rights, placed a considerable burden on employees and
unions. The requirement that the employee first exhaust remedies and
that she prove that the union breached its duty of fair
representation, before she could seek judicial enforcement of her
contractual rights, severely restricted individual employment rights. If, for instance an employee working in a non-unionized workplace or one governed by a non-certified employer association was dismissed in violation of a prior contractual agreement, she could sue the employer for breach of contract, without any of these obstacles being placed on her actions. More importantly, if the employee in a unionized workplace was unable to prove that the union breached its duty of fair representation (in refusing to process the grievance), not only would the action against the union be dismissed, but also would the contract action against the employer not be determined, regardless of its merits.

Justice Black, in particular, was concerned with the problems such an approach created for employees. He stated in a dissenting opinion,

[T]oday's decision ... converts what would otherwise be a simple breach of contract into a three-ring donnybrook. It puts an intolerable burden on employees with meritorious grievances and means that the worker will frequently be left with no remedy. Today's decision while giving the employee and ephemeral right to sue ... creates insurmountable obstacles to block his far more valuable right to sue his employer for breach of the collective bargaining agreement.

(ditto)

If the presence of a plant level bargaining and arbitration apparatus prevented individual employees from pursuing claims against employers, a much broader issue was at stake; namely the question whether the collective bargaining process actually empowered
individual workers, or whether it had come to limit individual rights with regard to the critical issue of employment termination.

4.1.3 Managers and Union Representatives: An Unholy Alliance?

The requirement of Vaca, that employees exhaust grievances, did much to delay the spread of employment rights litigation as well as the evolution of individual employment rights per se. Most cases following Vaca, upheld compulsory arbitration against rivaling claims. As recently as 1991 the Supreme court affirmed the basis of the Vaca doctrine against claims arising from the Age Discrimination in Employment Act of 1967. Although some union leaders welcomed the court's willingness to preserve the integrity of the bargaining process, the Vaca doctrine had high direct and indirect costs for the unions. Among others, the Vaca doctrine laid the ground for decisions which held unions liable for the unjust discharge of employees. Indirectly, and perhaps less tangibly, it had the potential of positioning workers against their unions.

4.2 Unions and Employers as Parties in the Employment Contract

One direct effect of the implementation of the Vaca doctrine was that unions became directly responsible for damages in cases where employees could prove unfair representation. Several years after Vaca, in Bowen v. U.S. Postal Service (1983), the Supreme Court established that the union was liable to a discharged employee, where failure to take the grievance to arbitration had increased the
employer's liability to the employee. Because of the considerable period of time between potential reinstatement and trials, the practical effect of Bowen was to impose most of the damage liability in an unjust discharge to the union.

We will briefly look at the issues involved in the case, not because of the specific importance of the ruling, but rather because of its conceptual implications for the interpretation of termination decisions. Mr Bowen was discharged following an altercation with another employee. His union, the American Postal Workers Union, declined to take his grievance to arbitration. Bowen sued the Postal Service and the union in a federal district court, seeking damages and injunctive relief. The District court entered judgment against the Postal Service for $22,954, and against the union for $30,000. The court of appeals concurred with the trial court regarding the total amount ($52,954), but held that the union should not be responsible for damages as ultimately the injury to the worker had been caused by the employer's actions. The Supreme Court reversed the judgment of the appeals court, and allocated the trial court's damages against both the Postal Service and the union.

Aware of the problem that the damage to the employee resulted in the first instance from the employer's misconduct—namely his wrongful discharge of the employee—Justice Powell established an alternative conception of the unionized worker's employment contract. In his view, shared duties were imposed on the employer and union. Starting
with a review of the union's position, Powell established the joint liability of employer and union. 80

The union feels itself as liable only for Bowen's litigation expenses resulting form its breach of duty ... The union contends that its unrelated breach of the duty of fair representation does not make it liable for any part of the discharged employee's damages; its default merely lifts the bar to the employee's suit ... against the employee.

The difficulty with this argument is that it treats the relationship between the employer and employee as if it were a simple contract of hire governed by traditional common law principles. This reading of Vaca fails to recognize that a collective bargaining agreement is much more than traditional common law employment, terminable at-will. Rather it is an agreement creating relationships and interests under the federal common law of labor policy. (Bowen v. U.S. Postal Service, 459 U.S. 212, 103 S.Ct. 588)

According to Justice Powell, this joint liability implied that damages had to be paid by the union. This was the case for two reasons; firstly because otherwise employers would be made responsible for the union's breach of duty, and secondly, because it would prevents the employee from recovering full damages. Said Powell, 81

The fault that justifies dropping the bar on the employee's suit for damages also requires the union to bear some responsibility for increases in the employee's damages resulting from its breach. To hold otherwise would make the employer alone liable for the consequences of the Union's breach of duty.

(ditto)

and further

Even though the employer and the union have caused the damage suffered by the employee, the union is responsible for the increase in damages, and, as between the two wrongdoers, should bear its portion of the damages ...

Although each party participates in the grievance procedure, the union plays a pivotal role in the process since it assumes the responsibility of determining whether to press ahead employees' claims. The employer for its part, must rely on the union's decision not to pursue an employees grievances ...

(ditto)
If we take Powell's decision at face value, the employment contract of the unionized employee did not merely establish a contractual relationship between employer and employee in which the workers could seek protection through the union; rather it established a contractual relationship between the employee on the one side and the employer and the union on the other side. Legally, both the employer and the union had obligations towards the employee: employer obligations arose from the general requirement to observe fair labor practices and the specific requirements of the labor contract she or he subscribed to, whereas unions were obligated by the duty to represent employees fairly in all matters including discharge related grievances.

Powell's decision formalized what previous decisions, including Vaca v. Sipes, had already implied. His decision, perhaps intentionally, made the employee client of both the employer and the union. This dual obligation necessarily restricted the rights of the employee vis a vis the employer. Since responsibility for employment rights fell on the employer and the union, the employee was required to exhaust union procedures before she could establish a breach of the contract. How the damages for breach of conduct would be allocated between employer and union would then be a decision of the Board or the courts.
4.3 The Costs of the NLRA Regime

Apart from putting a potentially substantial financial liability on the unions, the practice of plant level regulation, as it had evolved by the eighties, placed a high responsibility on unions, which inevitably created tensions between union representatives and individual workers. In the late 1960s and throughout the 1970s charges by workers against unions accelerated and constituted a main element in the general growth of litigation under the NLRA. This acceleration corresponded roughly with the Supreme Court decisions which expanded the concepts of fair representation. By 1970, Vaca-type employee charges against unions had become numerous, with more charges against unions being raised by employees than by employers in most years (see Figure II(1)).

Whereas in 1970 a roughly equal number of charges of unfair labor practices were filed by workers against unions (approximately 3,200), more than 6,300 charges were filed by workers in 1975, and 4,250 by employers. Although the number of charges filed against unions by workers had declined in the late seventies, almost 7,800 charges were filed by workers, while less than 5,000 charges were filed by employers. Over the decade from 1970 onward, the ratio of worker to employer charges against unions increased from 1:1 in 1970, to 1.5:1 in 1975, to 1.6:1 in 1980. One report suggests that in the early eighties a large portion of these employer charges involved issues of dismissal or substantive dismissal (i.e., various types of harassment which forced employees to resign).
While the NLRA regime had severely limited the ability of unions to bargain for the job security of their members, it had paradoxically imposed key responsibilities with regard to individual employment rights on the union. When a wave of terminations hit US industry in the late 1970s and early 1980s, this setup provided all the elements of a vicious cycle, where the limited impact of unions on terminations made them appear increasingly unattractive to workers, while loss of support from workers in turn further reduced the effectiveness of union action.

5. Conclusion: Assessing the Legacy of the Plant Level Initiatives

The plant level component of dismissal regulation established by many unions in succession to the establishment of the NLRA regime, is perhaps the most difficult dismissal regulation component to evaluate. One the one hand, the presence of a host of plant-level initiatives to restrict, control, and prevent dismissals, refutes the notion of postwar "business unionism"; i.e. the belief that US unions were characterized by a short sighted singular focus on wage gains of union members. On the other hand, it is difficult to characterize the plant level route to dismissal protection as an unambiguous success. In the first two or three postwar decades, when open challenges to the managerial authority were difficult, plant level initiatives were perhaps one of the few pathways open to unions. During the automatization drives of the 1960s and 1970s, when the courts
increasingly came to the defense of managerial authority, perhaps also, plant level initiatives contributed substantially to the job security of those covered by collective bargaining agreements. Yet, while these strategies could be initially successful they were costly in the long run. Plant level job security was predicated on a broad, and perhaps broadening coverage of the workforce by unions. When union densities plummeted, not only did coverage by plant level job security measures decline as well, but also did the legislative and political influence of unions. Had unions pushed for legislative measure of dismissal protection in the 1960s or even the late 1970s, such initiatives might well have been successful. Once union coverage had declined and the political landscape had shifted to the right, it was too late for such initiatives.

But there was an other, perhaps more sinister side to job control unionism. By the early eighties the practice of collective bargaining, together with a host of court decisions had created a split between individual and collective bargaining rights with regard to dismissals. The enforcement of job security through collective bargaining was predicated on a diminution of individual employment rights: first, in the narrow sense, through the restriction of the individual’s right to assert her or his claims directly against the employer’s breach of contract, and secondly, in the wider sense, through the neglect of individual employment rights by the unions. According to James Atleson (1983), the workplace contractualism which represented the principal element of job protection for unionized
workers "defined industrial democracy in process terms—outcomes or fairness were irrelevant." Says Atleson,\textsuperscript{85}

Collective action or self help in the labor dispute is constrained, making it difficult for employees to challenge an employer's action that the union fails to challenge or where the that arbitration process is tainted in some way. (Wartime Labor Legislation, p. 169)

For individual workers in the unionized workplace, the rank and file, dismissal protection had not been won. Some job protection could nevertheless be provided, either through the active and comprehensive enforcement of just-cause clauses (during periods of "normal business"), or concerted policies such as concession bargaining agreements (during downturns); but it was and is not a matter of rights.\textsuperscript{86} In the non-unionized workplace meanwhile, no procedures for grievance or bargaining were specified—unless by voluntary agreement—and individual employment rights were limited to statutory provisions and the exemptions granted so far by state courts (on the latter see the consecutive chapter). As a whole, dismissal protection in the US had neither evolved within common or statutory law, nor in the arena of collective bargaining.

When in 1970 the prominent industrial relation scholars Bok and Dunlop summarized the "successes" of unions with regard to the legal positioning of workers, they ended up stressing psychological factors rather than actual power gains. Said Bok and Dunlop,\textsuperscript{87}
The existence of unions, the opportunity to join such organizations ... all of these things help persuade the workers that the conditions under which he labors are tolerably fair. Without unions this assurance could not be given and workers might easily demand government regulation as the only practical alternative. Our experience ... suggests that this alternative would exact a heavy price in red tape and in a loss of flexibility for our firms and labor markets.

(Labor and the American Community, p. 464)

Whatever we think about Bok and Dunlop's analysis, it is remarkable that the authors of Labor and the American Community, saw little more in 50 years of union expansions than the avoidance of civil strive and regulation. If one of the main results of unionization was the avoidance of employment regulation and dismissal legislation in particular, things had indeed gone formidably wrong for US workers.

If collective bargaining could not effectively contribute to job security, some workers could turn to the pathway of private litigation. As long as the at-will rule governed the common law perception of the work place, individual workers had little or no recourse in the law. Once the first exemptions from employment-at-will were granted in the early 1980s a new era of individual challenges to dismissals started. The next chapter will examine how the individual side of dismissal protection evolved, and perhaps give some indications about the key problems encountered in this arena.
NOTES:


2. Taylor's analysis must be seen in the context of a deep dissatisfaction with free-market forces, which was characteristic of the Depression period. See Taylor, supra note I-72, at pp. 234-237.


6. While Commons' proposal was primarily aimed at creating privately financed unemployment insurance, he also emphasized the incentive effects his systems would have in reducing terminations. See Commons, Trade Unionism and Labor Problems (New York: Ginn & Co., 1905) at p. 10.

7. See Commons, supra note I-51, at p. 42.

8. See An Act in Relation to Labor, constituting chapter thirty-one of the consolidated laws of the state of New York, at section 530 (full text available on the Internet, vide Internet, Labor Resources).

9. Id. at section 521.

10. See California Codes: Labor Code; and for Wyoming, Title 27, Labor and Employment (full text for both codes available on the Internet, vide Internet, Labor Resources).


14. See General Motors Co., War Labor Reports 22 (1945), p. 484. The case is discussed in James Atleson, "Wartime Labor Regulation," pp. 143-175, in Lichtenstein and Howell eds., Industrial Democracy in America (Cambridge: University of Cambridge Press, 1993) at p. 165. It is perhaps worth noting that up until the passage of the Social Security Act, unions provided most of the unemployment insurance to their members either directly or via collective bargaining agreements with certain industries. Since 1923, for instance, the clothing trade in Chicago was covered by an agreement which paid idle workers 40% of their wages after the first to weeks of idleness. Since the inception of the plan to 1926, 30,000 members received approximately $3,000,000 in benefits. In 1928 similar regulations were concluded for the entire men's clothing industry. In 1926 a regulation was added to the Chicago arrangements which provided for a "discharge wage" of up to $500 if a workers was made permanently redundant because of technological improvements. In some cases union insurance funds accumulated substantial amounts of capital. The Brotherhood of Locomotive Engineers, for instance, carried approximately $200 million during the mid 1920s and paid out approximately $2.5 million each year. The Firemen's union carried about $150 million during the same period. In 1921 the national crafts union of the AFL paid out approximately $5.5 million in insurance benefits. Prior to 1929, however only approximately 250,000 persons out of a wage earning population of about 26 million were covered by such arrangements.

15. Aaron Levenstein, Labor Today and Tomorrow (New York: A. Knopf, 1946) at pp. 103-104, gives a detailed account of these funds.

16. Barbash explains the limited goals of unions, including their inactivity with regard to job security, on the basis of the US history of adversarial industrial relations. Some of Barbash's statements have been debunked by the wave of concession bargaining agreements and strategic initiatives during the mid eighties. See J. Barbash, "Values in Industrial Relations: the Case of the Adversary Principle," in Proceedings of the 33rd Annual Meeting (Wisconsin: Industrial Relations Research Association, 1981).


support just-cause legislation for non-union workers, because the provision of arbitration at the unionized workplace provided "a principal selling point for unions involved in organizational campaigns where the attempt is to reach workers concerned with job security." Gould suggests that "the union's fear has been that the availability of such procedures would erode its ability to attract new members." Gould's view is not fully supported by the analysis of this chapter, which highlights the limits imposed on unions with regard to providing job security. Given that there is little recourse for a union opposed to downmanning, it appears unlikely that job security could have been a key factor unions could have used in an organization drive.

20. See the then popular book by Philip Murray and Morris Cooke, Organized Labor and Production, (New York: Harper, 1940) at p. 48. A similar view was expressed by the labor lawyer Arthur Goldberger who represented the UAW in several disputes. Goldberger argued management had two rights, the right to manage its business and the right to direct the workforce. Managing the business involves "the product, the machine to be used, the manufacturing method, ... the plant layout, the plant organization, and innumerable other questions. These are reserved rights, inherent rights, which are not diminished or modified by collective bargaining ..." The other type of right--to direct the workforce--by contrast, is merely procedural and as such subject to bargaining. See A. Goldberger, "Management's Reserved Rights: A Labor View," p. 118 ff. in McKelvey ed., Management Rights and the Arbitration Process (1956).

21. See Aleine Austin, The Labor Story; A Popular History of American Labor, 1786-1949 (New York: Coward-McCann, 1949), at p. 204. At the end of the war, when the no-strike era came to an end, the US experienced the largest strike wave in its history. Apart from official strikes for wages, which had fallen behind wartime inflation and against cutbacks in employment as the defense industry was dismantled, US factories experienced a wave of wild-cat strikes, which typically involved one or another form of local grievances.

22. Featherbedding is only one subcategory of a host of patterns of indirect bargaining over employment. G. E. Johnson, "Work Rules Featherbedding, and Pareto-optimal Union-Management Bargaining," in Journal of Labor Economics, vol 8, no 1 (1990) pp. 237-260, at pp. 238-239 suggest that bargaining over employment is a particular characteristic of the US industrial relations system. Johnson notes that many US collective bargaining agreements specify the number of persons assigned to machine and/or require negotiation about the use of new machinery. Among others unions and management bargain over the intensity of work--i.e., its pace, the number of functions a worker performs, the length of breaks etc. A detailed but somewhat antiquated discussion of these practices is provided in A. Rees, The Economics of Trade Unions, Chicago: University of Chicago Press, 1977, ch. 8.


23. Gomberg's analysis was reprinted in two industrial relations readers. For the original see William Gomberg, "Featherbedding: An
24. The Lea Act can be found in section 506 of the Federal Communications Act; i.e., 47 U.S.C.A. para. 506. For a comment on the implications of the act on labor relations see Bureau of National Affairs, 17 Labor Relations Reference Manual (LRRM) p. 2203.

25. In U.S. v. Petrillo, 332 U.S. 1 (1947) the Supreme Court upheld the Lea Act against constitutional charges of vagueness, as well as against an equal protection challenge for the allegedly irrational exclusion of employees in the broadcast industry other than musicians. Mr Petrillo was nevertheless acquitted for lack of knowledge that the extra musicians for whom he sought employment were not needed (N.D. Ill. 1948). The case is discussed in Bureau of National Affairs, 20 Labor Relations Reference Manual (L.R.R.M.) 2254.


27. The court's reluctance in applying the Lea Act was also obvious in a series of cases in which the courts refused to apply the Act. These include: Langworth Feature Programs v. Manning (27 L.R.R.M. 2511), in which the New York supreme court stuck down an attempt to apply the Lea Act; General Teleradio v. Manuti (34 L.R.R.M. 2361), in which a federal appeals court upheld a decision by the New York court not to apply the Lea Act and not to issue an injunction. The Manuti case is an intriguing reflection of this dilemma: in Manuti the counsel for the union demanded that the court establish the number of musicians that the station required. Unable and unwilling to do so, the court decided in favour of the union.


32. See also U.S. v. Green, 350 U.S. 415 (1956).

33. See Gomberg, supra note 23, at p. 439.

34. Id. at p. 441.


38. Gomberg, supra note 23, p. 442.


42. See, e.g., the industrial relations textbook by Arthur Sloane and Fred Witney, Labor Relations (Englewood Cliffs: Prentice Hall, 1972) at p. 420.

43. See Freidin and Ullman, "Arbitration and the War Labor Board" in Harvard Law Review, vol 58 (1945) p. 309 ff., at pp. 355-356. By the 1950s this view was no longer acceptable. A 1955 arbitration decision asserted that "A just-cause basis for consideration of disciplinary action is, absent a clear proviso to the contrary, implied in a modern collective bargaining agreement" [see 25 LA 295 (1955)]. Interestingly the WLB itself had ordered arbitration in some instances where the contracts contained no arbitration clause.

Bargaining agreements providing for mandatory arbitration were first established in the clothing industries in the early 1920s. The Hart, Schaffner & Marx agreement, covering most of the Chicago textile industry, provided for the hiring of a full time professional arbitrator. The Amalgamated Clothing Workers, the United Garment Workers, the Journeymen Tailors Union, the Ladies' Garment Workers, and the United Cap and Hat Makers incorporated arbitration requirements by 1926 which covered roughly 400,000 workers. These agreements were followed some years later by the international Typographical Union, and the Building trades of some cities which typically established join boards such as the Joint Arbitration Board of Chicago.

44. See Sloane, supra note 42, at pp. 419-420; the survey is O. Phelps, Discipline and Discharge in the Unionized Firm (Berkely: University of California Press, 1959). Court cases of the sixties generally acknowledged the quasi legal nature of collective bargaining agreements. In Steelworkers v. Warrior and Golf, 363 U.S. 574 (1960), the Supreme Court equated the collective bargaining agreement with common law: "The collective bargaining agreement states the rights and
duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot fully anticipate ... The collective agreement covers the whole employment relationship. It calls into being a new common law, the common law of a particular industry or of a particular plant."

Freeman's widely cited analysis was the first to quantify the effects of "industrial jurisprudence" on dismissal rates. At the time Freeman conducted his analysis, 99% of all major collective bargaining agreements provided for grievance procedures and 95% provided for arbitration. See R. Freeman, "The Effect of Unions on Worker Attachment to Firms," in Journal of Labor Research, vol 1, no 1 (1980) pp. 29-62.

45. Selznick cites several surveys which provide evidence for the growth in the adoption of formal personnel policies. See Selznick, supra note I-40, at p. 83-85. W. Spriegl, and A. Dale, "Personnel Practices in Industry," Personnel Study no. 8 (Austin: University of Texas, Bureau of Business Research, 1954) reports that in a 1947 survey of 325 firms 46% had written personnel policies, whereas a 1952 sample of 628 firms identified 67% of all forms having such policies. A BNA survey of 160 personnel managers of a stratified sample of companies reported that in 1957 three out of four companies had written personnel rules. See infra note 46, BNA (1957).

Selznick's argument about the link of rule-based company governance and "managerial self restraint", in part, is based on a contrast with non-rule governed unorganized plants. Selznick cites a BNA report, which quotes an industrial relations executive of a non-union plant as saying, "Our plant rules are not formalized by being reduced to writing. We avoided this, for to do so would possibly make them subject to negotiation with the union. Not having written rules has strengthened rather than weakened the unilateral authority of management in this regard. This is a fact, not wishful thinking."


The high rate of job loss associated with layoffs during 1989 was due to a wave of corporate restructuring, buyouts and mergers, as well as, in case of manufacturing, cuts in the defense industry. In this specific context it made little sense for firms to give workers on layoffs with promises of recall. The high rate of job loss relative to layoffs during the 1980s, of course, was due a wave of bankruptcies, partial and full plant closing, during which a majority of workers, following layoffs, was finally confronted with job loss. Medoff's analysis, relying on data up until 1971, of course, could not capture these effects.

48. Selznick, supra note I-40, in part concedes to this point, but does not elaborate on the practical and procedural limits of "industrial justice." He states on p. 92 that "there are fundamental limits upon its [meaning the firm's] capacity to make decisions in the spirit of legality: (1) The enterprise is not mainly in the business of dispensing fairness. Its primary obligation, as seen by responsible leaders is to ensure survival and growth by getting the job done.... (2) Bureaucratic authority is not easily checked and challenged from below... For most employees there is no adequate opportunity to check the rules themselves in the course of presenting grievances."

For examples of "muddled cases" see the case appendices in the labor relation textbooks, E. Beal, E. Wickersham, and P. Keinast, The Practice of Collective Bargaining (Homewood: Irwin, 1976) at pp. 507-585; K. Kovach, supra note I-67, at pp. 311-355; See also Sloane, supra note 42. There are nevertheless several cases in which the courts and arbitrators affirmed dismissals on highly questionable grounds for dismissal. In the Cutter laboratories case of 1955, the arbitrator refused to uphold a discharge of a lab workers on the grounds of Communism. In this case the California supreme court overruled saying that the employee "as a Communist was not at any time or in any of her activities truly serving an American labor union ... she was but doing the bidding and serving the cause of her foreign master who tolerates no deviation and no debate" [23 LA 715 (1955)]. According to another arbitrator, the New York Times was justified in discharging an employee who admitted that he had been a member of the Communist party because he worked in a "sensitive" position--the rewrite desk.

49. In West Virginia Pulp & Paper Co., the arbitration board decided that "a discharge must stand or fall upon the reason given at the time of the discharge"; see Bureau of National Affairs, Labor Relations Reporter, Arbitration Decisions, (LA) 10, pp 117-118. A similar decision was reached in Penn Dixie Cement (29 LA 457), where the arbitrator concluded that "the determinations of reasonable cause must be made as of the time when disciplinary action was taken." See also Borden's Farm Products, 3 LA 607-608; Swift & Co., 12 LA 108; United States Potash Co., 30 LA 1039.
50. There is some disagreement about the economic effects of just-cause standards. Whereas the older literature typically considered just-cause regulations as an obstacle to the efficient operation of firms and labor markets, more recent analyses have given a different evaluation of these policies. D. Levine's, "Just-Cause Policies when Unemployment is a Worker Discipline Device", in American Economic Review, vol 79, no. 4, 1989 pp. 902-905, suggests that "moving toward just-cause (that is, increasing the evidence required for a dismissal) can increase efficiency." This is the case because "private calculation of the costs of a dismissal policy ignores the externality... [that] the hiring rate increases. The increased hiring rate reduces the expected duration of unemployment for other firms."

The difficulty in evaluating political accusations of "unethical" conduct by unions was highlighted by Arthur Goldberger's (special Counsel to AFL-CIO) response to employer accusations of featherbedding (cited in Gomberg, supra note 23). Goldberger called upon parties to stick to collective agreements and work conflicts out in arbitration. Regarding employer attempts to formalize matters he stated: "if it is outlawed for a union to ask for pay for work which is not being done, it must be, from a balanced view, equally bad for the union to agree to extra work without the employer paying or it. We have not heard of anybody's recommending legislation ... [such as a] stretchout provision." As Goldberger indicated, which charges are levied and which activities are considered unethical, depends primarily on who frames the debate.


56. The sophisticated and often manipulative nature of these personnel policies was observed early on. Selznick, supra note I-40, observed with regard to human resource management that "the individual is not seen as a goal achieving creature. Rather he is considered an inert 'element' that does not act unless acted upon and to be manipulated by means of human relations 'skills'. The aim of human
relations is to produce contended workers much as the dairy farms seeks contended cows. Thus the social science of the factory research is not a science of man, but a cow-sociology."


58. A comparison of union density measures has been compiled by M. French of the University of Glasgow. See also, Michael Goldfield, The Decline of Organized Labor in the United States (Chicago: University of Chicago Press, 1987), at p. 10.


61. Id. at p. 92.

62. Id. at pp. 88-89.

63. This quote is part of a broader argument on the alienation between union representatives and workers. See Ronald Radosh, American Labor and United States Foreign Policy (New York: Random House, 1969) at pp. 313-314.


65. Curtis, id. at p. 1008.

66. Id. at p. 1008.


68. Curtis et al., supra note 64, at p. 1010.


70. Curtis, id. at p. 1000.
71. Id. at p. 1001.

72. Id. at p. 1000-1001.

73. Justice Black's strongly worded dissent with the majority took particular issue with this point. He stated: "I simply fail to see how the union's legitimate role as statutory agent is undermined by requiring it to prosecute all serious grievances to a conclusion or by allowing the injured employee to sue his employer after he has given the union a chance to act on his behalf."

The contrasting view was expressed by several industrial relations scholars, including David Feller, who suggested that the employee should not be entitled to a judicial decision, but rather to a court order directing the union to proceed to arbitration. See D. Feller, "A General Theory of the Collective Bargaining Agreement," in California Law Review, vol 61 (1973) p. 61 ff.

74. This point is stressed in Gould, supra note I-59, at p. 154. Commenting on an earlier set of cases commonly referred as the Steelworkers Trilogy, Gould states "But even more formal are the barriers that exist by virtue of the Court's decision in Vaca v. Sipes ..."

75. It is understood that this ruling had adverse effects on minority rights: in the face of an exclusive bargaining agent, minority employees may not attempt to force an employer to negotiate with them individually, or with their civil rights representative over questions of discrimination. An employer faced with pressure to force such negotiations is free to discharge the protesting employees; see Emporium Capwell Co. v. Western Addition Community Organization (U.S. S.Ct., 1975). The implications of the Vaca doctrine on minority rights are discussed in greater detail in M. A. Player, Federal Law of Employment Discrimination (Minneapolis: West Publ., 1992).

76. Curtis, supra note 64, at p. 1007.

77. See Gilmer v. Interstate/Johnson Lane Co., certiorari to the United States Court of Appeals for the fourth circuit, no. 90-18, argued January 14, 1991 decided May 13, 1991. Gilmer, a stock broker, was terminated by NYSE at age 62, claiming, inter alia, violation of ADEA rules. NYSE rule 347 provides for arbitration in termination cases. The court decided that ADEA remedies were not immediately available to Gilmer, because his claim was subject to compulsory arbitration: "Since the Federal Arbitration Act manifests liberal policy in favoring arbitration ... and since neither the text nor the history of ADEA explicitly precludes arbitration, Gilmer is bound by agreement to arbitrate unless he can show an inherent conflict between arbitration and the ADEA's underlying purposes." Justice Stevens, with whom justice Marshall joined, cited an earlier Burger decision in their dissent. "For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians the chickens.

Gould, supra note I-59, pp. 157-162 notes that as yet "it is not entirely clear whether an individual has a right to participate in an arbitration hearing. Thus far it appears as though the union may
exclude the employee without violating its duty of fair representations."


79. See Curtis, Id. at p. 1019.

80. Id. at p. 1020.

81. Id. at pp. 1020-1021.

82. The growth of regulatory litigation is discussed in Townley, supra note 54. Supreme Court decisions which encouraged the wave of unfair representation charges include Vaca v. Sipes, 386 U.S. 171 (1967); NLRB v. J. Weingarten Inc., 420 U.S. 251 (1975). The Supreme Court's decision in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) provided incentives for either unions or workers to file unfair labor practice charges during a representation campaign in order to build a case for a bargaining order if the elections were lost.

83. Data are from National Labor Relations Board, Office of Statistical Service, and are cited in Townley, supra note 54, at p. 26.

84. See Townley, supra note 54, at pp. 24-32.


Catherine Van Wetzel Stone presents an analysis similar to that of Atleson. According to Stone the "industrial pluralism view of industrial relations" which dominated postwar US labor relations was "based upon a false assumption: the assumption that management and employees have equal power." As a false but powerful description of industrial relations "industrial pluralism obscure[d] the real issues and problems posed by the exercise of power in the workplace..." Stone suggests that with "increased government intervention in employment relations, industrial pluralism is proving an ill suited tool for the problems that arise" and proposes that "the internal contradictions within the model" are now "coming to light" (1981, p. 1511). See K. van Wetzel Stone, "The Post-War Paradigm in American Labor Law," in Yale Law Journal, vol 90, no 7 (1981) pp. 1509-1580.

86. A 1989 study by the Bureau of National Affairs reported, based on a random sample of 400 contracts, that 94% of all collective bargaining contracts included provisions allowing dismissal for "cause," "just-cause," or specific offenses only. See Bureau of National Affairs, "Collective Bargaining, Negotiation & Contract" (1989) 9 March.

This is not a contract of employment. Any individual ... may be terminated by the employer for any reason. Any written statements or promises to the contrary are hereby expressly disavowed and should not be relied upon by any prospective or existing employee. The contents of these are subject to change at any time at the discretion of the employer.

*Model Disclaimer*, American Society of Personnel Administration, 1984

The subject of the legal regulation of labor is one of great complexity. Up to the present time a priori objections to such regulations have delayed their introduction, and only gradually, as experience has demonstrated their usefulness, have they been extended to situations which seem to require them. In ... the United States the notion that the legislative power should not be used ... to regulate conditions of employment has been abandoned by most thoughtful persons, but the prejudice against interference ... is as strong as ever.

(H. R. Seager, *Economics*, 1904, p. 431)

Chapter III

THE COURTS AND INDIVIDUAL DISMISSAL PROTECTION:

WRONGFUL DISCHARGE LITIGATION—EVOLUTION AND PROBLEMS

Introduction - Unjust Dismissal Litigation as a Substitute for Dismissal Regulation

Many labor economists and legal experts have stressed the relative backwardness of US dismissal regulation.¹ This view is based primarily on the combination of a notably incomplete system of common law discharge protection, with a highly selective system of statutory dismissal protection which we have discussed in the previous chapters.² While most collective bargaining agreements include clauses that prohibit the discharge of employees except for "good cause", these provisions often fail to provide an effective source of
dismissal protection: first, because of the limited coverage of workers through union contracts (today less than 20% of the non-farm workforce are covered by collective bargaining agreements). Second, because of union discretion which allows union representatives to refuse arbitration to an individual; and third, because of the court's traditional adherence to managerial prerogatives, which tends to render dismissals for alleged economic reasons untouchable.

One response to weaknesses in employment protection law and the protection effected through collective bargaining, has been an attempt to strengthen individual employment rights; specifically the right to challenge a dismissal in court. In the past one and one half decades, US state and federal courts have become increasingly reluctant to apply the doctrine of employment-at-will, and have often allowed dismissed employees to sue employers for breach of contract, the violation of their constitutional rights, and/or employer actions which counter public policy goals.³

Unjust dismissal litigation was the confluence of several currents, which operated both on the supply and demand side. On the supply side the role of progressive, particularly those of California were of crucial importance. The judgments of these courts absorbed the influence of the consumer, environmental and civil rights movements, as well as concerns with fraudulent acts against the government, and translated them into labor decisions. The court's reasoning in these decisions was--despite formally complex decisions--often straightforward: if consumer protection was an important
policy goal, it could be tolerated that an employer dismiss a worker who complained about unsafe practices. Likewise, if environmental protection was to be taken serious, employers had to be prevented from dismissing workers who refused to engage in activities which resulted in illegal pollution. Support for unjust dismissal suit, perhaps surprisingly, also came from the political right. Here it was not the consumer or the environment which was to be protected, but rather the government which had to rely on whistleblower for protection from fraud. On the demand side, meanwhile, lowered coverage by collective bargaining agreements, waves of corporate restructuring, as well as the increase in knowledge about legal options particularly amongst managerial employees, contributed rapidly increasing numbers of court filings.

The next sections will critically review how unjust dismissal litigation evolved. We will then briefly discuss the main characteristics of this "individual pathway" to dismissal restriction, such as the size of awards and plaintiffs success rates in jury trials.

1. Unjust Dismissal Litigation: Evolution and Characteristics

Up until the 1970s, labor legislation left the majority of non-union employees unable to challenge their dismissal. These gaps in the legal protection of non-unionized workforce (and to some degree union workers as well), have permitted dismissals to occur under
circumstances, which could not be accepted by some progressive state and federal court judges. These instances included initially the dismissal of employees who alerted public authorities or company management of criminal wrongdoing or unethical conduct, as well as dismissals which were contrary to previous promises of continued employment with the firm. Over time, the sum total of these decisions has created a set of new judicial doctrines which, when invoked in private litigation, restrict the range of legitimate grounds for dismissal. We will briefly trace the evolution of these doctrines, as well as discuss various attempts to stop the expansion of wrongful termination litigation.

1.1 The Beginnings: Unjust Discharge and the "Interests of the State"

In the absence of specific statutory provisions, the state courts of several states have responded to instances of unjust discharges, by suspending the otherwise applicable at-will right of employers to dismiss workers on a case by case basis. Perhaps ironically, the first such exemption from employment-at-will was granted in connection of a worker who was employed by a Teamster union local, by what was a evidently right wing California court. The key issues at stake in this case was the threat of dismissal and finally the dismissal of an employee who refused to commit perjury on behalf of his employer. In this case, Peterman v. International Brotherhood of Teamsters Local (1959), a California state court broke the employment-at-will rule, by deciding an employee could not be dismissed for refusing to perjure himself. The Peterman court explicitly recognized that, in the
absence of contractual limitations, an employer enjoyed broad
discretion to discharge an employee, but stated that as a matter of
"public policy and sound morality" this specific employer's conduct
could not be condoned. More specifically, the court concluded that it
was not in the interests of the state to allow an employer to fire at-
will if such a dismissal contravened the state's penal code. The
court explained,\(^5\)

The commission of perjury is unlawful [Pen. Code, 118] ... It
would be obnoxious to the interests of the state and contrary to
public policy and sound morality to allow an employer to
discharge any employee, whether the employment be for a
designated or unspecified duration to commit perjury, an act
specifically enjoined by statute ... The public policy of this
state as reflected in the penal code section referred to above
would be seriously impaired if it were held that one could be
discharged by reason of his refusal to commit perjury. To hold
that one's continued employment could be made contingent upon his
commission of a felonious act at the insistence of his employer
would be to encourage criminal conduct upon the part of both the
employee and the employer and serve to contaminate the honest
administration of public affairs.
(Peterman v. Int. Brthd. Teamsters, 174 Cal. App. 2d, pp. 188-
189).

In Peterman the court effectively held that, even in the absence
of an explicit statutory provision prohibiting the discharge of a
worker who refused to conduct a criminal act, fundamental principals
of public policy required an exemption from the at-will doctrine. In
doing so, the Peterman court established something akin of a "mock
statute" which exempted any Californian employee from at-will
discharges, who could prove that her employer discharged her because
of a refusal to violate an existing criminal statute.
The notion of a public policy interest, as established in Peterman, was general enough to allow future courts to expand exemptions from at-will doctrine in two directions: firstly, to those instances in which the plaintiff herself was not actually forced to commit an illegal act, but merely objected to others doing so, and secondly, to instances in which the action involved was not actually deemed criminal by law, but merely stood in violation of professional or other codes of conduct.

One of the most important extensions of the Peterman doctrine was given in the oft-cited Tameny v. Atlantic Richfield Co. case (1980). Here the court was in part driven by concerns with consumer rights--specifically that of service station managers--but translated this concern into the protection of an wholesale employee who objected to price fixing practices of his employer. Although the practices of the wholesaler were not per se criminal, the plaintiff-employee was granted tort remedies; i.e. received punitive and compensatory damages. We will briefly discuss the issues involved in this case, because the court's award of tort remedies marks an crucial step in the development of dismissal litigation and the conception of the duty of employers.

Mr Gordon Tameny was discharged by the Atlantic Richfield company (Arco) after 15 years of service, allegedly because he refused to participate in an illegal scheme to fix retail gasoline prices. Hired in 1960 as a relief clerk, Tameny had received regular advancements, merit increases, and commendatory evaluations in his initial years
with the company. In 1966, he was promoted to the position of retail sales representative, which he held until he was discharged in 1975. His duties as a retail sales representative included, among other matters, the management of relations between Arco and the various "independent" service station dealers in his assigned territory. During the early 1970s Arco's district manager, Mr McDermott, pressured Tameny to "threaten and cajole" the so called independent service station dealers in his territory to cut their gasoline prices at or below a designated level specified by Arco. When Tameny refused to yield to his employer's pressure to engage in such tactics, his supervisor told him that his discharge was imminent, and soon thereafter Tameny was fired. Although Arco indicated in its personnel files that Tameny was discharged for "incompetence" and "unsatisfactory performance", no supporting evidence for such unfavorable performance record could be found, and Tameny successfully argued that the sole reason for his discharge was his refusal to committed the illegal acts required by his supervisor.

In 1975, Mr Tameny sought recovery from Arco, contending inter alia, that Arco's conduct was tortuous, and hence required the employer to pay compensatory as well as punitive damages. A Los Angeles county trial court contended that remedy was available to Tameny only in contract and not in tort (i.e., that Mr Tameny would receive compensatory but not--potentially much larger--punitive damages). This decision was reversed by the California supreme court, which argued that "the relevant authorities both in California and throughout the country establish that when an employer's discharge of
an employee violates fundamental principles of public policy, the
discharged employee may maintain a tort action and recover the damages
traditionally available in such action."7 With no precedent of tort
action involving a wrongful discharge claim available, the California
court cited previous cases in which Californian courts had construed
an action in tort growing out a breach of duty of a contract. In the
Tameny court's primary precedent, the 1896 case of Sloane v.
California Railroad Co., the court had contended that "if the cause of
action arises form a breach of promise set forth in the contract, the
action is ex contractu, but, if it arises from a breach of duty
growing out of the contract it is ex delicto."8

Extending this principle of a dutyholder to the employer, the
California court concluded that all employers had a contractual duty
not to dismiss an employee for a refusal to conduct illegal actions.
Failure to act on this duty by the employer, entitled the employee to
seek tort remedy. An employees' action for wrongful discharge,
therefore, was typically ex delicto and subjected the employer to
tort-liability. The court explained,9

... as the Peterman case indicates, an employer's obligation to
refrain from discharging an employee who refuses to commit a
criminal act does not depend upon any express or implied
"promises set forth in the employment contract" (Eads v. Marks,
39 Cal. 2d at p. 811), but rather reflects a duty imposed by law
upon all employers in order to implement the fundamental public
policies embodied in the state's penal statutes. As such, a
wrongful discharge suit exhibits the classic elements of a tort
cause of action.

(Tameny v. Arco, Cal., 610 P. 2d 1330)
Arguing that the employment contract of the "at-will" employee included the employer's duty in tort not to discharge in violation of public policy, the court concluded,\textsuperscript{10}

We hold that an employer's authority over its employee does not include the right to demand that the employee commit a criminal act to further its interests, and the employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order. An employer engaging in such conduct violates a basic duty imposed by law upon all employers, and thus an employee who has suffered damages as a result of such discharge may maintain a tort action for wrongful discharge against the employer.

(ditto)

The ruling that an unjust discharge violating public policy, warranted action in tort (\textit{i.e.}, the award of punitive damages), was of crucial importance to the evolution of unjust dismissal litigation for two reasons. First, it reestablished the notion that dismissals had to be checked against certain employer obligations; in this cases an employer obligation towards the state. (As compared to older obligations, such as the obligation to employ a worker for a full year). Second, it established that the remedy for a dismissal failing to meet such an obligation was in tort. It was this latter aspect which provided the crucial economic incentive for a further expansion of dismissal litigation. By requiring punitive damages rather than the mere payment of back wages or reinstatement, the courts of California and other states essentially opened the floodgates to a surge of discharge litigation, which was to take place throughout the late eighties and early nineties.
1.2 Expanding the Limits of the Wrongful Discharge Exemptions

By the early 1980s, with the Tameny decision and similar judgments, the parameters for an expansion of wrongful discharge litigation in California were set. However, at that time, the remit of such litigation was still narrow.

1.2.1 The Public Policy Doctrine

The first important step in the expansion of wrongful discharge litigation, was the decision to treat all public policy claims as an action in tort. In the 1986 case of Koehrer v. Superior Court, a California appeals court explained why all wrongful discharge claims based on a violation of public purpose were arising in tort (establishing a doctrine which is now accepted by virtually all other states which acknowledge the public policy exemption).

The Koehrer court argued,

As Tameny explained, the theoretical reasons for labeling a discharge wrongful in such cases [meaning cases involving public policy claims] is not based on the terms and conditions of the contract, but rather arises out of duty implied in law on the part of the employer to conduct his affairs in compliance with public policy ... [T]here is no logical basis to distinguish cases of wrongful termination for reasons violative of fundamental principles of public policy between situations in which the employee is an at-will employee and [those] in which the employee has a contract for a specified term. The tort is independent of the terms of employment.

(Koehrer v. Superior Court, 181 Cal. App. 3d 1155)

Following Koehrer, the state courts of California and some other states included several types of discharges under the public policy
exemption and awarded torts damages to plaintiffs. By the mid 1980s, at which time several states had granted similar exemptions from at-will employment, these included roughly four instances: discharges for refusing to engage in prohibited activities (as was the case in Tameny);\textsuperscript{13} discharges for complying with a legal obligation, such as jury service or a grand jury subpoena;\textsuperscript{14} discharges for engaging in an activity that was either encouraged or protected, such as the filing of a worker compensation claim;\textsuperscript{15} and finally, discharges for whistleblowing, i.e., the notification of a government authority or the media of an employers' wrongdoing.\textsuperscript{16} These decisions reflected a perhaps novel understanding of the courts, which placed explicit agreed upon public policy goal above the at-will rights of employers. This understanding was based on rather straightforward reasoning; if a policy issues was important enough for a legislature to criminalize or otherwise ban it, the at-will right of employers could not be allowed to undermine this agenda.

Initially, most courts interpreted the Tameny decision to require that a claim of wrongful discharge under the public policy exemption be based on the violation of a clearly stated public policy mandate. Under this rule the courts had little difficulty in identifying a claim for wrongful discharge, mandated when the employer terminated the employee for refusing to engage in a statutory prohibited act.\textsuperscript{17} When, however, the particular act, or refusal to act, was not directly mentioned in a statute, some courts relied on general principles of determining public policy. Such general principles were evoked
specifically in the context of consumer and patient rights, where many judges considered existing legislation as inadequate.

Such an extension was taken first by a California court, most notably in *Dabbs v. Cardiopulmonary Management Services* (1987), where issues of patient care were at stake. In Dabbs, the court was confronted with a plaintiff employed as a therapist who refused to work and was terminated as a result. Mrs Dabbs alleged that she stopped working because she was the only experienced therapist on duty, when customarily there were three experienced therapists to serve the patients on her shift. She asserted that her termination was due to her refusal to work under conditions that would jeopardize the "health, safety, and physical well-being of the patients", and argued that her actions were in protest of conditions which "violate[d] fundamental public policies in the state of California." Asking the question "how may public policy be determined?" the court explicitly rejected the notion that public policy could only be found in statutes or regulations as opposed to sources of "more general public policy." The court summarized its analysis by saying that it could find adequate statutory support for the public policy claim asserted by Mrs Dabbs, in sections of Business and Professional Codes dealing with safeguards for the health of patients as well as the Respiratory Care and Practice Act. The court, however, made its most telling point when it said,
[W]e need not look to the Respiratory Care Practice Act alone. We find support for our decision in general societal concerns for the quality of patient care. This policy militates against allowing an employer to discriminate against or discharge an employee for voicing dissatisfaction with procedures he or she reasonably believes might endanger the health, safety, and welfare of the patients for which the employee is responsible. (Dabbs v. Cardplmnry. Mgmt., 188 Cal. App. 3d 1437, at p. 1444)

With its Dabbs decisions, the court opened a wide range of judicial discretion in determining what was public policy, and in deciding which workers were protected from at-will discharges. By deciding that public policy claims could arise independent of the violation of a concrete statute, the job protection available through the public policy exemption became open ended. This provided a further incentive to both employees who felt their dismissal was unethical and plaintiffs' lawyers who expected to recoup damages in a wide array of cases. Dismissal suits claiming the public policy exemption, not surprisingly, became the most frequent category of wrongful termination suits by the late 1980s; a status which they have maintained ever since.

1.2.2 The Implied Contract and Good Faith Exemptions

Another factor contributing to the expansion of unjust dismissal litigation, was the realization that the complexity of the employment relationship had increased substantially. Employees, often driven by oral or implied promises, made considerable investments in their jobs. As a matter of the civil rights of employees, these investments had to be protected. Following several early judgments on these matters of implied promises, the state courts of several came to acknowledged two
additional groups of wrongful discharge claims; though not necessarily as actions in tort. Under the first of these groups—the implied contract exemption—oral and written assurances of termination only for good cause or some other specified standard (such as standard of work requirements), were been interpreted as enforceable contracts. Dismissals in the presence of such contracts were held actionable in contract and in some cases in tort by several state courts, which awarded damages to employees similar to those awarded in the context of the public policy exemption.

California courts, have found dismissals wrongful because of assurances constituting an implied contract as early as 1972.21 Following several less significant cases, a developed and definitive statement of such an implied contract breach was given in Pugh v. Sees Candy Inc., in 1981.22 In Pugh, a California appeals court stated that,23

... personnel policies or practices of the employer, the employees longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of industry in which the employee is engaged [citations omitted] can give rise to an enforceable contract.

(Pugh v. Sees Candy, Inc., 116 Cal. App. 3d 311)

This notion of an implied contract exemption, like the public policy exemption earlier, again was broadened in a succession of cases. Recently even the violation of a corporate memorandum on the right of privacy has been deemed an enforceable contract giving rise to a wrongful discharge claim.24
A third source of at-will exemptions acknowledged by California courts and the courts of about seven other states, has been the claim of breach of the covenant of good faith and fair dealing. The initial case recognizing that claim, Cleary v. American Airlines Inc. (1980), held that the discharge, without just-cause, of an employee with a satisfactory record of long term employment was a breach of the implied covenant and gave rise to action in tort. The claim of unjust dismissal in Cleary was based on company policy statements, which expressed albeit vaguely, that an employee would not be dismissed without cause. This, and similar assurances, the court argued, represented an implied contract, whose violation constituted an unjust dismissal.

1.2.3 A Just-Cause Standard for Non-Union Employees?

Perhaps most important of all, was the extension of the implied covenant of good faith and fair dealing by a California context in Khanna and, later, in a federal court, in Huber, during the mid 1980s. In these cases the respective courts held that employees who were dismissed in the absence of a good-cause had available unjust dismissal remedies. Whereas in Cleary the contract specified an employment dispute resolution procedure, which implied the presence of a just-cause standard, these court decisions have rejected the need for such a contractual prerequisite. Giving one of the most extensive interpretations of the implied covenant, a California appeals court stated in Khanna v. Microdata Co. (1985), that dispute resolution procedures,
... are not the *sine qua non* to establishing a breach of the covenant of good faith and fair dealing implied in every employment contract ... To the contrary, a breach ... is established whenever the employer engages in bad faith action extraneous to the contract.

(Khanna v. Microdata Co., 170 Cal. App. 3d 250, at p. 262)

Having argued that the "original employment contract" was irrelevant with regard to good faith action, the court further concluded,\(^{28}\)

... a breach of the implied covenant of good faith and fair dealing in employment contracts is established whenever the employer engages in "bad faith action ... combined with the obligator's intent to frustrate the [employees] enjoyment of contract rights." [citations omitted]. The facts in Cleary establish only one manner among many by which the employer might violate this covenant.

(ditto, at p. 262)

Applying the doctrine established in Khanna, the appeals court for the 9th circuit extended the applicability of the good faith doctrine in *Huber v. Standard Insurance Co.* (1988).\(^{29}\) In Huber, the appeals court ruled that bad faith could be inferred merely from evidence that an employers' discontent with an employee was unfounded—or in other words that the employer lacked good-cause for termination.

Huber's basis for establishing his bad faith claim was to factually contest the employers reason for the discharge. The court decided that because Huber

presented affidavit evidence ... contradicting each of [the employer's] stated reasons for termination, Huber has raised genuine issues of material fact ... as to the existence of a prima facie case of breach of the covenant of good faith and fair dealing.

(*Huber v. Standard Insurance Co.*, 841 F. 2d, 9th Circuit)
In Huber, the federal court essentially interpreted earlier rulings of California courts, to mean that any termination of a non-union employee in California must have a just-cause basis or may be challenged by the employee.\textsuperscript{30} With Huber, the evolution of California's wrongful dismissal doctrines culminated in the equalization of the employment protection provided to non-union at-will employees, with the just-cause standard of the unionized workplace. In other words, in Huber, individual court action, at least in theory, secured rights similar to those created earlier within the framework of collective bargaining.

However there were several important differences. While the standard arbitral remedy under collective bargaining for a discharge not based on just-cause was reinstatement plus backpay for lost wages and benefits, non-union employees like Huber, could recover much more substantial damages in wrongful discharge tort action. Huber, taken at face value, therefore carried with it a greater level of deterrence against dismissing an employee unjustly than did the just-cause standards of the unionized workplace.

By contrast to the protection provided in the unionized workforce, the protection achieved through court action, however, was geographically restricted and legally unreliable. Geographically it was limited to those states which acknowledged most, or all of the exemptions granted by the California's courts (only the public policy doctrine has been adopted by a majority of US states). Within the geographical area where the California type exemptions were accepted,
the protection provided through the courts was less than reliable; firstly, because of the psychological and financial investment involved in a suit, and secondly, because of the unpredictability of the suit's outcome.

This latter point of unpredictability can be gauged looking at percentage of cases going actually to trial. Estimates have indicated that in California only approximately five percent of unjust discharge cases filed actually go to trial. This is only partly due to out of court settlements, as pretrial case rejections are typically more significant. Assuming that unjust discharge plaintiffs prevail in pretrial disposition, at the same rate at which they prevail at trial, only four percent of those who seek relief are able to obtain court action in their favor.31 Despite these low rates of trial court uptake, several attempts at curbing the expansion of unjust dismissal litigation were from the late 1980s onwards.

2. The State and Unjust Dismissal Litigation

By the late 1980s, several state legislatures had become aware that the litigation of state and federal courts had altered the legal interpretation of dismissals. The result was a series of initiatives to curb further litigation, which were advocated on several grounds, including firstly, high caseloads, and secondly, the potential negative economic impact of large awards for employees. Despite concerted attacks from various directions, the exceptions established
by the California and other state courts, proved remarkably resistant to change.

2.1 The Backlash: Foley, the Montana Statute, and the Uniform Termination Act

In the late 1980s, the California Supreme court took a deliberate step to halt a further expansion of dismissal suits, by adopting a tougher stance on wrongful discharge claims in its decisions on Foley v. Interactive Data Co. (1988). Despite premature predictions of a "death" of unjust dismissal litigation, this decision had surprisingly little impact on legal practices in California and other states.32

In Foley, the California supreme court affirmed all three exemptions from employment-at-will (i.e., the public policy, implied contract, and good faith exemptions) and then gave guidance as to what constituted a proper claim and proper remedies. Amongst other statements, the court concluded that a merely private purpose which served only the interests of the employer and employee, and not the public at large was inadequate to state a claim for breach of public policy. With regard to the implied covenant of good faith and fair dealing, the court concluded that it would continue to recognize it, but said that it would treat it as a contract claim consistent with traditional contract law analysis, rather than as an action in tort. Specifically the court declined to analogize the implied covenant in the employment setting, to the implied covenant in insurance contracts which gives rise to tort claims. According to the Foley court,
employers did not perform a quasi public function comparable to that of insurers (as a previous court decision had argued). Whereas the threat of tort action was necessary to protect the public from the inherent tension between the insured and the uninsured, the employment relationship did not require a tort context, as it involved processes of "mutual accommodation."³³

In a detailed review of the impact of Foley, the attorney Richard Moon (1990) concluded that despite the narrowing of the public policy exemption and the elimination of action in tort on other matters, Foley was unlikely to have any major impact on current litigation practices; a finding which he was able to confirm later on. Moon suggested that the implied contract, as well as good faith and fair dealing cases might become somewhat less lucrative in California. This, Moon suggested, would, however, merely encourage attorneys to represent higher paid employees with projected future losses of at least $150,000. If the number of employees seeking court action continued to increase, this restriction would have no effect on aggregate case numbers. More importantly, Moon suggested that California's temporary retreat from a further expansion of dismissal litigation, was in fact a boon to plaintiffs lawyer's in other states. He predicted that the court's exacting analysis in Foley would be used as a weapon to expand public policy and implied contract claims in other jurisdictions, where such issues were as yet unresolved.

In addition to challenges by the courts, there were several legislative attempts at curbing unjust dismissal litigation. These
challenges to the system of wrongful discharge litigation proved equally unsuccessful, both in California and elsewhere. Partially driven by concerns with the high cost of wrongful discharge suits, bills were introduced in the California and Michigan legislatures in 1984 and 1982 respectively, which provided general protection against unjust discharge. Under these bills all dismissals would have had to follow a just-cause standard, while the amount any employee would have been able to recover was to be restricted by law. In neither of these states--both pioneers of wrongful discharge legislation--did these bills or any similar successor bills come to pass, or were even close to doing so.

The first dismissal statute was passed by a small state, specifically the Montana legislature in 1987. The passage of this law, called the Montana Wrongful Discharge from Employment Act, was prompted by rather special circumstances. Between 1981 and 1986, a perhaps unusually large number of unjust dismissal suits, 182 in all, were filed in Billings, Montana. This flood of lawsuits was triggered by a downsizing effort in Montana's health and tourism industry. In a 1986 case, the Montana supreme court awarded its highest punitive damages ever, with $1.3 million going to an employee. Some months later the state court held that liability for wrongful discharge was not a "covered occurrence" under a general liability policy. Following complaints by employers, legislative committees heard testimony that liability insurance to cover wrongful discharge could not be easily purchased by Montana employers. Some employers claimed that they could face bankruptcy by reason of the expense of defending
such litigation. When the state supreme court widened its interpretation of wrongful discharge to require that employers must investigate claims on which dismissal are based, the legislature feared that a further wave of costly litigation would face employers and consecutively drafted and passed the Wrongful Discharge Act.

The act defined wrongful dismissals as a) cases where the dismissal was in retaliation for an employee's refusal to violate public policy of reporting such a violation; b) instances where the employee had completed her probationary period and there was no good cause for firing her; and c) cases where there was an express written personnel policy which did permit such a dismissal. Most importantly, the statute limited damages to four year's lost wages and required the employee to exhaust internal company appeals procedures. All common law claims were successively preempted by the new state-law. Due to its comparatively narrow definition of wrongful discharges (employees who cannot rely on an express statute in their public policy claim or merely exercise a legal right were excluded unless protected by federal statute) and its limit on damages, the act was welcomed by employers.

In 1989 the constitutionality of the act was challenged in *Meech v. Hillhaven West*, in which Montana's supreme court upheld the constitutionality of all its components; even though the act eliminated damages for wrongful discharge for pain, suffering, and emotional distress. This confirmation of the act led some observers to expect that similar legislation would be passed in other states.
Influenced by the Montana policy, the National Conference of Commissioners on State Laws, an association of high ranking civil servants, drafted and passed their Model Uniform Termination Act. The act was prompted by the belief that it was desirable to have uniformity regarding employees substantive rights and remedies. Concerns with the high case load of state courts due to wrongful discharge suits apparently also played a major role in this initiative. Less generous than the Montana statute, the Uniform Termination Act, from it inceptions, was severely criticized labor lawyers (see Appendix C for an excerpt from the Act). Mauk (1991) reports that employer associations were also critical of the act. Apparently support for the act came predominantly form the National Association's employee representatives, who described its passage as a big victory for unorganized labor. Management representatives had voiced strong criticism throughout the three year drafting period, but agreed to participate in order to "prevent worse." Contrary to the employers' criticisms, the National Association of Labor Lawyers critiqued the act for its loopholes and potential ineffectiveness. Its spokesman, Dr Rosen, suggested that employers could void coverage by treating an employee as independent contractor, by keeping an employee for some months at less than 20 hours per week, or by firing the employee before a year of employment had passed. Plaintiff's attorney Golden of Southfield (Michigan), similarly argued that the law was not intended to give rights to employees in states where they had none, but to neutralize employees where they do have some rights.
He predicted that the act would go nowhere in states where employees had already been given discharge litigation rights.

As yet only the state of South Dakota has adopted a similar statute and there are no indications for any future adoptions by other states. This has surprised most observers since in 1991, the Uniform Termination Act or similar legislation was pending in at least a dozen states, including California, Illinois, Michigan and also New York. The passage of these statutes, moreover, was assumed to have been given a boost with the Montana Supreme Court’s Meech decision (which upheld the constitutionality of the Montana act).

The reluctance of most state legislatures to adopt such acts has also debunked Alan Krueger’s premature statement of an “evolutionary theory of unjust dismissal legislation, in which employer groups, responding to the threat of large and variable damage awards, imposed by the judicial system, eventually support unjust dismissal legislation in order to clearly define property rights, reduce uncertainty, and limit employer liability” (see introduction). Perhaps most importantly the debate on the Uniform Act or similar statutes reflected a relatively stable preference of most state legislatures and judiciaries, for a flexible system in which compensatory and/or punitive damages are assigned according to the specific circumstances of a case, vis a vis the near flat-rate compensation of wrongfully discharged employees irrespective of the circumstances. It has also highlighted a preference of many employers
for a low-risk of high awards regime, as compared to the frequent assignment of less substantial payments to dismissed employees. While it is impossible to determine the precise motives for such a preference, it is reasonable to assume that it can, at least in part be explained by organizational factors rather than purely economic calculus. Managers may feel that the frequent payment of dismissal awards is detrimental to their authority, and hence prefer the current regime to a more predictable situation. Such an interpretation, at least, would be supported by the historical evidence on the contest over managerial prerogatives, discussed in the previous chapters.

2.2 Unjust Dismissal Litigation-Diffusion and Confirmation

The particular reluctance of most state legislatures to curb the expansion of unjust dismissal litigation, has encouraged additional state courts to adopt one or several of the existing exceptions from employment at-will. In many cases the adoption of an exemption doctrine has been triggered by a more or less spectacular case, in which the plaintiff's attorney convinced a state court to adopt a doctrine applied in another state to a similar case.

2.2.1 Geographic Diffusion and Conceptual Consolidation

Outside California, the legal possibilities of the Peterman decision, the first unjust dismissal suit, initially remained unexplored for some time. A similar decision to that in Peterman was first rendered by a Michigan Appeals court in 1978 in Trombetta v.
Detroit, Toledo, & Ironton Railroad; a case involving an employee who refused to falsify pollution reports. In 1973 the Indiana supreme court applied the public policy exemption, by ruling that it was wrongful to discharge a worker because she or he filed a worker's compensation claim in Frampton v. Central Indiana Gas Co. In 1977 the Massachusetts supreme court concluded that it was not only contrary to public policy to allow an employer to dismiss an employee for exercising rights created by law, but also to allow employers to terminate employees for exercising a private right spelled out in a company handbook (see Fortune v. National Cash Register Co.). One year earlier a Massachusetts court had held that, where an employer's conduct in discharging an employee was extreme and outrageous, the employee could recover damages for the employers intentional infliction of mental distress (see Agis v. Howard Johnson Co.). In 1980, New Jersey followed the California doctrine and ruled in favor of a drug company employee who objected to the submission of a drug for human testing, even though no explicit statute was available (see Pierce v. Orthopharmaceutical Co.). In the 1992 case of Wider v. Skala, finally the New York Supreme court condoned wrongful dismissal action for breach of contract in a case where no company handbook or other written evidence of a long term employment contract was available.

The cumulation of court decisions which suspended at-will rights has led to the recognition of specific exemptions from employment-at-will. Today US courts find dismissals unjust and/or award damages if, and only if the employee states a claim that her or his case falls
into an acknowledged exemption from employment-at-will. In other words, an employee can receive compensation if her or his dismissal falls under any of the three recognized categories of exemptions.

As yet the courts have--largely following the lead of California and Michigan and to a lesser degree Massachusetts--recognized three such exemptions.41 First, a dismissal is deemed unfair because the employer terminated the employee in violation of public policy: i.e., dismissed her or him because of a refusal to commit a criminal act on behalf of the employer, or reported a violation of federal, state, or professional regulations. A second possible exemption from employment-at-will arises from the fact that the employer's personnel policies, course of conduct, or oral promise created an implied contract for continued employment. Third, a claim for unfair dismissal may arise from an employer's breach of the covenant of good faith and fair dealing. (Outside California this doctrine has been applied almost exclusively to cases where employers dismissed workers in order to evade a pension, bonus or injury compensation payment, i.e., where evidence for employer opportunism exists).

2.2.2 Confirmation through Federal Courts

The expansion of unjust dismissal litigation discussed in the previous sections would not have been possible without the assent of the federal judiciary. In some cases the federal courts have extended the applicability of the state's legislation to actions in tort and/or added to the coverage of the doctrine.42 In the 1985 case of Andersen
v. E & J Gallo Winery, for instance, a district court, applying Connecticut's stringent whistleblower legislation, established the liability of the employer in tort.\textsuperscript{43} Similarly the appeals court for the 3rd circuit awarded punitive damages to an employee who was wrongfully discharged. In this case, Woodson v. AMF Leisureland Centers Inc. (1983), an employee was discharged after she refused to serve alcoholic beverages to intoxicated persons.\textsuperscript{44} The federal court concluded, that even though Pennsylvania law did not expressively forbid such conduct, the protection of the employee would not constitute an unwarranted extension of Pennsylvania law.

The key endorsement of whistleblower statutes and the public policy exemption from employment-at-will, however, came only recently from the Supreme Court itself. For the Supreme Court it was not so much the protection of the public which stood at the center of attention, but rather the question, which remedy, collective bargaining arrangements or a state whistleblower statute was to be applied to an employees wrongful dismissal. In the case of Hawaiian Airlines v. Grant T. Norris (decided June 20, 1994) the Supreme Court concluded that the Railroad Labor Act \textit{did not} preempt an aircraft mechanic's action for wrongful discharge.\textsuperscript{45} (note: apart form labor relations in the railroads, the RLA also covers employees of commercial airlines). The Hawaiian Airlines decision challenged and reversed a trend which had been established by the Supreme Court's Ingersoll Rand Co. v. McClendon as well as several Appeals Court decisions.\textsuperscript{46} In these, and earlier cases, the Supreme court had
consistently rejected the applicability of state wrongful discharge claims, if alternative remedies, particularly those based on federal statutes were available (the potential damage awards in such cases is typically much smaller than in state-law wrongful termination litigation).

In Ingersoll (decided December 9, 1990), for instance, the Supreme Court had held that an employers public policy action claiming that "the principal reason for his dismissal was the employer's desire to avoid contributing to or paying benefits under the employees pension fund", was preempted by ERISA (the Employer Retirement Income Security Act). The Court concluded that "ERISA's explicit language and its structure and purpose demonstrates congressional intent to preempt a state common law claims that an employee was unlawfully discharged to prevent his attainment of benefits under an ERISA secured plan." 47

Although a similar preemptive character could have been construed from the RLA, and indeed several federal courts had previously rejected wrongful discharge claims where other Acts specified remedies (such as Title 7 of the Civil Rights Act), the "Hawaiian Airlines" court considered the matter at hand too important to deny the employee common law action for wrongful discharge. 48

A brief look at the issue at stake in Hawaiian airlines will highlight the significance of this decision with regard to the evolution of the individual pathway to dismissal regulation
(particularly in comparison to the Vaca doctrine discussed at the end of chapter II). Mr Grant Norris, an aircraft mechanic, was employed by Hawaiian Airlines (HAL) in February of 1987. The terms of his employment were covered by a collective bargaining agreement (CBA) between the carrier and the machinist and aerospace worker's union (IAMAW). Mr Norris's mechanic's license authorized him to approve an airplane and return it into service after he made, supervised, or inspected, what he deemed to be necessary repairs. In July 1987, Mr Norris refused to certify a maintenance record. (Note: according to FAA regulations, the license of a mechanic who approves any aircraft on which repairs do not conform to FAA safety standards, can be revoked). As a consequence, the supervisor suspended Norris pending a termination hearing. Mr Norris reported the incident immediately to the Federal Aviation Authority. Two weeks following the incident, a Step-1 grievance hearing was held as specified in the collective bargaining agreement. At the end of the meeting, the hearing officer terminated Mr Norris for insubordination. Conforming to CBA procedures Norris appealed the decision and sought a Step-3 grievance hearing. Before the second hearing took place, HAL offered to suspend Norris for an unspecified time without pay, but warned him that any further action of this kind would result in his immediate discharge.}

In December 1987 Mr Norris filed suit against HAL. His complaint included a claim for wrongful-discharge and torts-discharge in violation of the public policy expressed in the Federal Aviation Act, and dismissal in violation of Hawaii's whistleblower act. HAL removed the action to the district court for the district of Hawaii which
dismissed both wrongful discharge claims as preempted by the Railroad Labor Act. A second suit filed with a state court (naming as defendants the three HAL officers who had directed the discharge) was dismissed by a Hawaii trial court, again on grounds that is was preempted by RLA. Mr Norris suit was then upheld by the supreme court of the state of Hawaii.\textsuperscript{50}

Contrary to expectations by HAL and others, that the Supreme Court would hold this claim preempted by the Railroad Labor Act, an unanimous court held that neither the RLA nor the collective bargaining agreement preempted state law causes of action on wrongful discharge.\textsuperscript{51} Justice Blackmun stated with regard to the latter issue that "the most natural reading of the term 'grievances' in this context is as a synonym for disputes involving the application or interpretation of a collective bargaining agreement."\textsuperscript{52} Since procedures regarding whistleblowing were not and could not legally be a part of collective bargaining agreements, requirements to use grievance could not be imposed on a whistleblower, and neither could her or his claims be relegated to collective, compulsory arbitration.\textsuperscript{53} With that, justice Blackmun established, that the just-cause standard typical of collective bargaining agreements, could not be interpreted so as to preclude common law actions of whistleblower.\textsuperscript{54} (See chapter II, on the notion of a primacy of arbitration and collective bargaining over individual dismissal rights, as established in \textit{Vaca v. Sipes} and the earlier cases of \textit{Union News Co v. Hildreth, Simmons v. Union News Co}).
As to the second issue, namely whether the plaintiff was required to exhaust arbitral remedies under the RLA, justice Blackmun concluded—in a potentially pathbreaking analysis—that the CBA was not the principal source of respondent's right not to be wrongfully discharged. Contrary to previous interpretations which suggested that grievance procedures had to be exhausted before court action could be sought, and/or that union and employees were jointly liable with regard to the employee's just-cause rights, Blackmun established a direct legal liability of the employer with regard to a wrongful discharge. He explained,\(^5\)

... the CBA is not the only source of respondent's right not to be discharged wrongfully. In fact, the only source of the right respondent asserts in this action is state law tort. Wholly apart from any provisions of the CBA, petitioners [meaning the employer] had a state law obligation not to fire respondent in violation of public policy or in retaliation for whistleblowing. The parties' obligation under RLA to arbitrate disputes arising out of the application or interpretation of the CBA did not relieve petitioners of this duty.

(Hawaiian Airlines Inc. v. Grant T. Norris, sec. II C, emphasis added)

In Blackmun's view, it was unacceptable to allow a wrongfully discharging employer to hide behind a collective bargaining agreement. Employers, in his view, were directly and exclusively responsible not to discharge wrongfully, both to the respective employee and the state.

2.2.3 Removing Collective Barriers to Dismissal Litigation

The crucial element in Blackmun's analysis was the notion that an employer was obligated by law not to fire an employee in violation
of public policy. By stressing the singular obligation of the employer with regard to these individual employment rights, Blackmun's analysis in part reversed older notions of a joint liability of employer and union for the implementation of the just-cause standard as established in Bowen v. U.S. Postal Service. (See chapter II, on the notion of a dual liability of employer and union to the employee with regard to just-cause standards as established in Bowen and consecutive cases). In Blackmun's view such a joint liability did not apply to instances of wrongful discharge and whistleblowing, and neither did the obligation of the employee to exhaust grievance remedies. (As established earlier in Vaca v. Sipes).

Citing the 1988 case of Lingle v. Norge Division of Magic Chef Inc., Blackmun suggested a fundamental difference between contractual claims and state or common law dependent claims. According to Blackmun's analysis, a state-law retaliatory discharge claim required the court to interpret factual issues of whether the employer discharged unfairly under the respective doctrine of wrongful discharge. Said Blackmun,

It is observed, however, that--purely factual questions about an employee's conduct or an employer's conduct and motives do not require a court to interpret any term of a collective bargaining agreement ... The state law retaliatory discharge claim turned on just this sort of purely factual question: whether the employee was discharged or threatened with discharge, and if so, whether the employer's motive in discharging him was to deter or interfere with his exercise of rights....

(ditto, section II D)
As to the interaction of federal law (such as the NLRA and the RLA) and state wrongful discharge claims, Blackmun further concluded that,\textsuperscript{61}

For while there may be instances in which the National Labor Relations Act preempts state law on the subject matter of the law in question, ... preemption merely ensures that federal law will be the basis for interpreting collective bargaining agreements, and says nothing about the substantive rights a state might provide to workers ... In other words, even if dispute resolution pursuant to a collective bargaining agreement, on the one hand, and state law on the other, would require addressing precisely the same facts, as long as the state law claims can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for preemption purposes.\textsuperscript{62}

(ditto, section II-D)

Although the latter qualification of "as long as the state law claims can be resolved without interpreting the agreement itself" may be somewhat ambiguous, Blackmun's analysis generally suggests that in principle a state-law discharge claim should be upheld. This, according to Blackmun, was necessary because "state tort claims ... require only the factual inquiry into any retaliatory motive of the employer."

Although speculations about motives in this case are difficult, it is likely that the Hawaiian Airlines decision, as well as the Supreme Court's earlier Lingle decision, were motivated by a desire to eliminate the barriers to wrongful discharge litigation facing union members.\textsuperscript{62} An equalization of the remedies available to union workers with those available to non-unionized workers would appear desirable, given that union workers are paradoxically not protected by any of the wrongful termination theories. Most importantly, the remedies of
union workers are usually limited to reinstatement and back pay 
(rather than the often substantial awards involved in wrongful 
discharge suits). Together with the Lingle decision, the Hawaiian 
Airline decision hence may well herald a change in the Supreme courts 
understanding of the employment relationship in the unionized 
workplace, necessitated by advances of individual employment rights 
which primarily took place in a non-union environment. In any case 
the Supreme Court's HAL decision represents a strong endorsement of the 
public policy exemption in unjust dismissal litigation, which in some 
sense, marks the victory of an individual rights view of dismissals, 
over earlier doctrines of collective (CBA based) dismissal regulation.

2.2.4 Implied Contract and the Federal Courts

In cases involving oral and written promises of job security, 
the federal courts correspondingly have tended to support and, in some 
cases, extend the state courts' implied contract exemptions from 
employment-at-will. In one of the earliest applications of the 
implied contract doctrine, the case of Perry v. Sinderman (1972), the 
Supreme court ruled that a college's de facto tenure policy had arisen 
from officially promulgated customs, even though no explicit rules for 
tenure existed. The college's customs, according to the Supreme 
court's interpretation, created legitimate reliance and property 
interest in continued employment amongst junior college professors. 
In Gorril v. Iclandair (1985), the appeals court for the 2nd circuit 
similarly affirmed the implied contract doctrine, when it decided that 
an operations manual barred the company from terminating senior
American airline pilots in favor of junior pilots and engineers of Icelandic and Bahamian origin. These, and several other decisions indicate, that despite the vagaries of judicial appointments in higher federal courts, and the appointment of 130 federal district judges (a majority) by the Reagan administration, the federal courts have presented no effective obstacles to expansion of unjust dismissal litigation (which should not suggest that there was bipartisan support for wrongful discharge litigation).

2.3 Political Confirmation: Discharge Protection in Federal Acts—The Example of the False Claims Act

In addition to case law, federal statutes have increasingly become a source of protection for employees seeking legal redress for their discharge. Today, many federal statutes provide varying degrees of dismissal protection. The fifteen federal acts which provide for the protection of the employee from unjust discharge fall into three main categories, a) those that relate to collective bargaining, b) those related to the reporting of violations, and c) those related to discrimination based on sex, race, color, age, and national origin. While not necessarily following a clear pattern, the level and detail of measures intended to protect employees from unjust discharge in federal statutes on the whole seems to have increased with time, with most acts being amended with regard to discharge protection from the mid to late 1970s onwards.
A particularly interesting endorsement of at-will exemptions, has been given in the 1986 amendments to the False Claims Act, which provides extensive whistleblower protection to those testifying under that Act. The Act's amendments follow roughly the measures of whistleblower protection applied in ERISA and many state workmen's compensation acts, but allow for vastly greater incentives to the whistleblower. In essence, the amended federal False Claims Act provides that, in addition to being awarded a substantial percentage of the sum recovered, the whistleblower—in case of the statute one reporting a fraudulent claim against the US government—shall be made whole if he/she is discharged, demoted, or harassed in any way. The 1986 amendment states specifically,

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms or conditions of employment by his or her employer because of a lawful act done by the employee, on behalf of the employee, or others in furtherance of an action under this section, including investigation for, initiation of, testimony for or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs, and reasonable attorneys' fees. An employee may bring an action in the appropriate district of the United States for the relief provided in this subsection.

(False Claims Act, 31 U.S.C. sections 3729-3732)

While litigation under the federal False Claims Act has increased substantially, the act plays a comparatively small role in the area of whistleblower protection. What makes the act attractive is the size of the awards typically involved in proceedings under that act. Prior to the 1986 amendments to the False Claims Act, the Justice Department
used to get about 6 qui tam actions per year (i.e., actions under the Act). During the first 10 months to 1989 the Justice Department received about 100 qui tam actions. Six months prior to the enactment of the amendment, the Justice department spent about 1,100 hours on qui tam litigation, but during a 6-month period in 1989, the Justice Department spent about 11,000 hours on qui tam cases. Between 1990 and 1991 qui tam litigation has increased again by approximately 300%.

Preliminary evidence suggests that litigation under the act is likely to increase substantially over the next ten years. As in the case of dismissal litigation in general, this is largely due to the exceptionally large awards typically involved in these cases. In 1992, a private attorney testified that his firm was involved in settlement negotiations for two qui tam actions. In these two actions, the plaintiff--i.e., the respective government department--had received offers to settle the two cases amounting to almost $100 million. If settlement occurs at this level, the whistleblower involved is likely to receive anywhere between $15 and $30 million.67

The False Claims Act, like several other federal statutes, is not primarily aimed at protecting individuals from dismissals. The act, and particularly its 1986 amendments, were established to protect the government from fraud, to which the protection of the whistleblower was merely instrumental. Action under the act is limited to those instances of whistleblowing which disclose a firm's fraudulent act against the federal government. More important than its contribution to the restriction of unfair dismissals restriction, therefore, is its
role in acknowledging the need that employees are vulnerable and must be protected by law, if fraudulent and criminal acts are to be uncovered. That such an amendment was passed in 1987, indicates, albeit on a limited scale, an increasingly widespread understanding that goals public policy goals and the unconstrained dismissal of employees are incompatible. Perhaps more importantly it highlights the contradictions evolving from a legal system which guards managerial prerogatives and simultaneously seeks to protect the public and the state from fraud.

3.Demand Factors in the Spread of Dismissal Litigation

The increased prominence and frequency of unjust dismissal suits was not driven by an expansive applications of the doctrine by state and federal courts alone. A major contributor to the spread of wrongful discharge litigation has been the increased demand by employees to challenge discharges and to call for protection through the courts. This increased demand for individual protection from dismissals can be attributed to several factors. Firstly, during the 1980s, the US saw a general rise in litigiousness, manifest especially in consumer litigation, personal injury litigation, and landlord-tenant suits. Several observers have therefore speculated that the boon in dismissal litigation was due to spillover effects from these types of litigation to labor issues. Secondly, there is evidence, that corporate restructuring, mergers, and takeovers, have resulted in a greater uncertainty about jobs, especially amongst management level employees. Since these employees are particularly knowledgeable about
their legal options, the wave of corporate restructuring during the late 1980s and early 1990s, may well have contributed to an increase in dismissal litigation.69

A final--and perhaps the most important--factor in the emergence of unjust dismissal litigation has been the accelerated decline in unionization in the early eighties, which reduced collectively bargained dismissal protection for many employees and encouraged them to seek recourse in court action. Kornblau (1987) and Mendelsohn (1990) suggest that the diminished availability of arbitral remedies under collective bargaining, has encouraged judges to grant exemptions from employment-at-will.70 Equally plausible is, of course, that employees who did not have available arbitral remedies, were increasingly likely to seek recourse in the courts. The AFL-CIO's open support for a general dismissal standard (see introduction) dramatically illustrates the realization amongst unions that collective bargaining can no longer provide adequate dismissal protection for workers.71 This sea-change should not be undervalued, since AFL-CIO unions drew strength from the just-cause provisions of collective bargaining agreements, and were reluctant to advocate the extension of such protection to the workforce as a whole.72

Taken together, several factors point to a situation where employees have become increasingly aware of their individual employment rights, while the collective pathways to dismissal protection has lost prominence. This poses two critical questions. First, if employees increasingly rely on typically state-level
wrongful discharge litigation, it is important to know whether legislatures will accommodate these demands in the future. The latter question, is particularly hard to answer. Both state and federal authorities might become increasingly reluctant to support such claims when facing simultaneously increasing case loads, budget cuts and popular demands for less government interference. (We will not discuss this issue as it requires a legislative analysis which is beyond scope of this analysis). Secondly, and perhaps even more difficult to answer is the question, whether individual dismissal litigation, has a significant impact on the number and type of employment terminations conducted by employers. (We will address this issue in the next chapter, as well as the concluding section of this chapter).

4. Deterrence and the Level of Awards

Many of the conventional assumptions about the impact of unjust dismissal litigation are related to the spread of exemptions allowing these suits, as well as the level of awards granted by them. Today the acceptance of wrongful discharge exemptions is widespread. A majority of US state courts and legislatures prohibit the discharge of workers who publicize misconduct on the part of their employer or other employees (whistleblowing), refuse to commit illegal or unethical acts, and/or insisted on their legal rights.73 In 1990 the courts of 39 states recognized one of the three exemptions from employment-at-will.74 A total of 37 states recognized the public policy exemptions which protects whistleblowers (making this the most
widely recognized exemption), 31 states recognized the implied contract exemption, and 7 states the good faith exemptions. These exemptions have been granted irrespective of older statutes that codify the at-will rule, which are in force in California, New York, Georgia, Louisiana, Montana, North Dakota and South Dakota. With the exception of Georgia and Louisiana, all of these "at-will" states had adopted one or another exemption from employment at-will before 1990s.

Wrongful dismissal suits alleging any of these three exemptions or combinations thereof have been successfully filed against large multinational firms, small local companies, and public employers. Typically, the plaintiffs are individual employees who are generally not represented by unions. Workers from all levels have filed unjust dismissal suits. But, according to several analyses, supervisory and managerial employees in service occupations and the service industries seem to be somewhat overrepresented.

The plaintiffs are typically represented by private attorneys who work on a contingent fee basis; that is, the attorney is compensated by a percentage of the award, and remains uncompensated if the lawsuit fails. Because attorneys' risks in accepting a contingency fee remuneration are higher than in conventional law suits, the typical compensation rates of contingency contracts substantially exceed the payments involved in conventional fee-for-service contracts. Employees, in turn, appear more willing to enter a suit as the risk of paying high legal fees for an unsuccessful lawsuit is eliminated. The
labor law expert Lewis Maltby has estimated that in 1987 approximately 1,240 unjust discharges cases were filed in California alone.\textsuperscript{78}

A study by the Rand corporation estimated average legal fees charged by defense attorneys at $80,073, and the median at $65,000, with record fees exceeding the half million dollar mark. A recent analysis has suggested that, given a fee and cost of $175 per hour and a approximate workload of 200 hours, amounting to $35,000 in total costs, lawyers should not take on contingency contracts in which a recovery of at least $50,000 is not possible.\textsuperscript{79}

Several surveys have noted that unjust dismissal suits are characterized by high plaintiff success rates and exceptionally sizable awards to employees. \textit{Jury Verdicts Weekly}, for instance, reported that during the period from October 1981 to November 1987 the plaintiffs prevailed in almost 66\% of all wrongful discharge suits tried before California juries.\textsuperscript{80} F. Brown's unpublished survey (\textit{Summary of Wrongful Discharge Cases which Concluded with a Jury Verdict}) compiled from \textit{Jury Verdicts Weekly} (1988) estimated awards for the period between October 1981 to November 1987. Brown notes that total awards exceeded the defendant's, or the company's last offer by 1,497\% and exceeded the settlement demands of the employees by 187\% on average. The plaintiff's settlement demands ranged from $5,875,000 to zero; the settlement offers ranged from $760,000 to zero; and the verdicts from $8,000,000 to zero. (Recently several cases were recorded in which awards exceeded the $8 million mark, such as the $10.29 million case against WD-40. The highest ever recorded
award for unjust dismissal stands at $69.5 million. This award, however was not based purely on common law action). The mean compensatory and punitive damages, amounted to about $630,000, and the median award was $60,000 (this difference between mean and media, of course, is due to some exceptionally high awards). An estimate by the California Employer Association for the years 1994/95 yielded a lower appraisal of the average awards of wrongful discharge settlement at about $440,000. While this might reflect an actual decrease in awards, the lower figure may be also be due to the exclusion of cases with high punitive awards which the CAE ignored in its calculations. 81

These figures indicate that unjust dismissal suits can be lucrative for both the employee and attorney. Just how lucrative is illustrated by the following calculation which has appeared on the Legal Mall of the Internet. Assume that a middle manager, age 40, earning $100,000 per year was improperly terminated. He/she could claim 25 years at $100,000 minimum, or accounting for inflation $100,000 in year 1 and approximately $400,000 in year 25. This would average at about $250,000 annually or a total of $6,250,000 in total salary losses. If successful, a jury would typically also add attorney's fees and costs, but make a deduction for the right of receiving this income now. Income taxes would ordinarily not be deducted because the employee would still have to apply on the settlement in many instances. The defendant would be arguing that in 25 years the plaintiff should get a job, and that perhaps 2 years would be an appropriate time in which the plaintiff should find reemploy, yielding a sum of about $250,000, all factors taken into
account. At this stage arguments about how much damage had been done to the employee's reputation, emotional state, etc., would have to be heard. If the jury settled in somewhere in the middle, the award would amount to somewhere around 2.5 million, if it were to settled at the lower end, the manager could still receive in excess $200,000.82

5. Conclusion: The Question of Impact

By the 1990s, two pathways to limited dismissal protection have crystallized in the US; a collective pathway implemented through collective bargaining, and a individual pathway, which relies heavily on private litigation. On the one hand, some dismissal protection is available in the context of collective bargaining. The influence of unions on matters of partial plant closings or other similar forms of redundancies has been restricted severely by the courts, but this does not rule out the possibility that unions can offer arrangements which induce employers to set aside their original redundancy and investment decisions.83 In the context of individual dismissals, unions meanwhile maintain some control over termination decisions through the implementation of the just-cause standard and the grievance arbitration system.

On the other hand, the courts of several states have increasingly come to suspend the at-will status of employees, allowing individual employees to sue for unjust dismissal. Ultimately, the effects of this pathway to dismissal protection are difficult to judge. Except in isolated decisions, such as the California case of Huber,
exemptions from at-will employment hardly reach the stringency of a just-cause standard. Perhaps more importantly, despite evidence about the exceptional size of awards to plaintiffs and the high success rates of unjust dismissal suits, it is unclear whether the threat of these suits create a deterrence effect to employers. Whereas studies of the 1970s and 1980s identified a reduction of planned dismissals due to grievance arbitration, no comparable evidence on private unjust dismissal litigation is as yet available. An award of $60,000, the median identified in Brown's survey, evidently would not have a substantial impact on a medium service sector firm with typical profits in excess of $5 million (where it would amount to 1.2% of the profits). Since most companies, willing to do so, should be able to settle out of court, the high awards reported in many jury trials, should be the exception rather than the rule. Where the threat of dismissal suits is substantial and frequent, we should moreover expect a company to devise counter strategies. The next chapter will address question of the compatibility and effectiveness in this divided political economy of dismissal. Specifically, I will investigate what the impact of unjust dismissal litigation on the likelihood of termination is, and how this experience compares to the effects of collective job protection as exemplified by the period of concession bargaining during the 1980s.
NOTES:

1. See, e.g., William B. Gould, supra note II-19. Gould emphasizes the more advanced nature of European discharge legislation and criticizes Chicago-School economists, who assume that higher unemployment rates in Europe are attributable to European dismissal and plant closing laws. Rather than advocating the adoption of European type legislation in the US, which Gould deems unrealistic, he proposes a system of compulsory arbitration.

2. See Grenig, supra note I-70, at p. 569, and Mendelsohn, supra note i-8.

3. The recent reluctance of US state and federal courts to apply traditional notions of at-will employment can also be interpreted as part of a larger movement of American jurisprudence from a predominantly contractual to predominantly fiduciary system. In Jethro Lieberman's model (see his Litigious Society, 1981) of a contractual versus fiduciary legal system, two fundamentally different forms of jurisprudence are distinguished: the former applying essentially to the prewar period and the latter evolving after WWII. The contractual model assigns rights and duties contractually. As such, rights are explicit and specific, and a judge is expected to adjudicate individual disputes on the basis of clear and unambiguous rules. The unadulterated at-will right of the employer represents such an unambiguous definition of rights. The key characteristic of the contractual model, as implemented in employment-at-will, is that the individual has a right because a specific contract-like agreements exist between two or more parties. Under the fiduciary model, by contrast, rights are based on trust and confidence among the parties. Because they are established by vague standards of care and potentially ill-defined standards of trust, they must be inferred from the fiduciary relationship between litigants or between the state and its citizens. Fiduciary jurisprudence has been characterized by legislation that assigns a standard of care rather than establishing specific obligations, and by judicial policies that balance between rights and obligation, rather than specify such a balance contractually. Exemptions based on public policy criteria or notions of implied contract and good faith exemplify fiduciary elements, just as the at-will doctrine is a representation of contractual jurisprudence. See Jethro Lieberman, The Litigious Society (New York: Basic Books, 1981).


5. Id. at p. 188-189.


7. Id.

8. Sloane v. Southern California Railroad Co., 111 Cal. 668, 44 p. 320 (1896). See also more recent cases confirming the Sloane judgement: Jones v. Kelly, 208 Cal. 251, 254, 28- P. 942 (1929); Eads

10. Tameny, supra note 6.


12. Id. at p. 1166.

13. See Tameny, supra note 6, and more recent cases outside California including: Sabine Pilots Assn. v. Hank, 689 S.W. 2d 733 (Tex. 1985) which involved the termination of an employee who refused to pump bilges at a place that was prohibited by federal law; and Suchodolski v. Michigan Consolidated Gas Co., 316 N.W. 2d 710 (Mich. 1982) which involved the wrongful discharge of an employee based on a code of ethics for internal auditors which, according to the court's judgement, did not represent a clear public policy.

14. See Peterman, supra note 4, and the non-California cases of Palmeteer v. International Harvester Co., 421 N.E. 2d 876 (Ill. 1981) which, like Peterman, involved the wrongful termination of an employee who refused to perjure himself on behalf of his employer; Wiskotoni v. Michigan National Bank West, 716 F. 2d 38 (6th Cir. 1983) which involved the wrongful discharge of an employee who correctly submitted subpoenaed material to a grand jury.


19. Id. 188 Cal. App. 3d at p. 1441.
20. *Id.* 188 Cal. App. 3d at p. 1444.


23. *Id.* 171 Cal. Rptr. 925-926.


27. *Id.* at p. 262.

28. *Id.* at p. 262.


33. Moon, supra note 30, at p. 7-2, and pp. 7-9 to 7-15. The Foley court's stance on the implied covenant cited here is interesting for several reasons. The court gives an implicit analysis of modifications of the employment contract affected by previous wrongful discharge decisions. According to the Foley court, previous judgments on the implied covenant have assigned the employment contract a status similar to an insurance contract. In doing so, it forced the employer to perform quasi "public responsibilities" which required her to act fairly under the threat of tort action. Feeling that too much burden is imposed on the employer under this doctrine, the Foley court adopts a distinctly Austrian interpretation of the employment contract. In this interpretation conditions of employment are not subject to a rigid interpretation of the contract, meant to protect the employee primarily, but rather to processes of flexible negotiation. The employment contract as is, merely provides a framework to this process of negotiation. When action against the employer arises, it should merely serve to restore the integrity of the contract, rather than penalizing one or the other party.


40. See Wider v. Skala, 80 N.Y. 2d 628 (1992). The circumstances of the Wider case are worth mentioning in this context, primarily because Wider presents a novel interpretation of the notion of "implied contract" constructed not out of the employment contract but external obligations. Mr Wider was employed as a commercial litigation attorney with defendant's law firm from June 1986 until March 1988. In September 1987, Wider complained about the illegal conduct of an employee of the firm to his senior partners and asked them to report the issue to the Appeals Division Disciplinary Committee as required by the Professional Responsibility Association of the Bar of New York. Wider withdrew his complaint to the bar because the firm indicated that it would discharge him if he reported the misconduct of his fellow employee. Thereafter the two senior partners berated the plaintiff for having caused them to report the misconduct. The firm nevertheless employed him because he was in charge of handling the firm's most important litigation. Mr Wider was discharged a few days after he filed motion papers in that important case. The court found no support for a public policy claim, concluding that the whistleblower law of the state was not applicable, and that no evidence for an implied contract could be found in a company handbook. The court, then found that in any hiring of an attorney, there is an implied understanding so fundamental to the relationship, as to require no expression. This understanding is that the firm's conduct will be in accordance with the ethical standards of the profession. Given that an attorney could face disbarment if he failed with the state's reporting requirement, the court stated that by insisting that the employee disregard the misconduct of another employee, the firm made his further employment impossible. Concluding that Mr Wider had stated "a valid claim for breach of contract based on an implied-law obligation" the court reversed a previous judgement and granted Wider relief.

The implication of the Wider case are striking: if other states or cases were to follow the Wider decision, a wrongful discharge based on an implied contract breach could be declared a public policy exemption.
41. The legal literature as yet does not completely concur in the classification of exemptions, although the categorization of exemptions under the topics public policy, implied contract, and good faith, seems to be the most frequently used. The trend to distinguish three groups of exemptions has been strengthened by many court decisions which held other claims, such as those based on discrimination, preempted by other statutes, like state human rights acts, Title VII of the Civil Rights act, or other federal acts, including the Employment Retirement Income Security Act (ERISA). For a summary of the above classifications see, e.g., Mendelsohn, supra note 1-8 at pp. 4-10; Richard G. Moon, "Wrongful Termination--New Claims and New Theories for Plaintiffs and Defendants," pp. 9-1 to 9-31 in Labor Law Developments 1988 (Washington: Bureau of National Affairs, 1989); D. A. McWhirter, Your Rights at Work (New York: Wiley, 1989) at pp. 59-42.

42. There are, of course, also cases in which federal courts have proven unsympathetic to wrongful discharge claims. In Pease v., Pakhoed Co., U.S. 5th Circuit Court of Appeals, Docket 91-2798 (decided Jan, 1993), the Appeals court rejected an employee's wrongful discharge claim because "his pleadings continually fail to reference the specific criminal laws that he alleges Pakhoed directed him to violate." Mr Pease was hired by Pakhoed in 1975, and advanced quickly through a series of promotions to managerial status. He alleged that he was demoted and ultimately dismissed in 1988 because he refused to participate in a fraudulent scheme proposed by his supervisors. The US district court for the Southern District of Texas decided against Mr Pease, a decision which was consecutively upheld by the Appeals court. Both courts held that an employee needed to demonstrate that he was forced to commit specific criminal acts, in order for a dismissal to be considered to be wrongful. The Pease decision reflected an unusually narrow understanding of a public policy claim, particularly in light of the decision of State courts in California and elsewhere.

43. See Andersen v. E & J Gallo Winery, 1 IER cases 1207 (DC Conn. 1985).

44. See Woodson v. AMF Leisureland Centers Inc., 3 IER Cases, 836 (3rd Circuit, 1988).

45. See Hawaiian Airlines, Inc. v. Norris; on writ of certiorari to the supreme court of Hawaii; No. 92-2058 (argued April 28, 1994-Decided June 20, 1994) syllabus and opinion available on the Internet, vide Internet, Legal Resources, Cornell University Law School.

46. See Ingersoll-Rand Co v. McClendon; on writ of certiorari to the supreme court of Texas; No. 89-1298 (argued October 9, 1990-Decided December 3, 1990, 1994) syllabus and opinions available on the Internet, vide Internet, Legal Resources, Cornell University Law School. The Supreme Court's stance in Hawaiian Airlines reverses several appeals court and district court decisions. In Medrano v. Excel Co., U.S. 5th Circuit Court of Appeals Docket 91-7385 (decided March 9, 1993), the appeals court ruled that an employee's claim for retaliatory discharge was preempted by the collective bargaining agreement. Mr Medrano was employed as a butcher at Excel's meat packing plant in Texas in June 1989. During his work Mr MeCrano
suffered injuries which made it impossible for him to work for most of 1990. Following his return to work one month later, Medrano was informed that Excel had no jobs available to accommodate his medical restrictions. In a jury trial, the District Court for the Northern District of Texas awarded Mr Medrano $60,000. The Appeals court reversed the decision, ruling in favour of Excel.

47. Id. syllabus, at p. 1.

48. See, e.g., the federal cases of Salazar v. Farr's, Inc., 629 F. Supp. 1403 (D.N.M. 1986) in which the court held that ERISA preempts employee' wrongful discharge claim; Greene v. Union Mutual Life Inc. Co., 623 F. Supp. 295 (Me. 1985) in which the state human rights act was held to be the exclusive remedy for an age discrimination based discharge; D'Amato v. Wisconsin Gas, 760 F. 2d 1474 (7th Cir. 1985) in which a wrongful discharge claim based on handicap discrimination was held to be preempted by state law.

There are several exceptions to this rule even amongst early cases. This was particularly the case when the act or refusal to act involved was not directly found in a statute or regulation. See e. g. Novosel v. Nationwide Insurance Co., 721 F. 2d 894 (3rd Cir. 1983) which involved the termination of an employee who refused to lobby for employer desired state legislation. The Novosel court held that the employee had a public policy exemption claim based on his first amendment rights. See also Kelsy v. Motorola Inc., 1384 N. E. 2d 353 (Ill. 1978) in which an exemption was granted to an employee who was discharged for seeking workers' compensation; and Monoidis v. Cook, 794 A. 2d 212 (MD, 1985) in which public policy was violated in the dismissal of an employee who refused to take a polygraph test.

49. This summary follows the case summary given in justice Blackmun's opinion. See Hawaiian Airlines, opinion, supra note 45, section I.

50. The analysis of Hawaii's supreme court was essentially identical to that of the US Supreme Court which upheld the Hawaiian decision. See Norris v. Finazzo, 74 Haw. 235, 842 P. 2d 634 (1992); Norris v. Hawaiian Airlines, Inc., 74 Haw. 648, 847 P. 2d 634 (1993) both of which were consolidated in the US Supreme Court's certiorari. The Hawaiian court, like the Supreme Court, based its decision primarily on Lingle, infra note 59. Blackmun's opinion however stressed the notion of a paramount employer obligation not to fire and/or retaliate unjustly more strongly than any previous decisions. See infra note 53, for a more detailed examination of the significance of Blackmun's opinion.

51. Some union sponsored literature which was temporarily available on the Internet suggested that Hawaiian Airlines (HAL) received support for its appeal to the Supreme Court from numerous carriers, who wanted to prevent a future wave of costly wrongful discharge litigation, particularly in the context of public policy claims.

52. See Hawaiian Airlines, supra note 45, opinion, section II B. It is important to remember that the classical industrial relations literature typically disfavored the imposition of any outside standards on the collective bargaining apparatus. Shulman, for instance argued that the "law to be applied is the set of rules the
parties have negotiated. There is no room for outside considerations such as public interest or good faith." See Shulman, supra note I-99.

53. The significance of the Hawaiian Airlines Decision (as well as that of the Supreme Court's earlier Lingle decision, see infra note 59) has not yet been fully explored in the literature. Preliminary analysis of the Lingle case—in which a worker's wrongful discharge claim was held not to be preempted by the workmen's compensation act—suggested that this ruling was likely to encourage unionized workers to file wrongful termination suit based on public policy. The broader stance taken in the Hawaiian Airlines decision, could be taken as an indication of the court's desire to equalize the dismissal rights of union and non-union workers. Up until Lingle and Hawaiian Airlines, unionized workers were generally not covered by any of the wrongful termination theories, and the remedies of workers were usually limited to reinstatement and back pay.

54. See Vaca v. Sipes, 386 US, 87 S.Ct. 903, 17 L. Ed. 2d 842 (1967) and also the earlier cases leading to this decision, including Union News Co. v. Hildreth, 295 F. 2d 658 (6th Cir. 1962); and Simmons v. Union News Co., 382 U.S. 86 S.Ct. 165, 15 L. Ed. 2d 125 (1965). The assumption of a preemption of wrongful discharge action through CBAs was made, more or less explicitly, by most court decisions following Vaca v. Sipes. In the Supreme Court's Vaca ruling, Justice White had stated that "[I]f the wrongfully discharged employee himself resorts to the courts before grievance procedures have been fully exhausted, the employer may well defend on the ground that the exclusive remedies provided in the contract have not been exhausted ... For this reason it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement ..." Justice Black condemned compulsory arbitration and argued that a previous exhaustion of remedies was necessary because, "If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employers' confidence in the unions' authority and returning the individual to the vagaries of independent and unsystematic negotiation. Moreover under such a rule, a significantly greater number of grievances would proceed."

The Hawaiian Airlines (HAL) decision takes a diametrically opposed view, at least for the context of public policy exemptions. The HAL court concludes grievance remedies need not be exhausted before state law remedies on wrongful discharge are sought, and that the grievance should not impede such an action.

55. See Hawaiian Airlines, supra note 45, opinion, section II B and C. Again, the significance of this part of Blackmun's ruling has not yet been debated in the literature. It seems that Blackmun wanted to establish an independent common law obligation of employers not to discharge in violation of public policy. This obligation is autonomous from bargaining agreements and applies to union and non-union workers to the same degree. Additional obligations arising from the just-cause standard would then be shared by the employer and the union. Such an interpretation would be in line with Blackmun's partial dissent in Bowen v. United States, in which Blackmun stated concerns that arrangement arising from Vaca v. Sipes would limit individual access to dismissal litigation.
56. See Hawaiian Airlines, supra note 45, opinion, section II C.

57. See Bowen v. U.S. Postal Service, 459 U.S. 212, 103 S. Ct. 588, 74 L. Ed. 2d 402 (1983); and also Vaca v. Sipes, 386 US, 87 S.Ct. 903, 17 L. Ed. 2d 842 (1967). Blackmun's attitude towards the Vaca doctrine (i.e., that employees must exhaust grievance mechanisms before other action are available to them) is not completely clear. His earlier opposition to the joint liability doctrine of Bowen, however, suggests that he attributes the "state law obligation" not to dismiss a worker in violation of public policy exclusively to the employer. This contrasts with justice Powell's opinion in Bowen, which stated that "The fault that justifies dropping the bar on the employee's suit for damages also requires the union to bear some responsibility for increases in the employee's damages resulting from its breach. To hold otherwise would make the employer alone liable for the consequences of the Union's breach of duty." Powell further argued that "Even though the employer and the union have caused the damage suffered by the employee, the union is responsible for the increase in damages, and, as between the two wrongdoers, should bear its portion of the damages ..." It is perhaps worth noting that Blackmun, like Powell earlier, could also have attributed some damages to the union representatives, particularly since Norris was terminated in a grievance hearing by the hearing officer. The political implications of Blackmun's decision not to take any of the older routes should not be underestimated.

58. On Vaca v. Sipes, see supra note 54.

59. See Lingle v. Norge Division of Magic Chef, Inc. 486 U.S. 399 (1988). The case is discussed in Hawaiian Airlines, supra note 45, opinion, section II D. In Norge, an employee covered by a labor agreement was fired for filing an allegedly false worker's compensation claim. After filing a grievance pursuant to her collective bargaining agreement, which protected employees against discharge except for "proper" or "just" cause, Mrs Lingle filed a complaint in an Illinois state court, alleging that she had been fired for exercising her rights under the Illinois Workers' compensation laws. The state court held her state law claim preempted because "the same analysis of facts was required in both the grievance proceedings and the state-court action." The Supreme Court reversed.

60. See Hawaiian Airlines, supra note 45, opinion, section II D. Blackmun seems to draw a sharp distinction between contract interpretation, i.e., issues involved in arbitration, and the issue of fact involved in a wrongful discharge claim. He deems the latter to stand independent of contractual issues. This distinction, obviously helps support the notion that wrongful discharge claims are independent of contractual arrangements. It allows Blackmun to proceed along these lines although previous legal analyses have rejected or questioned such a division.

61. Id. at section II.

62. Id. at section III. Mendelsohn, supra note 1-8, at p. 16 suggests that even with the Supreme Court's decision in Lingle, wrongful termination litigation may be more difficult for unionized workers. Mendelsohn speculates that such a situation could make union membership less attractive, particularly because non-union workers
have gained many of the advantages typical of union workers--such as a good cause standard--in court decisions.


64. Gorill v. Icelandair/Flugleidir, 1 IER Cases 1166 (2d Circuit 1985).

65. There is some evidence that certain federal acts such as EEO legislation are mostly applied with regard to dismissal protection. In a 1991 survey, 34% of all personnel managers indicated that the most serious EEO issue was wrongful discharge. Wrongful discharge also received the greatest percentage of awards, with 53% of all cases resulting in damages being awarded. See R. Reminger, "At Risk," in Personnel Journal, vol 7, no 3 (1991) pp. 51-55. Federal Acts acts providing for the protection of employee from unjust discharge include: i) collective bargaining; Railway Labor Act, 45 USCA 152 (1976) ii) reporting of violations; Energy Reorganization Act, 42 USCA 5851; Federal Water Pollution and Control Act, 33 USCA 1367 (1978); Air Pollution Prevention and Control Act, 42 USCA 7622 (1983); Occupational and Health and Safety Act, 29 USCA 660-661 (1975); Coal Mine Safety Act, 30 USCA 815 (1983); Railroad Safety Act, 45 USCA 441 (1983); Fair Labor Standards Act USCA 215 (a)(3) (1965); Employee Retirement Income Security Act, 29 USCA 1140 (1975) iii) discrimination based on sex, race, color, age, and national origin; 42 USCA 2000 (e)(2)(a) (1981); Age Discrimination in Employment Act, 29 USCA 623 (1975) (d) Veterans protection; 38 USCA 2021 (b)(1) (1979) iv) Garnishment: Consumer Credit Protection Act, 15 USCA 1674 (1982) v) Federal Employee Protection; Civil Service Act 5 USCA 4803 (a)(1983).

66. See False Claims Act, 31 U.S.C. sections 3729-3732 (1986). The False Claims Act is in fact a very old piece of legislation. It was created during the Civil War, and is sometimes referred to as the "Lincoln Law", because the president took special interest in stopping the fraud that was rampant during the war. After discovering that the union army was overcharged and given substandard supplies, Lincoln urged Congress to pass the act. On October 31, 1861 General Ulysses S. Grant gave testimony which triggered the passage of the Act. Asked what he knew about a certain type of rifle, called the Austrian musket, Grant responded that "They have been subject to complaint wherever the troops had them, first, because in firing them the greater portion of them would miss fire; and, secondly, because the recoil is so severe that it militates very much against the effectiveness of the arm."

Despite its long history, little attention was paid to the act up until the mid 1980s when several extraordinary cases of fraud caused Congress to review the act and subsequently add whistleblower provisions as well as increase incentives to plaintiffs.

67. See Carl E. Person, "How to Make $100,000 as a Whistleblower, Under the United States False Claims Act," in The Legal Mail, (Internet, revised July 1994). A Press release by the Justice Department (Oct, 1995) gives the following figures for case numbers and approximate recoveries.
<table>
<thead>
<tr>
<th>Year</th>
<th>Cases Filed</th>
<th>Recovery Mill USD</th>
</tr>
</thead>
<tbody>
<tr>
<td>1987</td>
<td>33</td>
<td>n.a.</td>
</tr>
<tr>
<td>1988</td>
<td>60</td>
<td>2</td>
</tr>
<tr>
<td>1989</td>
<td>95</td>
<td>32</td>
</tr>
<tr>
<td>1990</td>
<td>82</td>
<td>40</td>
</tr>
<tr>
<td>1991</td>
<td>90</td>
<td>36</td>
</tr>
<tr>
<td>1992</td>
<td>119</td>
<td>124</td>
</tr>
<tr>
<td>1993</td>
<td>131</td>
<td>193</td>
</tr>
<tr>
<td>1994</td>
<td>221</td>
<td>379</td>
</tr>
<tr>
<td>1995</td>
<td>274</td>
<td>143</td>
</tr>
<tr>
<td>Total</td>
<td>1110</td>
<td>3342</td>
</tr>
</tbody>
</table>

Despite the incentives and protection provided in the False Claims Act there have been instances in which employees have sought state or common law wrongful discharge protection, predominantly because their action under the False Claims Act was pending, and/or the outcome was uncertain. In Robertson v. Bell Helicopter Textron, Inc., U.S. 5th Circuit Court of Appeals, Docket 93-0178 (decided, Sept 26, 1994) the court concluded that the employees state law claim for wrongful discharge was preempted by the False Claims Act. Finding that Bell knew of Mr Robertson's investigation under the False Claims Act, and that Bell had not given a reasonable non-retaliatory explanation for discharging him, a jury initially granted Robertson relief under the Federal False Claims Act. Bell filed motion for judgement as a matter of law. The district court found insufficient evidence to support the jury's notion that Bell knew about Robertson's whistleblowing, as well as the notion that Bell's dismissal was pretextual. Finally the District Court concluded that Robertson was not entitled to a jury trial. The Appeals Court upheld the court's judgement on the False Claims retaliatory discharge claim, and concluded that Robertson's common law public-policy discharge claim was precluded by his assertion that he was fired in retaliation for his investigations under the False Claims Act.

68. Mendelsohn, supra note i-8, pp. 3-4. Additional explanations for the rise of wrongful dismissal litigation are provided by the comparative law literature. Comparative legal analysts, such as J. R. Prichard argue that the expansion of private litigation in the US is contingent on cost, fee and financing rules, and suggest that these rules influence the development of substantial law. According to Prichard the expansion of wrongful dismissal litigation and its suppression in the UK is due to the fact that UK law prohibits contingent fee contracts between lawyer and clients which are widely popular in the US. This affects low probability claims in particular, because the US system allows lawyers to adjust compensation to the risk at hand and hence receive reasonable benefits in such suits. An additional factor highlighted by Prichard is the availability of legal aid in the UK which is accessible in meritorious ad substantial cases to lower income persons. Legal aid entails a preselection of cases and encourages officials (including judges) to reject novel cases which may lead to costly future legal aid claims. See J. R. Prichard, "A Systematic Approach to Comparative Law: The Effect of Cost, Fee, and Financing Rules on the Development of the


72. Mendelsohn, supra note i-8, at p. 16 suggests that the expansion of wrongful discharge litigation may have adversely affected union organizing efforts. Through wrongful discharge litigation, non-union workers have gained many of the advantages that were in the past only provided under collective bargaining agreements, such as a good cause standard, severance pay and in some cases even in house arbitration. Mendelsohn interprets the AFL-CIO's commitment to protection against wrongful discharge for all workers as a recognition by union leadership that the benefits of just-cause standards can no longer be restricted to union members.

73. For a concise summary of each exemptions see, e.g., Mendelsohn, supra note i-8, at pp. 4-12; McWhirter, supra note 41; and Heshizer, supra note i-54.

74. See Maltby, supra note 31.

75. This number was derived from the 1973 to 1990 January issues of the Monthly Labor Review, which includes a review of state Labor legislation enacted in the previous calendar year.

76. See Mendelsohn, supra note i-8, at pp. 1.

77. Id. at pp. 1-2.

78. Maltby, supra note 31, at p. 51.


80. This estimate appears in Mendelsohn, supra note i-8; Maltby, supra note 31, at p. 52, cites a report, by the San Fransisco Law Firm of Schachter, Kristoff, Ross, Sprague & Curriale, for the calendar year of 1987 which estimates the percentage of suits won by plaintiffs (employees) at 61% and that won by employers at 39%.
81. See Mendelsohn, supra note 1-8, at p. 13, and Dertorizos et al., supra note 79, at pp. 39-40, Table 16. The California Employer Association estimate was calculated by T. Dowalls of Littler, Mendelson, Mathieson, Pastiff, Tichy and Mathieson, and appeared on the Internet in connection with a CAE briefing and workshop. The $69.5 million case is McKay and Williams v. Ashland Oil Co., 683 F. Supp. 639 (KY. 1988), which involved the discharge of two employees who opposed their employer's questionable foreign payments and cover-up attempts. This award was equivalent to more than one half of the employer's profits for the respective fiscal year.

82. The numerical example appears in Person, supra note 79, at p. 3. It reflects the experience of a practising New York attorney.

83. The notion that unions reduced significantly the likelihood of mass terminations was confirmed in several studies. Medoff (1979) found that labor adjustment in US manufacturing differed systematically under trade unionism than in nonunion settings. In firms covered by collective bargaining agreements, layoffs were a more important adjustment mechanism, relative to discharges in comparable nonunion firms. Most laid off union members returned to their previous employer after a short spell of unemployment. See Medoff, supra note II-47. Unfortunately, the layoff labor adjustment mechanism described by Medoff was greatly weakened during the crises of 1980s, when the vast majority of long term layoffs (defined by the BLS as those in excess of 30 days) became permanent separations. There is little evidence for a revival of the layoff mechanisms during the more prosperous years of the 1990s.


85. The role of unions in lowering the probability of the separation of individual workers during "normal business" has been confirmed in several studies throughout the postwar era. In one of the earliest studies, mentioned in chapter II, O. Phelps (1959), supra note II-44, found that the penalty imposed by management was lowered in 20% of all disciplinary and in 36% of all discharge cases. Later studies found that unions significantly reduced voluntary and involuntary turnover. In one of the most convincing studies Freeman (1980) concluded that "trade unionism is associated ... with significantly lower probabilities of separation" and attributed this effect to "to grievance systems and specific work rules like seniority" or more general the "industrial jurisprudence mode of operation." See Freeman, supra note II-44.

86. There are several qualitative studies analyzing the various strategies employers adopted in response to this threat. The only quantitative study cited in the Social Science Citation Index and the Law Index is still my own analysis of public sector data. See "Public Policy Exemptions, Whistleblower Statutes, and Government Worker Layoffs: A Case of Adverse Effects?", in Journal of Collective Negotiations, vol 24, no 1 (1995) pp. 1-15. Its core hypothesis of adverse effects will be discussed in greater detail in chapter IV.
87. This figure has been derived from Bureau of Economic Analysis, Business Statistics (various years). It refers to companies with 200 to 500 employees.

88. As a rule of thumb, 90% of all civil litigation in the US is disposed of prior to trial. Some cases are resolved through pretrial motions—yielding typically low or no awards to plaintiffs. Others are settled out of court, typically yielding awards lower than those expected in jury trials. Mendelsohn suggests that because of the great uncertainty involved in unjust dismissal suits, out of court settlements are particularly frequent in this area. See Mendelsohn, supra note i-8, at p. 12.

89. See, supra note i-9.
PART B

Different Pathways to Dismissal Protection?

A Quantitative Analysis
While we take no position on whether unions are good or bad, we believe that union representation is unnecessary for employees to enjoy job security, career opportunities, fair and equitable treatment, and competitive wages. (from a Mobil Coal Producing, Inc. Company Handbook, cited as evidence in Mobil Oil v. Parks, 704 P.2d)

Chapter IV

Individual Versus Collective Dismissal Protection

A Quantitative Analysis

Introduction - Expectations Regarding Different Routes to Dismissal Protection

Both the private and the collective routes to dismissal protection are tied to expectations about the effectiveness of the respective approach. In the case of the private litigation approach, positive expectations with regard to the restriction of dismissals are typically based on the assumption that wrongful termination suits exercise a deterrent effect. This deterrent effect, created through the frequent assignment of high awards, is believed not only to discourage employers to dismiss workers unfairly, but also to reduce unnecessary or excessive dismissals.\(^1\) Robert Hall and Edward Lazear, for instance, have taken a favorable view of policies which restrict dismissals, by arguing that such interventions reduce the excess sensitivity of layoffs to demand. Excessive layoffs in bad times are the result of the specific nature of the worker-firm relationship, which creates a situation of bilateral monopoly. Legal restrictions on dismissals, including the possibility of a lawsuit, can act as a constraint on dismissals, and reduce aggregate layoff rates during
recessions to socially more efficient levels. More specifically, Flanagan (1987) has suggested that, although restrictions on the employers right to dismiss are weaker in the US as compared to Europe, the high monetary costs of an unjust dismissal in the US, today, is likely to deter employers from excessive discharges.

Similar expectations are associated with the collective, union-based pathways to dismissal restriction. In the context of the unionized workplace, it is typically assumed that the just-cause standard will discourage arbitrary dismissals. This is the case, not because of a deterrence effect, but rather because each discharge decision is reviewed by employee representatives, or even by professional outside arbitrators. Unionism, up until the 1980s, was also said to correlate with the improved protection of workers from economic redundancies. Here, the observed preference of union plants for temporary layoffs over discharges, together with the tolerance of unions members for such temporary layoffs, was thought to contribute to lower rates of permanent dismissals. The third route to collective dismissal protection, concession bargaining, typically was viewed less favorably by the theoretical literature. While some research suggested that the union structure was better suited to negotiate concessions than a non-union plant, more prevailing "right to manage" models suggested that unions were ill suited to pursue bargaining for continued employment. This, according to Nickell and Andrews (1983), both principal exponents of this theory, was the case because "disemployed" workers lose their voting rights in the union and their connection with the firm.
The following analysis will examine the validity of some of these assumptions on the basis of data for the 1980s and 1990s. We will start by examining formal theories of the employment relationship and the dismissal decisions of the firm (section 1). Using information from these theories, I will then introduce a model of the dismissal decision, which analyzes the effects of an increase in the cost of individual dismissals vis a vis other forms of cost increases, such as those resulting from a strategy aimed a limiting mass layoffs (section 2). One prediction of this model, namely that dismissal litigation is likely to have adverse effects by raising the total number of dismissals, is tested with data on permanent public sector layoffs (section 3.1), and data on layoff events in the private non-manufacturing sector (section 3.2). The concluding section (3.3) explores the second prediction of this model, namely that collective-union initiatives can lower dismissal rates substantially, by exploring the relationship between union strength and separation rates for the period of concession bargaining during the 1980s.

1. Discharges and the Firm: A Review of Key Theories

This section reviews models of the dismissal (or hiring) decision of the firm. Most models of the employment relationship focus on the expansion of the firm and its hiring decision, and treat dismissals at best as a peripheral matter. The conceptualization of the hiring decision within the principal models of the employment relationship, however, can be readily applied to termination decisions. In this
section we will examine the implications on dismissal, of three models of the employment relationship, including a) the Coasian model of the firm as nexus of contracts, b) Simon's model of employment as an authority relationship, and c) Alchian and Demsetz's analysis, which analogizes employment in the firm with the spot market.

1.1 Employment Decisions and the Theory of the Firm

The principal theories of the employment relationship have been formulated within the context of transaction cost economics. From the stand-point of transaction cost theory, firms are formed and survive as an institutional response to transaction costs. How the decision to terminate a workers' employment, is made, according to transaction cost approaches, is intrinsically related to the institutional framework of the firm. In a world of perfect information and costless knowledge, there is no justification for the existence of firms. Where opportunities are continually discovered and the formation of agreements is costly, firms serve to reduce the costs of coordinated efforts.7

1.1.1 The Coasian View

In the basic transaction costs view, firms are characterized by a system of bilateral contracts, in which each person has come to an agreement with the firm. This is the view taken in Ronald Coase's 1937 paper.8 For Coase, the firm is a "nexus of contracts", so formed
as to provide flexibility in the face of unpredictable events. Says Coase,\(^9\)

The main reason why it is profitable to establish a firm would seem to be that there is a cost of using the price mechanism ... [including] negotiating and concluding a separate contract for each exchange.

("The Nature of the Firm", p. 391)

Coase's approach is straightforward and compelling. In the absence of a firm, each worker must contract with every other worker of the firm whose cooperation is required. If "n" individuals cooperate a set of "n(n-1)/2" is required, whereas the total number of contracts required in the firm equals "n" (i.e. "n^2-3n/2" fewer contracts). If there is no cost of contracting, or these costs are derisory, the advantages of the firm would be minimal. Where contracting is costly, however, rapid savings arise from the centralization of contracting in the firm.\(^10\)

Focusing on reasons for the formation of firms, Coase's analysis stresses the efficiency gains resulting from contract creation. In this context, Coase focuses specifically on the efficiency differential of the firm vis à vis the cooperative, which arises when additional parties are contracting and the firm expands. This argument can be applied to the reverse situation, where contracts are terminated and workers are dismissed. In a cooperative of bilateral agreements, the termination of any single contract party would require the consultation of "(n-1)(n-2)/2" parties, providing that the party whose dismissal is considered is excluded from the negotiation
process. In the firm, by contrast, the total number of negotiations would equal "n-1", if all other workers except the worker to be dismissed were consulted, and n if all workers were consulted. If the firm unilaterally decides on the termination of the contract, perhaps only consulting with the employee whose contract was to be terminated, the "Coasian" transaction cost would amount, just like the hiring decision, to only one transaction.

A Coasian type analysis, therefore, would suggest that, since organizations tend to adopt setups which minimize transaction costs, most employers would acquire sole authority over the dismissal decision. In the Coasian framework, a firm, seeking to minimize transaction costs, would provide no framework for consultation of workers in dismissal decisions, just as it--as nexus contracts--does not provide for consultation with other workers in hiring decisions. The implications of the Coasian framework with regard to dismissal are hence relatively simple. Firstly, any deviation from a situation where management singularly decides about the creation and termination of contracts, will increase inefficiency (i.e., add transaction costs). Secondly, the idealtypical transaction-efficient firm, will not allow the involvement of the workforce in dismissal decisions, just as it does not involve other worker in the hiring decision. If any factors restrict the employer's right to terminate a worker's employment, they must arise from the individual contractee's efforts. Dismissal protection, on efficiency grounds, hence is a purely individual matter. If need for such protection arises in the Coasian firm, it has to be met in the context of individual negotiation.
1.1.2 Simon's Employment Relation as Exercise of Authority

The Coasian notion that the formation of the firm involves the extension of standard contracts from the firm to individuals, has been rejected by the second generation of transaction cost theories of the firm. In a first attempt to model a contract specific to the employment relationship, Simon (1957) suggested that "due to the authority relationship between employer and employee, the employment contract differs generically from the "normal" contracting relationship. For Simon, the employment relationship is established when the employee "agrees to accept the authority of the ... [employer] and the latter agrees to pay the former a stated wage (w)."¹² The contract, created though this exchange, according to Simon,¹³

... differs fundamentally from a sales contract--the kind of contract that is assumed in ordinary formulation of price theory. In the sales contract a party promises a specific consideration in return for the consideration promised by the other. The Buyer (like B [meaning the employer]) promises to pay a stated sum of money; but the seller (unlike W [meaning the employee]) promises in return a specified quantity of a completely specified commodity. Moreover, the seller is not interested in the way in which this commodity is used once it is sold, while the worker is interested in what the entrepreneur will want him to do (what x will be chosen by B[the employer])

(Models of Man, "The Employment Relation", p. 184)

Having established how the employment relationship differs from the sales contract, Simon investigates when the employment relationship will be preferred to the sales contract.¹⁴ According to Simon the employee, "will be willing to enter the employment contract..."
... only if it does not matter to him 'very much'" which bundle of activities "x" the employer will choose or if he is "compensated in some way ... for an x that is not desired." The employer, meanwhile, will offer the added compensation of an employment contract if he is unable to predict with certainty, at the time the contract is made, which "x" will be the optimum one from his standpoint."¹⁵

Assuming that one option "x" includes the termination of the contract, the implications of Simon's authority model with regard to dismissal are striking. For Simon, the employment contract is the result of the "postponement of choice." The firm by hiring an employee, rather than contracting out a task, acts upon "a liquidity preference", where "the liquid resource is the employee's time, instead of money."¹⁶ If the firm were to contract with another firm, or an individual for the performance of a specific task, it would be bound by contractual specifications. A change in the task assigned, as well as the termination of the relationship would then represent a breach of contract. By entering the employment relationship, the firm buys itself flexibility and freedom from these obligations. The firm can change the tasks assigned to the employee, and--expanding Simon's argument to its corner solution--terminate the relationship altogether without the penalty that would arise in a sales contract.¹⁷

In an extended view of Simon's theory, the right to discharge--as a corner solution of the employers exercise of authority over the employee's time--represents one of the reasons for the establishment of the employment contract. Employers hire workers, rather than
contract out, not only because they need not predetermine what task is to be performed, but also because they can terminate the relationship at-will. Implicit to this view of the contracting decision, is a conclusion which is similar to the Coasian interpretation of the employment contract. If the right of the employer to terminate the specific employment contract is restricted, entering such a contract will be far less attractive for the firm (possibly leading it to prefer a contracting out or subcontracting solution).

The willingness of the employer to hire a worker, hence will depend at least to some degree, on her or his ability to terminate the contract at-will. Problematic with this view is that neither the hiring nor the termination decision involves transaction costs.

Perhaps more importantly, while Simon's theory establishes when the potential employer and the prospective employee, will enter into an employment relationship, his model like that of Coase, leaves open when and under which circumstances it will be terminated. This question receives an answer, albeit an unsatisfactory one, in the next model.

1.1.3 Alchian and Demsetz: The Employment Relationship as a Spot Market Contract

In their 1972 paper "Production, Information Costs, And Economic Organization," Alchian and Demsetz take a position diametrically opposed to that of Simon. According to Alchian and Demsetz it is "a delusion to characterize the employment relation by
reference to fiat authority or the like." Rather, the relationship between employee and employer is identical to that between a buyer and a seller in a spot market, such as between a "shopper and his grocer." Alchian and Demsetz explain, 19

The single customer can assign his grocer to the task of obtaining whatever the customer can induce the grocer to provide at a price acceptable to both parties. That is precisely all that an employer can do to an employee. To speak of managing, directing or assigning workers to various tasks is a deceptive way of noting that the employer continually is involved in renegotiation of contracts on terms that must be acceptable to both parties ... Long term contracts are not the essence of the employment relationship. ("Production, Information Costs, and Economic Organization," p. 777)

As Williamson, Wachter and Harris (1925) point out, the key assumption underlying this view is that the transaction costs associated with turnover are negligible. Employers need not establish a long term relationship with employees, because they are able to adapt to changing markets by filling jobs on a spot market basis. Williamson et al. comment on the Alchian and Demsetz view of job stability, by saying that, "although job incumbents may continue to hold jobs for a considerable period of time, and may claim to be subject to an authority relationship, all that they are essentially doing is continuously meeting bids for their job markets." 20

Job stability, in Alchian's model is conditioned by the employee's ability to compete with outside offers. Her or his position as an insider provides no detectable advantages over those competing from the outside; not even with regard to superior information. Dismissal occurs if an individual outside the firm
performs the tasks required at a lower cost than an insider, and/or if
the insider's skill or work is no longer relevant to the firm. The
employment contract, conceptually at least, ceases to be long term; a
result which contradicts most observations, including Hall's (1980)
estimate of an average tenure of American workers of 8 years.21

While offering a seemingly rigid explanation of when a firm will
dismiss a worker, this view of the employment relationship and
dismissals is unsatisfactory for several reasons. First, it assumes
that there are no transaction costs in contracting or recontracting.
Second, it assumes that there are no idiosyncrasies of employment.22
Workers have no start-up period, there is no on-the-job learning, no
gains from teamwork, and in fact no firm-specific skill. The
worker's employability depends solely on his or her personal
characteristics, while previous employment in the firm does not figure
into the employers selection criteria. Firms encounter no
administrative or search costs, and the hiring and dismissal of all
workers, at all times, is costless.

2. The Firm's Dismissal Decision: A Generic Model

This section introduces a simple model of the dismissal decision,
in which the transaction costs of hiring and dismissing workers figure
into a firms' determination of the number of workers it is willing to
discharge over a certain period.23 The decision on the quantity of
layoffs, holding economic conditions constant, in this model, depends
on two factors: a) the firm's characteristics (particularly its
valuation of flexibility and stability) and b) the costs of discharging workers (whereby different costs are assumed to occur for small-scale and large-scale dismissals). For simplicity's sake we assume that there is only one type of discharge which is permanent; i.e. all layoffs are permanent, and the firm is unable to recall workers.

2.1 A Transaction Cost Model of the Firm's Dismissal Decision

The basic assumption of this transaction costs model of the firm's layoff decision, is that the decision to lay off or dismiss workers over the year, depends on its perception of the volatility of the market in which it operates and the firm's ability to cope with these fluctuations, given a certain workforce size. Based on this perception, the firm assesses the benefits from a dismissal, and the costs of a dismissal. Ultimately, the assessment of these costs determines how many dismissals the firm will conduct in a certain time period, such as a year (absent economic fluctuations).

In this elementary model of the frequency of discharges, we assume that the firm has knowledge of, and balances two marginal functions; the costs of dismissals--with the benefits of dismissals.24

a) Costs of Dismissals

The costs of dismissals reflects expenses to the firm that occur when workers are laid off and the firm is unable to rehire them.
They include, among others:

- Loss of output of the immediate financial cost
dismissed worker[s]
- Costs of initial lost human capital investment inefficiencies of a new worker
- Costs of introductory administrative costs job training
- Costs of hiring (advertisement)
- Transition costs occurring when administrative costs the workforce cannot be increased rapidly enough

b) Benefits from Dismissals

The benefits a firm derives from a dismissal include among others savings in wages, fringe benefits savings, and savings of welfare contributions. In the case of a replacement of dismissed workers additional benefits may be derived by replacing dismissed workers with entry-level workers with lower earnings, introducing two tier wage plans, cutting fringe benefits, or changing work rules. In addition benefits may be derived from hiring workers with a whose skills match company meets better (e.g., in the context of automatization). The benefits from dismissal hence include:

- Reduction of the wage bill immediate financial benefits
- Hiring of "cheaper" entry reduced or mismatch level labor
- Two tier plans, benefit cuts overhang of human
- Improved skill match
- Removal of inefficient workers
- Eased introduction of new administrative benefits technology
- Streamlining of organizational structure
- Reduced monitoring and deterrent effect

Both costs can be depicted as cost functions in a coordinate system. In Figure IV(1) these costs are represented as marginal cost
functions, where the y axis represents costs to the firm and the x axis the level of turnover and/or dismissals. Through its decision to dismiss workers, encounters the costs and benefits of a discharge. The marginal costs of dismissal rise with each additional worker—as the least productive worker is dismissed first—so that the marginal cost of dismissal (MCD) increases monotonically away from the origin (the MCD function is concave up). The marginal benefit from each dismissal meanwhile falls with each additional worker being dismissed—because as the number of dismissals increases, more productive workers are dismissed—so that the marginal benefit of dismissal stability cost curve (MBD) decreases monotonically away from the origin; (i.e., the MBD function is also concave up).  

Given these two marginal functions, the firm will dismiss workers up until the point where the marginal costs of a dismissal equals its marginal benefit; i.e., up to the point where the marginal cost and the marginal benefit curves intersect.  

2.2 Assessing Different Pathways to Dismissal Restriction

The notion of marginal costs and benefits from dismissals allows for the differentiated assessment of the impact of different forms of dismissal regulation on dismissal decisions of the firm. We assess the effects of a) dismissal litigation, and b) collective measures to restrict dismissals, such as concession bargaining.
2.2.1 Individual Attempts to Restrict Dismissal: A Case of Adverse Effects?

As discussed in chapter III, unjust dismissal suits can yield substantial awards to individual plaintiffs. Once these suits go to a jury trial, moreover, the likelihood of an employee winning the suit is relatively high; exceeding in California, for instance, the 50% mark. Together, the incidence of high awards and the high incidence of verdicts in favor of employees, suggest that unjust dismissal litigation, initiated by individual employees, can increase the cost of a dismissal to an employer substantially.28

In terms of the model of Figure IV(1), this would indicate that the marginal costs of dismissals rises. Given that unjust dismissal suit can and are typically initiated by one or a few workers, this rise should apply most markedly to the right part of the MCD curve where few workers are dismissed and taper off as we move to the right, where more workers are dismissed (see Figure IV(1)). If such a change occurred, the point of intersection of MCD with MBD would shift to right, resulting in the expected outcome of a reduction of dismissals, by shifting $d^*$ to $d^\prime$.

This is, however, not the only possible outcome. An alternative outcome is that of a substitution effect, where the rise of the cost of dismissal of one or a few worker causes the firm to price the dismissal of a greater number of workers lower than in the original stage (see Figure IV(2)); primarily because the dismissal of a greater number of employees would classify these terminations as
"normal redundancies", which are largely immune to unjust dismissal claims (particularly in a non-union environment). In doing so, the employer would bank on the fact that, in a common law system with a full recognition of managerial prerogatives, the fortitude of an unjust dismissal claim decreases with additional workers being dismissed. (In an extreme scenario, a firm--fearing unjust dismissal suits--could actually "centralize" undesirable employees in a branch, and then eliminate the branch without encountering legal problems).

The results of such an increase in the cost of dismissals are perhaps unexpected. As Figure IV(2) illustrates, the intersection point of the MCD curve with the MBD curve will shift to the right; causing the firm to dismiss more workers than in the original stage. As a consequence, the firm will choose a perceived dismissal level \( d^{**} \) that is higher than the level \( d^* \) of the original firm. In other words, facing the increased cost of an individual dismissal, the firm would tend to increase its overall dismissal activity.

In summary then, several outcomes resulting from the imposition of unjust dismissal penalties are possible. Section 3 will explore, on a provisional quantitative level, which model mirrors empirical observations more closely. Prior to doing so, we will briefly assess, in the context of our model, the alternative pathway to dismissal reduction, in which an agent acting on behalf of the workers seeks to reduce dismissals.
2.2.2 Collective Dismissal Restriction

The converse to individually initiated dismissal protection is a situation, where an agent--such as a union representative--is selected to design a strategy for the restriction of dismissals for the workforce as a whole. As chapter II has illustrated, a union's options for bargaining in order to avoid layoffs are limited. Typically, a firm will not consent to give long term assurances not to dismiss or layoff the workforce (see chapter II, section 3.4 ). Similarly, firms will usually avoid caps on terminations.33

One of the most obvious approaches to collective dismissal protection, therefore, is for the bargaining agent or union, to offer a certain concession in exchange for the prevention of a mass layoff for the time being. The incentive to offer such a concession for the union will rise with the size of the planned layoff; this being the case because a minor, small scale layoff will be unlikely to trigger a collective sacrifice of wages, benefits, or bonuses. In terms of our model, a concessionary offer can be represented as an increase in the marginal costs of dismissal which is small to the left side of the MCD curve, where few workers are dismissed, and more marked to the right when more workers are dismissed. Figure IV(3) illustrates that once such a shift in MCD occurs, the intersection point of MCD and MBD moves to the left; or in other words a reduction in dismissals comparable to that of the model in Figure IV(1) is achieved. In this
case, the union is able to achieve the desired effect of reducing aggregate dismissal levels. 34

3. A Quantitative Analysis of Different Dismissal Regimes

The previous sections have argued on a theoretical level, that dismissal litigation initiated by individual employees, may have an adverse effects on the aggregate number of dismissals. The following section will explore both hypothesis on a quantitative level, utilizing three different data sets: one for the public sector, one for the private non-manufacturing sector, and one for the manufacturing sector.

We start by examining the relationship between at-will exemptions and dismissal litigation for the public sector. Here we compare the odds of a public sector dismissal in strong versus week dismissal litigation adopter states, utilizing data on permanent public sector layoffs, reported in the BLS Mass Layoff surveys from 1988 to 1990 (section 3.1). The next section looks at the relationship of dismissal litigation for private sector non-manufacturing employees. Here we look at the correlation of the date of adoption of dismissal litigation, the number of exemptions granted by a state's supreme court, and the number of layoff events in the private non-manufacturing sector for 23 states; again utilizing data from BLS Mass Layoff surveys (section 3.2). The concluding section (3.3) explores the second prediction of this model, namely that collective-union initiatives can lower dismissal rates substantially, by exploring the
relationship between union strength and separation rates for the period of concession bargaining during the 1980s. Here we utilize layoff data reported in the data appendix of the *Monthly Labor Review* for the years from 1975 to 1988.

### 3.1 Unjust Dismissal Litigation in the Public Sector

The public sector has been the foremost adopter of unjust dismissal regulation. Court exemptions from employment-at-will, in many states have been complemented by explicit statutes prohibiting the dismissal of employees who report violations of criminal, civil, administrative, or professional codes. One proxy for an adverse effect of unjust dismissal litigation on dismissals is the relationship between the adoption of unjust dismissal litigation and the relative number of permanent layoffs, which we investigate in this section. If adverse effects were prevalent, early/strong adopters of unjust dismissal exemptions should have, *ceteris paribus*, higher relative public sector layoff rates. If, by contrast, the opposite were true, and unjust dismissal litigation represented a deterrent to terminations, early/strong adopters of dismissal litigation should show lower relative layoff rates than late/weak adopters.¹
3.1.1 The Level of Unjust Dismissal Protection in the Public Sector

Several factors indicate that the effects of dismissal litigation should be more pronounced in the public sector, than in the private sector. First, unjust dismissal exemptions are more widely recognized in the public sector than for private sector employees. (This particularly applies to exemptions dealing with public policy or whistleblowing). Several states, 12 in total, have passed explicit legislation banning the dismissal of public sector employees in violation of public policy. In addition to specific statutes, the courts of at least 37 states have accepted some variant of the public policy exemption. By contrast to specific public sector statutes, these exemptions apply to both public and private sector employees, often reinforcing the statutory rights of public sector employees. With both the statutory protection and the court's acknowledgment of public policy exemptions, public sector workers who report mismanagement are protected in a majority of the US states.

3.1.2 Measurement and Methodological Considerations

If any of these statutes have a measurable effect on the level of discharges, this should be more easily discernible in the case of the public sector data than in the case of data from the private sector. Government data on permanent layoffs and dismissals, in many regards, is more reliable than private sector dismissal data. The problem of economic fluctuations does not apply to the public sector
to the extent that it does to private sector employees. Economic conditions also affect government employment. In addition the size of public sector employment can be influenced by regime shifts, but typically years of high fluctuation are the exception rather than the rule.

As Figure IV(4) illustrates, workforce fluctuations of state and local employees have generally been minor, with the largest number of cuts occurring in 1980/81. A greater level of fluctuation can be identified for federal employees (which can be attributed primarily to changes in the number of direct and indirect defense sector employees). In part the effect of this fluctuation, with regard to a quantitative analysis, is mediated by the fact that state and local employees outnumber federal employees.

In addition, US states can be relatively easily classified as a strong or a weak adopter of unjust dismissal exemptions according to when they adopted the public policy exemption either in form of a statute or a court decisions. The following analysis will utilize this information in order to assess the relationship between early/strong adopters of unjust dismissal regulations, and the level of government worker layoffs.

Data on permanent layoffs in the public sector are reported in the Bureau of Labor Statistics' annual Mass Layoff Survey which is available on disk as well as on hard copy. The Mass Layoff surveys report the number of layoffs involving permanent separations as well
as the number of separations (permanent layoffs).\textsuperscript{39} The sample for this analysis includes data for four states for which dismissal data for the three calendar years from 1988 to 1990 were available; Massachusetts, Colorado, Wisconsin and Georgia.\textsuperscript{40} Two of these states—Massachusetts and Colorado—can be considered early adopters. The two others—Wisconsin and Georgia—are late adopters.

Massachusetts courts, together with their counterparts in Michigan and Indiana, were amongst the earliest to recognize the public policy exemption, with decisions in favor of plaintiffs being made from the mid-seventies onwards.\textsuperscript{41} Whereas the influence on unjust dismissal legislation in Massachusetts came from the courts (the state never passed a comprehensive whistleblower protection statute), the leading influence in Colorado came from the legislature. Passing a whistleblower statute in 1979 that protected public sector workers who disclosed evidence of mismanagement, or abuse within state government from dismissal and retaliation, Colorado was among the first states to place public sector workers under such a statute.\textsuperscript{42}

Wisconsin and Georgia, serve as our counter example of weak or late adopters of dismissal litigation. Each passed statutes protecting employees from unjust dismissal much later: Wisconsin in 1984, and Georgia in 1987.\textsuperscript{43} The Wisconsin superior courts, moreover, still rejected public policy exemptions as late as 1982. A 1990 survey concluded that Georgia's superior and appeals courts had not decided a single case in favor of a public policy exemption by that time.\textsuperscript{44}
3.1.3 Method and Analysis

In the recent literature, several researchers have advocated the use of general Odds/Ratio methods in setups where the occurrence of an incident, such as a dismissal, is measured against different-sized base groups, such as firms or organizations of varying sizes. In such models the number of dismissals or layoffs of government workers are treated as "cases", and the total government workforce from which dismissed workers have been chosen serve as "controls." This setup can be applied to aggregates of multiple years, as well as for different years separately, if an analysis of sequential changes is desired. This analysis starts with a simple application of this procedure, in which we compare the approximate aggregate odds of being dismissed in the two early adopter states, with the odds of being dismissed in the late adopter states over the three year period from 1988 to 1990. Table IV(1) shows the sum of all government layoffs over the three year period observed for the two early adopter states (Massachusetts & Colorado) in the first row of the first column (a), and the three year sum of dismissals for the late adopter states in the first row of the second column (c). The first and second columns of the second row show the average size of the public sector workforce, from which laid-off workers were drawn, over the three year period for the two early adopter states (b) and the two late adopter states (d) respectively, with both numbers serving as controls. The odds ratio of being laid off in an early, versus a late adopter state, is very high at 3.160, indicating that government workers in our
strong dismissal regulation states are about three times as likely to be laid off than public employees in our weak adopter states.46

The above analysis, though supportive of the adverse effects hypothesis, is only an approximation of the underlying relationships. The aggregation of dismissal data across the years, as well the aggregation of the two early and late adopter states may hide other associations. In order to assess the stability of the relationship in Table IV(1) over time, the data have been stratified and the odds ratio of dismissals for the two early versus the two late adopter states has been computed for each year separately [see Table IV(2), odds ratio (1&2) versus (3&4)]. The fifth line of Table IV(2) shows that these odds ratios (\( \psi \)) have been very stable over the three years in question, ranging from a peak of 3.6 to a low of 2.8.

From these odds ratios, I have computed the Mantel-Haenszel estimate \( \psi_{mh} \) of the aggregate odds ratio. The Mantel-Haenszel estimate can be regarded as a weighted average of the subgroup-specific odds ratios.47 Again the odds of being dismissed in an early/strong adopter state about three times as high as compared to a late/weak adopter state are (with an odds ratio of 3.168).

The same basic patterns also holds true when we disaggregate at each early and late adopter state separately. As previously shown, the four states in this analysis can be categorized in terms of the time of their commitment to unjust dismissal litigation, with Massachusetts being first, followed by Colorado, Wisconsin, and
finally Georgia. Using the same stratified setup as above, the single and Mantel-Haenszel odds ratios of separations have been computed between the first adopter state, (Massachusetts) versus the two late adopter states, (Wisconsin and Georgia) taken together [see Table VI(2), odds ratio (1) versus (3&4)]. With a value of 3.316, the Mantel-Haenszel estimate of this odds ratio falls clearly above the previous estimate which included Colorado [see Table VI(2), odds ratio (1&2) versus (3&4)]. This observation that the earlier/stronger and adoption regime the higher are the odds applies to all four possible comparisons (see Table IV(2)). Overall there is a strong correspondence between the ranking of the states in terms of their adoption of UDL and the contrast of these odds ratios.

### 3.1.4 Conclusion - The Effects of Dismissal Litigation in the Public Sector

The previous section has suggested that there are theoretical reasons to expect that UDL can have adverse effects on dismissal rates, and that it is possible that more workers will be dismissed under a regime governed by unjust dismissal statutes than under a system of contractual agreements. The evidence used to test this hypothesis was limited, with the analysis applying in the first instance to public sector employees in four states. Given that a mass layoff is an exceptional event, ideally additional variables controlling for triggering events, such as budget cuts, or covariates such as the size of military employment should also have been included.
3.2 Unjust Dismissal Litigation in the Private Sector

An analysis of the relationship of unjust dismissal litigation and private sector dismissal rates faces some methodological difficulties. Dismissal regulation in the private sector is generally not as widely developed as in the public sector. To compensate for this problem, this analysis is limited to the non-manufacturing sector, where union densities are lower on the aggregate, and where dismissal suits appear to be concentrated.49

3.2.1 Method and Analysis

This analysis again relies on the Bureau of Labor Statistics' *Mass Layoff Survey*, which gives data on mass layoffs and layoff events for the non-manufacturing sectors of 23 states for both 1989 and 1990. In order to get a preliminary indication of the relationship of layoffs and dismissal litigation, the relationship between the dependent variable relative layoff events and two independent variables which reflect the strength of UDL in a particular state have been investigated.50 The first variable, YREX (year in which a public policy exemption has been adopted), measures the time which has passed since the state's legislature or a state court has accepted the public policy exemption for the first time.51 The second independent variable PPOLEX (Number of Public Policy Exemptions Granted), measures how often the supreme courts of a state have granted the public policy exemption to a plaintiff.52
3.2.2 Exploratory Analysis and a Limited Variable Model

In order to give an initial indication of the relationship of non-manufacturing layoff events, and the indicators of acceptance and strength of unjust dismissal litigation, these relationships have been investigated using ordinary least squares regression. Data for this regression was available for twenty three states and two years; 1989 and 1990.

Figures IV(5 to 8) show scatterplots for the bivariate correlations of the dependent variable--relative layoff event-- and the two independent variables for the years 1989 and 1990. The weighted regression (weight=size of the non-manufacturing Labor force) of relative layoff events with YEAREX yields the best fit with significant slopes and coefficients of determination for both 1989 and 1990, whereby the regression for 1989, yields stronger parameters.

Table IV(3) reports the result of these regressions for 6 models; 1) an unrestricted unweighted model which shows the results for bivariate regressions of each independent variable separately, 2) a restricted unweighted model on which both independent variables have been entered simultaneously, 3) an unrestricted weighted model, again using the bivariate setup of [1], but weighting each case, i.e., state, by the size of its non-manufacturing workforce, 4) a restricted model in which both independent variables are entered simultaneously and the same weight as in [3] is applied, 5) an unrestricted model with the same setup as in [1] with the same weight as before, but
excluding an outlier, and 6) a restricted weighted model also excluding the outlier state (Minnesota).

While all signs follow the expected direction, the relationship of relative layoff events and the two independent variables YEAREX and PPOLEX again appears relatively weak, with insignificant parameters for models 1 to 4. Only models 5 and 6 stand out with relatively high coefficients of determination, and some significant slope coefficients. With 42.5\% of the total variation in the relative incident of layoff events being explained by the two dependent variables in model 6, there seems to be some indication that the number of layoff events varies with the strength of dismissal regulation.

This analysis can refined by applying a limited dependent variable model.\textsuperscript{55} Since layoff events represent count data, \textit{i.e.}, data which can take only positive integer values, the model involves a limited dependent variable, for which maximum likelihood estimates, specifically Poisson regression models are more appropriate.\textsuperscript{56} A precondition for the use of Poisson regression models, is that the dependent variable represents count data or in other words takes only integer values. Such is the case obviously with layoff events, but does not apply if a ratio such as relative layoff events is computed. In order to compensate for differences in the non-manufacturing workforce size, which are likely to affect the number of non-manufacturing sector layoff events, an additional dependent variable, NMLF (non-manufacturing labor force), has been included as an
independent variable. All regression results reported in Table IV(4) have been controlled by NMLF.

As Table IV(4) illustrates, the Poisson regression model yields overall better estimates than the OLS models, with significant parameters for YEAREX and PPOLEX for all models. Following the format of the previous analyses, four models have been tested, including: 1) a partially unrestricted unweighted model in which YEAREX and NMLF, and PPOLEX and NMLF were entered separately, 2) a restricted unweighted model in which all variables were entered, 3) a partially unrestricted weighted model, following the format of [1] but using a weighting procedure which corresponds to the size of the states' non-manufacturing labor force, and 4) a restricted weighted model, using the same weighting procedure as [3] and entering all variables.57 Again the signs of all coefficients follow the expected direction.

The dependent variable YEAREX yields the coefficient with the highest significance probability in all models, but PPOLEX also yields significant coefficients as well. Both the year of passage of the public policy exemption, and the number of state supreme court suits (controlled by the size of the non-manufacturing labor force) are positively related to the number of layoff events in the non-manufacturing sector of the states investigated. As in the case of our public sector analysis, the incidence of non-manufacturing sector layoff events appears to increase with dismissal litigation activity.
The correlation of layoff events and the independent variables measuring the strength of dismissal regulation, could indicate that the passage and implementation of unjust dismissal legislation has indeed encouraged employers to dismiss workers in batches more frequently (as is postulated in the model previously discussed). However, it could also indicate that states which experienced a high number of layoff events, adopted exemptions from employment-at-will more speedily than those with a lower incidence of layoff events.

Previous research on the evolution of dismissal litigation lends little credibility to the latter view. According to most analyses, the early adopters of exemptions from employment-at-will were not economically weak states with high layoff rates. Rather, early adopter states included relatively prosperous states like California, New Hampshire, Pennsylvania and New Jersey, which experienced moderate to high economic growth at the time they adopted the exemptions.58

While this may lend some credibility to the notion that there is a process whereby dismissal litigation encourages employers to discharge a greater number of employees, there are some caveats. Perhaps most importantly, the previous analysis does not assess the relative importance of dismissal litigation vis a vis other variables--such as sales receipts, profits etc.--which reflect business cycle fluctuations or other triggering events.
3.3 Collective Bargaining and Dismissal Protection

Much of the literature on concession bargaining describes this period of union initiatives to prevent terminations as a short term phenomenon (see chapter I, section 3.4). Implicit to this view is the assumption that, under conditions of "normal" business, unions cannot and will not address matters of job security. Using data on layoffs (from the Monthly Labor Review) and on wages (from the Area Wage Surveys) for the period from 1975 to 1988, this brief section proposes that during the 1980s, union have increasingly shifted their collective bargaining emphasis from short-term wage gains to long term job security. This shift in bargaining, has--in line with the Model of Figure IV(3)--effected a long-term reduction in layoff rates amongst union members by the mid to late 1980s.

3.3.1 Methodology and Data

The manufacturing sector of the US experienced massive employment fluctuations, with periods of intense employment decline during the mid 1970s and the early 1980s (see Figure IV(9)). The rate of fluctuations in employment has tapered off during the late 1980s. This reductions in employment loss during the late 1980s in particular can be attributed to the fact that restructuring in the US manufacturing industry was completed. Simultaneously union efforts at bargaining for job security, may have also contributed to a reduction in employment fluctuation and job loss.
This section looks at the relationship between unions on the one side, and layoff rates, and wage rates on the other. Our discussion focuses on these two variables, although, a more complex, model is was analyzed and is presented in the tables.\textsuperscript{59}

3.3.2 Exploratory Analysis: The Impact of Unions on Wage and Layoff Rates

Before proceeding to the main analysis with a pooled time series, I have conducted a set of exploratory analyses on each year separately (these analyses are limited to 49 cases--50 states minus Nebraska--for each run), using either wage rates (logwage) or layoff rates as dependent variables. The aim of these exploratory runs was a) to identify the appropriate lags for the independent variables, and b) to identify when changes in slopes coefficients occurred that could indicate changes in the relationship between union strength, layoff rates, and wage rates.

The results of the initial exploratory data analyses on the impact of union membership on wage rates and layoff rates, are summarized in Tables IV (5a to d, 6a to 6d). Overall, the data support the hypothesis of a changing collective bargaining emphasis of unions: a) for most lags, the relationship between wage rates and union density weakens over time (see particularly 5 c), while at the same time b) the slope coefficients between the variables layoff rate and union membership, decline (see particularly 6 d).
While the coefficients for union membership have significant positive slopes for most years and most lags tested, we can identify several spells where these slope coefficients decline consistently over several years in a row; indicating a declining impact of unionization on wages. This pattern is most obvious for the two and three year lags (see Table IV(5c and d)). Here the slope coefficients for the effects of the variable "percent union members in manufacturing" on "log wage of nonsupervisory earnings in manufacturing" decline gradually for several years in a row (see Figure IV(10)).

Some support can also be found for the hypothesis of a changing pattern in the union-layoff relationship. While states with higher rates of unionization initially had higher layoff rates than states with lower levels of unionization, this pattern gradually changed in the mid 1980s. This change was again most apparent for the three year lag (see Table IV(6d)) where the slope coefficients for the effects of the variable "percent union members" on "annual layoff rate" declined gradually for several years in a row, reaching a negative value in 1986 (see Figure IV(11)).

While this exploratory analysis appears to support the hypothesis that unions shifted their collective bargaining emphasis toward greater job security, it does not permit an assessment of the statistical significance of these changes.
3.3.3 Pooled Time Series Analysis

In order to assess the significance of these changes statistically, the fixed effects estimators for the complete pooled times series (from 1975 to 1988) have been computed for the dependent variables wage rate and layoff rate. These equations were then disaggregated at various points where a structural break was suspected.

**to Wage rates:** The equations and structural change test results for the determinants of wage rate are summarized in Table IV(7). Overall, tests were conducted for 5 possible structural breaks in the years of 1981/82, 1982/83, 1983/84, 1984/85, and 1985/86. Chow tests for the equality of regressions yield the highest F (calc) value with 1.517 for the 1982/1983 break. This indicates that in that period a significant change in the relationship between the dependent variable wage rate and the independent variables in the equation, including unions membership, took place.

**to Layoff rates:** The equations and results of the tests for structural change in the determinants of layoff rate are summarized in Table IV(8). Overall, I tested 6 possible structural breaks in the years of 1981/82, 82/83, 83/84, 84/85, 85/86, and 86/87. Chow tests for the equality of regression coefficients indicated a structural break, in the case of both the 1984/85 and the 1985/86 disaggregation. Our analysis suggests that a structural change in the determinants of layoffs might have taken place about three years later than the most
likely structural break of the wage equation. In other words, roughly from 1984 to 1986 onwards, the relationship of the independent variable layoff rate, and the dependent variables, including union membership, changed significantly.

Both analyses, together suggest, albeit on a provisional level, that following a shift of bargaining emphasis by unions away from wage gains, high layoffs rates of union members started to decline. This indicates that by the mid to late 1980s, unions have--by accepting lower wage gains--achieved a reduction of layoffs rates, and contributed to the job security of their members.60

4. Discussion

The effects of different regimes for the regulation of dismissals are difficult to assess. The previous analyses have investigated three data sets: one on the public sector, one dealing with private sector non-manufacturing employees, and one dealing with manufacturing employees. Cumulatively these three analyses appear to support the hypotheses suggested by the previous model; namely, that private, litigation based, attempts at regulating dismissal will have adverse effects on the total number of employment terminations, whereas collective efforts aimed at reducing terminations, can have beneficial effects.

The tentative implications of this analysis are apparent. The courts, and the US system of dismissal regulation in general, have
increasingly moved towards an emphasis of individual efforts to challenge dismissals. This pathway to dismissal regulation may have deficiencies. By contrast to just-cause rules of collective bargaining agreement, for which a dismissal reducing effect has been documented earlier, dismissal litigation rarely offers comprehensive protection from arbitrary discharge.

From a normative perspective, it is perhaps also important to note that in unjust dismissal litigation usually only one employee or a small handful of employees receives benefits. This is in sharp contrast to civil rights cases and similar class action suits, in which hundreds employees have shared large judgments. The conclusion, will extend this analysis, by discussing, on a qualitative level, the principle weaknesses of litigation based dismissal regulation.
NOTES:

1. Mendelsohn, supra note i-8 at p. 1, suggests that, due to the very heavy financial burden imposed by these suits, employers would modify their behavior, in a manner that would lead the US and European dismissal regimes to converge.


4. Apart from Selznic, supra note I-40, the reduction of individual dismissals in the union framework has been stressed by R. Bendix, Work and Authority in Industry (New York: Wiley, 1956). On the effects of unions on terminations for economic reasons see Medoff, supra note II-47.

5. For expositions of these models see, e.g., Layard, supra note II-47; and the earlier work by S. Nickell, and M. Andrews, "Unions, Real Wages and Employment in Britain," in Oxford Economic Papers 35, supplement (1983) pp. 183-06.

6. It is perhaps worth noting that Nickell et al.'s opposition to the notion that unions bargaining for employment is also based on the assumption that once workers are laid off, there is no recall, and hence the bond between worker and firm is severed.

7. This common theme of transaction economics and, and it implications on how the hiring decision is modeled, are discussed in Ricketts, supra note I-45, at pp. 18-20.


9. Id. at p. 391. Coase's notion of a saturated net of unilateral contracts, of course, is hardly realistic. A partnership or cooperative is most likely to be formed when each partner has specialized skills. If these include particular managerial skills, the partners would be likely to delegate the decision to contract with new members to the specialist. In addition Coase presupposes that the partnership is totally non-hierarchical. This is again unrealistic. In a hierarchical partnership, contracting, of course, would be likely to involve only the members at the top of the hierarchy.
10. The rapid rise in savings is illustrated in the following plot.

Cost Savings in Firm during Hirings

11. It stands to reason that, just as no other workers, except the one who is directly involved, are consulted in hiring decisions, this is the case for dismissals.

12. Simon, while not citing Coase, appears to have written his contribution, in part, in opposition to the idea that firms utilize standard sales contracts when hiring employees. See H. A. Simon, Models of Man (New York: John Wiley & Sons, 1957) ch. 11, "A Formal Theory of the Employment Relation," at p. 185.

13. Id. at pp. 184-185.

14. Simon's analysis has been critiqued early on by the view that the long time relation of employment can be modeled as a series of contracts, and as such as does not represent a generically different relationship.

15. Id. at p. 185. Simon, unfortunately does not explain where and why this premium is created.

16. Id. at pp. 194. It appears that the notion of a liquidity preference, although only mentioned at the end of Simon's analysis, is in fact the core of his analysis. Under the assumption of liquidity preference the employer's desire to establish a contract generically different from the sales contract appears rational.

17. Simon explores the notion of a change in tasks in some detail. His own analysis does not discuss the corner solution of "no task" i.e., the dismissal of the employee. This corner solution is implicit to Simon's discussion about when the employee will refuse to enter a labor contract, or an employer will refuse to offer one.

18. While not exploring the issues of dismissal explicitly, Simon gives an indirect answer to the question when the employment contract will be terminated. This can be deduced by reversing Simon's statements on page 185. Unfortunately the conclusions are trivial: the employee will terminate the agreement if the work is unacceptable. The employer meanwhile will refuse to enter an employment contract is she can predict precisely what tasks will be performed.


21. Williamson et al.'s analysis points to Alchian and Demsetz rejection of insider advantages. This rejection, to some degree is inconsistent with the Alchian and Demsetz arguments which otherwise acknowledge transaction costs. Hall's tenure estimate appears in R. Hall, "The Importance of Lifetime Jobs in the US Economy," NBER Working Paper no 560 (1980).

22. These idiosyncrasies are explored in great detail in Williamson, id. Williamson et al. discuss specifically i) indivisibilities, ii) nonseparabilities, and iii) small numbers and task idiosyncrasies.

23. The model discussed here roughly follows the analysis in Beck, supra note III-86. A more elaborate, formal version of this model--comparing the impact of different union strategies--has been developed by me in a paper which currently been resubmitted with the Journal of Economic Behavior and Organization.


25. There is some indication that firms can indeed dictate turnover levels in the company. This is due to the fact that firms have superior information regarding, i) the availability of work, i.e., the job security they will be able to offer [foresight on costs and benefits of staying in firm] and ii) the availability and quality of outside jobs [opportunity cost of a worker's current job]. This allows iii) the firm to manipulate its turnover level in the long run. Firms specifically take into account the typical actions of specific groups of workers, so as to obtain a level of job stability that maximizes their profits. See Simon, id. For analyses discussing such methods of turnover control see W. A. Schieman ed., Managing Human Resources: 1985 and Beyond (Princeton, N.J.: Opinion research Cooperation, 1984); F. Foulkes, Personnel Policies in Large Non-Union Companies (Englewood Cliffs, N.J.: Prentice Hall, 1980).

26. The why the cost function follows this patterns is that the dismissal of the least will be least costly, whereas any successive dismissal will become more costly, because a more productive worker has to be dismissed. The benefits of a dismissal conversely are highest when the least productive worker is dismissed and fall with every successive worker.
27. A more general way of expressing this model is to say that there is an optimal rate of labor turnover (assuming there are no quits) in a firm.

28. Which is not to say that it shifts the MCD curve, as a whole upwards.

29. The carrying out of economic redundancies, as we have argued in chapter I in particular, is relatively unconstrained. In a workplace governed by a collectively bargained agreements, however, redundancies must be carried out according to certain standards, such as seniority. These rules, of course, typically do not apply to the non-union workplace where employees can decide relatively unconstrained not just about the number of redundancies but also about whom to include. Unless this selection involves blatantly unjust practices, little can be done by the employee. Person, supra note II-79, cautions employees from pursuing unjust dismissal suits in the context of economic redundancies, as the courts have been reluctant to grant exemptions, even in the context where employees could prove unfair selection.

30. The problems created by the essentially individualistic common law of the labor contract, for those seeking class or group action have been highlighted in Atleson's classic analysis. See Atleson, supra note i-4, ch. 5 and conclusion.

31. This is indeed a solution advocated in the management literature, see supra note i-9.

32. Discounting as a response to the risk of a penalty has been discussed first by R. Posner, Economic Analysis of Law (Boston: Little and Brown, 1972) at pp. 331-385. Today, the assumption that potential penalties are reduced by the perpetrator according to the likelihood of its occurrence, is a standard assumption in legal-economic analysis.

33. This point has been stressed in the Business week survey on concession bargaining, supra note I-119, in which only 2% of all firms were willing to give long term job guarantees. Attrition quota were common in collective bargaining agreements of the 1960s, but have been voided since by the industry. Unions were typically also dissatisfied with these policies, as employees often tried to engineer "just-cause" dismissals in violation of the agreement.

34. The presence of financial pressure on the firm would of course serve as a strong incentive to accept the "gift" of the concession. In the firms' perception this could raise the flexibility costs of dismissing workers considerably, as carrying through dismissal would deprive it of the cost reduction. Of course, there may be counter-forces, such as the requirement by creditors to cut the workforce. The effects of these counter-forces, to some degree, would depend on the self financing capacity and/or independence of the firm.

35. The equalization of early adoption with strong adoption is frequent in the law economic literature. It is based on conceptual considerations as well as empirical observations. States which adopt a certain legal doctrine early on are likely to have accumulated at a later time more precedents than later adopters. This will make it
easier for plaintiffs to advance their claim according to the respective doctrine, i.e., lead to a strong enforcement of the doctrine. Apart from this self-reinforcing mechanisms the earlier adoption of a legal doctrine is a proxy of a court's commitment to its implementation. Early adopter states of unjust dismissal litigation, such as California, typically remain more willing to broaden and strengthen the remit of a legal doctrine than later, typically more reluctant adopters. Thirdly, a substantial literature on US politics indicates that early adoption of progressive doctrines typically correlates with other indicators of progressivism in a state. Thus early adopters are typically states, in which the political economy as a whole is supportive of certain progressive measures.

36. The estimate of state statutes was derived from the 1973 to 1990 January issues of the Monthly Labor Review, which includes a review of state Labor legislation enacted in the previous calendar year. The estimate of the acceptance of exemptions is for the year 1990, see Maltby, supra note III-31. It is reasonable to assume that additional states, by now, have accepted the pubic policy exemption in particular.

37. The reason for this is public employers announcing layoffs are more accurate in predicting whether these layoffs will be permanent. See, infra note 38.


39. The BLS describes its data collection as follows: "Information on mass layoffs is developed initially from each state's unemployment insurance data base ... The State agencies then call up ... establishment by telephone to determine if, in fact, a permanent layoffs or plant closing occurred." See Bulletin 2375, id. p. 1.).

40. Unfortunately the survey includes data on government separations for all of the above years for five states only. Apart from the four states included in this analysis, this also includes Illinois. I have excluded Illinois, as this state appears to fall into the middle range of the adopters, and its inclusion in our analysis would reduce the intended contrast.

41. See McWhirter, supra note I-41.


43. On Wisconsin, see Brockmeyer v. Dun & Bradstreet, 98 LC N.W. 2d 834 (Wisc. 1982)


46. The bottom lines of Table VI(1) give approximate confidence intervals at the .05 level (two tailed), which were computed using Woolf's method. These data confirm the significance of our findings, as both the lower and the upper limit fall above three.

47. The intuitive rationale for this stratification is that since the ranges of the variables are restricted within each subgroup, stratification will remove bias. As a consequence, a weighted average will also be free of bias. For the Mantel-Haenszel estimate of an odds ratio of a stratified sample, the odds ratio \( \bar{Y}_i \) of each subgroup \((i)\) is first estimated separately. Using the weight \( \omega_i = \frac{b_i c_i}{n_i} \)
Schlesselman, id, at p. 185 has shown that the weight \( \omega_i \) is approximately proportional to the reciprocals of the variances of the \( \bar{Y}_i \), so that the Mantel-Haenszel estimate \( \bar{Y}_{mh} \) is an average of the odds ratios weighted approximately to their precisions (reciprocal of variance).

48. In an analogue comparison of Colorado versus the two late adopter states [see Table VI(2), (2) versus (3&4)], by contrast, the Mantel-Haenszel estimate of the odds ratio fell below that of the estimate which included Massachusetts [see Table VI(2), odds ratio (1&2) versus (3&4)]. Although the single odds ratios were somewhat unstable in the case of the Colorado estimate, the difference in the Mantel-Haenszel odds ratios of the Colorado and Massachusetts comparisons indicate a correspondence between adopter rank and the strength of the odds ratio contrast, as the comparisons with the first ranked earliest adopter (Massachusetts) establishes a stronger contrast with late adopters than the second ranked early adopter (Colorado) does.

The same relationship between adopter rank and odds ratios holds true when the odds ratios of the late adopter states taken separately are compared to the two early adopter states taken together. At 2.141, the odds ratio of Wisconsin dismissals versus the two early adopter states [see Table VI(2), (1&2) versus (3)] falls considerably below the odds ratio of dismissals \( \bar{Y}_{mh} = 4.003 \) formed with Georgia versus the two early adopters [see Table VI(2), (1&2) versus (4)].

49. Mendelsohn, supra note i-8, pp. 3-4, stresses the concentration of these suits amongst managerial, white collar and service employees. Ideally this analysis should be based on layoff event data for the services (services proper, business services, professional services, finance, insurance, and real estate). Data for on layoff events (involving permanent layoffs) for this category, however is available very few states only, so that the non-manufacturing sector had to be used a proxy.

50. The Mass Layoff Survey's list layoff events (involving permanent separations) for firms involving at least 50 claims for a
consecutive period of three weeks. The dependent variable, relative layoff events, has been computed as a ratio of the number of layoff events in a state, to the state's non-manufacturing workforce. The reason for relying on layoff events, rather than separations is to avoid distortions due to seasonal employment. Relying on separations data, as in the case of the public sector analysis, could have brought major distortions as it would have been influenced by the large number of temporary workers who are laid off once yearly in some states.

51. YREX indicates whether a state has been an early/strong or late/weak adopter of dismissal litigation (it also approximates roughly the number of unjust dismissal cases which have already taken place in a state's courts). The emphasis on the public policy exemption is based on the fact that public policy exemptions were adopted first in most states, and draw the largest number of cases in all states.

52. PPOLEX is expected to give some indication of a judicial system's commitment to unjust dismissal regulation, but again serves only as a proxy, as a significantly larger, but typically unknown, number of these cases is decided in lower courts.

53. The circle size in these scatterplots corresponds to the size of the non-manufacturing workforce.

54. The regression of relative layoff events with PPOLEX yields weak results, with no significant differences between the two years. Overall, there appears to be only a weak indication that early/strong adopters of dismissal litigation, experienced a greater relative incidence of layoff events in both 1989 and 1990, than did late/weak adopter states (see Figures IV(5 to 8).

55. The application of OLS in Table IV(3) and Figures IV(5 to 8) is inefficient. This in part, is responsible for the low significance probabilities (t values) of the slopes reported in Table IV(3), where significant slopes are only detected for the variable YEAREX and model 5.

56. Poisson regression models assume that the explained variables $Y_1 \ldots Y_n$ have independent Poisson distributions with the parameters

$$
\text{Prob}(Y_{ri}) = \frac{e^{\lambda_i}}{r!}
$$

where

$$
\ln \lambda_i = \beta_0 + \sum_{j=1}^{p} \beta_j \times \text{rij}
$$

Maddala (1983) has shown that this model is part of an exponential family, with sufficient statistics that can be solved by the Newton Raphson method. See G. Maddala Limited Dependent and Qualitative Variables in Econometrics (Cambridge: Cambridge University Press, 1983)

57. The results for NMLF are spurious; Table VI(4) reports them only for completeness.

58. See, e.g., Krueger, supra note 44.
59. In this model dependent variables include:
- wage rates,
- layoff rates,

whereby wage rates represent the logarithm of the nonsupervisory hourly wage in manufacturing in a state, and layoff rates represent the ratio of the number of layoffs in the manufacturing sector and the number of manufacturing workers.

the independent variables include:
- unionization,
- occupational characteristics of the labor force,
- a variable describing political orientation of a state,
- the frequency of and success rate of dismissal suits

for a period from 1975 to 1990 (see Table 5a, and 6a for a description of these variables).

60. It is perhaps worth noting that Table IV(8) conveys no discernible relationship of layoff rates and dismissal litigation.

61. Gould, supra note II-19, has elaborate don this often neglected, but important dimension of unjust dismissal litigation.
CONCLUSION

A STORY OF MISSED OPPORTUNITIES?

The regulation of dismissals in the US has taken a long journey. This journey started with the imposition of restrictive English law, departed from the English standard with the adoption of Wood's rule, which marked the high-point of laissez faire labor law, and entered a new phase with the adoption of the NLRA and related statutes, which stressed the protection of workers through collective means. Today, dismissal regulation enters yet another phase, with the expansion of privately initiated unjust dismissal litigation.

Throughout this political history of dismissal regulation, attempts were made to restrict the power of employers to dismiss workers. These attempts were guided by different motives. Initially, in the days of the Erdman Act, blatant abuses of employees such as the blacklisting of organized workers, were a principal concern of those advocating a restriction of managerial dismissal powers. Later on, when the orderly extension of "collective" bargaining became a public policy goal, the, albeit limited, protection of workers engaging in organizing and strike activity became a part of the New Deal credo. Once unions had gained a legal foothold, other motives came to the fore, such as the creation and maintenance of justice at the workplace. Following the breakdown of the postwar consensus, the goal of industrial justice at the workplace appeared perhaps as too ambitious, causing new initiatives to focus only apparent types of "unfair" discharges.
All of these attempts to restrict "managerial prerogatives" touched on more than their immediate goal. No matter how limited each initiative was, it involved a questioning of the rights and the powers which the capitalist economy had seemingly assigned to the employer. This questioning in turn triggered counter-challenges both by employers and by the courts. In the context of these counter-challenges, the courts, more often than not, came to hinder the evolution of legislative possibilities by acting as guardians of such abstract principles as equal protection, property right, due process, and even the ambiguous managerial prerogative. This inhibitive role of the courts was most visible when the details of New Deal labor legislation were worked out and unions attempted to utilize newly established rights for job protection. In the end, a host of partial, yet practical solutions, such as severance pay, industrial tribunals, and comprehensive just-cause standards, prevailing in other countries, were lost in the muddle.

The system of dismissal regulation that was created out of these conflicts between union, employers, and the courts was haphazard, incomplete and perhaps confused. Its faults were visible on several levels. First, in the unionized workplace, it introduced new conflicts about collective versus individual rights by imposing on the unions the duty of fair representation, which had the potential of pinning workers against unions. Second, and perhaps more importantly, in the non-union workplace, it did not protect employees even against dismissals which resulted from unfair and illegal acts by employers.
When this situation was finally uncovered by some courts, they rushed to introduce exemptions from the at-will doctrine they had previously defended. In the absence of comprehensive dismissal regulation, the introduction of these exemptions unleashed its own dynamic. Unfair dismissal litigation became a major new category of legal action as well as a major business for those involved. Yet, despite the expansion of unjust dismissal doctrines, the definition of employees' rights by the courts remained negative. The courts were willing to specify as clearly as possible, what types of actions violated an employee's rights, but they were unwilling to state what rights employees had.

Within this dual system, over the past one and one half decades, the emphasis of dismissal regulation has increasingly shifted towards individualized dismissal regulation; firstly, because of a dramatic decline in union densities, and secondly, because of the expansion of exemptions from employment-at-will. The previous qualitative and quantitative analyses of unjust dismissal litigation, has suggested that this individual pathway to dismissal protection may be fundamentally flawed. Apart from the possibility of adverse effects, the current system of exemptions from employment at-will does not address adequately one of the most important sources of unfair dismissal, namely dismissals motivated by employer opportunism in the context of non-linear wage profiles. The public policy exemption, with its focus on societal relevance (currently the most prevalent of such exemptions) also cannot be applied to individual workers whose dismissal was based on an attempt to deprive them from an earnings
rise due to seniority. Meanwhile, the implicit nature of the non-linear wage contract will usually preclude a case of action based on implied contracts, or the covenant of good faith and fair dealing (both of which require explicit evidence of an agreement). Specific federal statutes such as ERISA finally, are also limited in their scope with regard to combating employer opportunism; primarily because their application requires a specific act of violation which employers are likely to circumvent through other, non-actionable, conduct.

The remit of the collective pathway to job security, meanwhile, is restricted by the coverage of workers through collective bargaining agreements. In the absence of a renaissance of trade unionism in the US, collective dismissal protection, with its formal, informal and concessionary components, is liable to be applicable to a minority of the workforce only. While the collective dismissal protection may present a more effective framework for the protection of workers from isolated as well as mass dismissals, it does not represent a model, which can be readily transplanted outside the framework of the unionized workplace. Since much of the unions ability to prevent terminations depends on their bargaining power, the transposition of this model to the non-union workplace, say in the form of an in-house grievance arbitration system, is unlikely to provide an effective protection for workers.

While this study has focused only on the union initiated and litigatory pathways to dismissal protection, other advanced
industrialized countries have demonstrated that there are alternative, predominantly legislative, options. These options may in many respects be preferable. The current system of dismissal litigation, for instance, is wasteful. In many countries, including Canada, most labor litigation takes place in industrial tribunals, that is in courts which are specialized in labor and dismissal matters, and which appear to perform their litigative task more speedily and more cheaply. The presence of such tribunals allows for the provision of a just cause standard combined with the rights to challenge dismissals to all or most employees.

Another option for regulating dismissal are severance pay requirements. Mandatory severance pay requirements are intuitively appealing in terms of their direct link to a property rights concept of jobs. Implicitly the provisions of severance pay acknowledges that workers hold a property right in their job, and must be duly compensated when they are "expropriated" from employment." Severance pay arrangements, perhaps, are also attractive in terms of a reallocation of the typically externalized costs of dismissal to the employer.

Neither severance pay nor industrial tribunals are, however, a panacea. Turnbull and Wass (1995), in reviewing the experience of industrial tribunals and redundancy pay in Britain, for instance, have argued that these schemes helped managers and shareholders pursue narrow economic interests, while encouraging workers to give up "job control." On a more general level, Mukerjee (1973) has suggested
earlier that there are inherent dangers in any such scheme which detracts from the fact that managers are the sole judges of the necessity for some workers to be "disemployed." To some degree, however, the British experience is unique. While redundancy payments were available to most workers, and amounts paid out corresponded roughly to previous wages and tenure, the payments were typically derisory; with a maximum of about $8,500 (applying to the case of an employee aged 41-64, in the top earnings category, with 20 years or more of service). If a legislator were to prevent employer opportunism in terms of the previously discussed theory, redundancy payments would have to be much higher, even for moderate wages. The income loss of an employee earning a moderate $20,000 per annum, with a typical non-linear wage profile, being dismissed at mid-career, for instance would amount to $30,000 (the assumption is that initial wages start 20% below productivity and increase by 40% over 30 years).

Whether a high-priced severance pay requirement would be able to halt the current wave of downsizing, and more importantly, whether such a requirement would be politically feasible, is a question I am unable to answer. Likewise, whether such options as industrial tribunals can be effectively transplanted to the US, also is a difficult question to answer.

As long as no legislative initiatives are taken, and at-will-employment termination is considered as "something we all have to live with," we will obviously never know what approach can or will work. My long term hope, therefore, is that there will be, at least in part, a reversal of the trajectory the US political economy of dismissals
has taken. The current wave of unrelenting corporate restructuring suggests an increasing need for a rediscovery of legislative restrictions of dismissals. Perhaps, getting to know what is wrong with the current "system" of dismissal regulation, is a step in this direction, at least for the time being.
NOTES:


REFERENCES:


Mass Layoffs in 1988 (Bulletin 2344, November 1989);  
Mass Layoffs in 1989 (Bulletin 2375 November 1989);  

Burn, R. (1743) Justice of the Peace and Parish Officer, London.


Commons, J. (1905) Trade Unionism and Labor Problems, New York: Ginn & Co.


Freidin, B. and Ullman, L. (1945) *Arbitration and the War Labor Board*, __.


Hoerr, J. "Beyond Unions," Business Week, 8 July.


Knight, F. (1921) Risk, Uncertainty and Profit, Boston: Houghton.


Person, C. E. "Fired, Laid Off or Demoted? Your Legal Options," in The Legal Mall, (Internet, revised July 1994).

-------- "How to Make $100,000 as a Whistleblower, Under the United States False Claims Act," in The Legal Mall, (Internet, revised June 1994).


Seidman, J. (1932) The Yellow Dog Contract, __


American Statutes and Laws

An Act in Relation to Labor, constituting chapter thirty-one of the consolidated laws of the state of New York (1928).

California Codes: Labor Code


ERISA, 29 U.S.C. MDRV 1001 et seq.


Labor Code of the State of Utah, Title 34-Labor in General.


Wyoming Statutes, Title 27, Labor and Employment.

English Statutes and Laws

Apportionment Act (33 & 34 Vict. c. 35).


Employers and Workmen Act of 1875 (38 & 39 Vict. c. 90).


Master and Servants Act of 1824 (4 Geo. 4, c. 34).

Master and Servants Act of 1867 (30 & 31 Vict. c. 141).

Statute of Labourers of 1562 (5 Eliz. c. 4).
American Cases


Adams v. Dick, 103 Misc. 259 (Sup. Ct., N.Y. Co. 1918).


American Radiator Co.--C-444; June 24, 1938; 7 NLRB No. 132.

Andersen v. E & J Gallo Winery, 1 IER cases 1207 (DC Conn. 1985).


Berry v. Donovan, 188 Mass 353 (1905).

Bowen v. Matheson, 96 Mass, 499 (1867).


Brown v. Trench (CA 1986) 1 IER 967.

Burka v. New York City Transit Authority (DC 1990) 5 IER 1139.

Capua v. Plainfield, City of (DC 1986) 1 IER 625.


Cleveland Board of Education v. Loudermill (US S.Ct 1985) 1 IER 424.

Cleveland Chair Co.--C-18; June 4, 1936; 1 NLRB. at p. 892.

Commonwealth v. Hunt, 4 Metc. 111 (1842).


Crowell v. Eastman, City of (CA 1988) 4 IER 40.


D'Amato v. Wisconsin Gas, 760 F. 2d 1474 (7th Cir. 1985)


Distefano v. Hall, 218 Cal. App. 2d 657, 678, 32 Cal. Rptr. 770 (1963);

Douglas Aircraft Co. Inc.--C-268-269; April 20, 1938; 6 NLRB. No. 108.


Drake v. Scott (CA 1987) 2 IER 554.


Duchesne v. Williams (CA 1988) 3 IER 715.

Duplex Printing Press v. Deering 254 U.S. 443 (1921)

Eads v. Marks, 39 Cal. 2d 807, 811, 249 P. 2d 257, 260 (1952);

Edward G. Budd Mfg. Co. v. NLRB, 138 F. 2d 86, 90 (3rd Cir. 1943).

Empire Furniture Co.--C-305 and R0-386; April 26, 1938: 6 NLRB. No. 124.

Emporium Capwell Co. v. Western Addition Community Organization (U.S. S.Ct., 1975).

Ewers v. Curry County, Board of County Commissioners (CA 1989) 4 IER 809.

Fireboard Paper Products Co. v. NLRB, 379 U.S. 203 (1964)


General Industries Co.--C-30; April 30, 1936; 1 NLRB: 678.

General Motors Co. v. NLRB, 191 NLRB 951 (1971).

General Motors Co., War Labor Reports 22 (1945).


Gorill v. Iclandair/Flugleidir, 1 IER Cases 1166 (2d Circuit 1985).


Gurish v. McFaul (CA 1986) 1 IER 689.

Harlan Fuel Co.--C-489; July 5, 1938; 8 NLRB. No. 3.

Hawaiian Airlines, Inc. v. Norris; on writ of certiorari to the
supreme court of Hawaii; No. 92-2058 (argued April 28, 1994-
Decided June 20, 1994)

Heyer v. Flaig 70 Cal. 2d 223, 227, 74 Cal. Rptr. 225, 449 P. 2d


Huber v. Standard Insurance Co., 841 F. 2d 980 (9th Cir. 1988).

Hudson v. Cincinnati, N.O. & T.P. Ry., 152 Ky 711, 154 S.W. 47
(1913)

Indianapolis Glove Co.--C-251; February 11, 1938; 5 NLRB. No.
34.

Ingersoll-Rand Co v. McClendon; on writ of certiorari to the
supreme court of Texas; No. 89-1298 (argued October 9, 1990-
Decided December 3, 1990, 1994)


Jennings v. Camp, 13 Jons. 94 (N.Y. 1816).

Johnston/Taylor v. Gannon (CA 1990) 5 IER 1596.

Jones v. Kelly 208 Cal. 251, 254, 28- P. 942 (1929);

Jones v. MCKenzie (DC 1986) 1 IER 1076.
Jordan v. Lake Oswego, City of (CA 1984) 1 IER 1547.


Kelsy v. Motorola Inc., 384 N.E. 2d 353 (Ill. 1978)


Krispy Kreme Doughnut Corp. v. NLRB, 635 F. 2d (4th Cir. 1980).

Langworth Feature Programs v. Manning (27 L.R.R.M. 2511).


Meech v. Hillhaven West, Inc 776 pl. 2d (Mont. 1989)

Metallic Lathers Local 46, 207 NLRB (1973) no. 631.

Morrison Cafeterias Consol. Inc. v. NLRB, 431 F.2d 254 (8th Cir. 1970).


Monoidis v. Cook, 794 A. 2d 212 (MD, 1985)


NLRB v. Health Care & Retirement Co. of America __
NLRB v. Newark Morning Ledger Co. 120 F. 2d 262 (C.C.A. 3d, '1941) cert. denied. 314 U.S. 693 (1941).
NLRB v. The Sands Manufacturing Company, (6th Cir. 1937).
Norris v. Finazzo, 74 Haw. 235, 842 P., 2d 634 (1992)
Pane v. RCA Corp., 868 F. 2d 631 (CA3 1989).
Paul v. Davis (US SCt 1976) 1 IER 1827.
Payne v. Western & A.R.R. Co. (Tenn, 1884), 81 Tenn 507.
Perry v. Aytch (CA 1983) 1 IER 337.


Piazza v. Roque (DC 1987) 2 IER 1411.

Pickett v. Walsh, 192 Mass. 572 (1906).


Ramsey v. People, 142 Ill. 380; 32 N.E. 364 (1892).

Richardson v. Felix (CA 1988) 3 IER 1421.

Robb v. Philadelphia, City of (CA 1984) 1 IER 1787.


Shawgo v. Spradlin (CA 1983) 1 IER 164.

Sheba Ann Frocks, Inc.--C-186; February 1, 1938; 5 NLRB. No. 5.


State Colleges (Board of Regents) v. Roth (US SCt 1972) 1 IER 23.

State v. Loomis, 22 S.W. 350 (1893).


Swift & Co., 12 LA 108.

T. W. Hepler--C-349; May 19, 1938; 7 NLRB. No. 34.


Teachers, Local 420 (St Louis) v. St Louis, City of, Board of Education (DC 1987) 2 IER 298.

Teamsters Local 456 (J.R. Stevenson Co.) 208 NLRB (1974) no. 145.


The Seagrave Corporation--C-189; January, 21 1938; 4 NLRB. p. 1093.


Union News Co. v. Hildreth, 295 F. 2d 658 (6th Cir. 1962).

United States Potash Co., 30 LA 1039.

Uxbridge Worsted Co. Inc.--C-131; April 21, 1938; 6 NLRB. No. 109.


Vinyard v. King (CA 1981) 1 IER 129.

West Virginia Pulp & Paper Co., 10 LA 117.

Whitfield v. Finn (CA 1984) 1 IER 1794.


Williams v. West Jordan City (CA 1983) 1 IER 1744.

Wiskotoni v. Michigan National Bank West, 716 F. 2d 38 (6th Cir. 1983)

Woodson v. AMF Leisureland Centers Inc., 3 IER Cases, 836 (3rd Circuit, 1988).

Zannis v. Birmingham, City of (DC 1986) 1 IER 796.
English and Scottish Cases

Anderson v. Wishart (1818) 1 Mur. 429 and 442
Baxter v. Nurse (1844), 6 M. & G. 935
Bayley v. Rimmell (1836).
Beckham v. Drake (1847-9) 2 H. L. C. 579.
Beeston v. Collier (1827), 4 Bing. 309.
Bentinck v. Macpherson (1869) 6 S.L.R. 376
Brace v. Calder (1895) 2 Q. B. 253; 34 digest 99, 739.
Brewster v. Kitchell (1678) 1 Ld. Raym.
Cameron v. Fletcher (1872) 10 M. 301.
Campbell v. Fyfe (1851) 13 D. 1041.
Collins v. Price, 5 Bingh. 132.
Dow v. Pinto (1854), 9 Ex. 327
Fawcett v. Cash (1854) 5 B & Ad. 904
Fewings v. Tisdal (1847) 1 Exch. 295.
Finlayson v. McKenzie (1829) 7 S. 717.
Gandell v. Pontigny (1816) 4 Camp. 375.
George v. Davies (1911) 2 K. B. 445
Harper v. Linthorpe Dimsdale Smelting Co. (1909) 101
Hartland v. Exchange Bank (1866) 14 L. T. 863.
Hochster v. De La Tour (1853) 2 E. & B. 678.
L. T. 608.
Innes v. Brand (1 June 1796) Hume's MS, lect.


Lilley v. Ellwin (1848) 11 Q. B. 742.

Martyn v. Hind (1776, 1779) 1 Doug, 142.

Maclean v. Fyfe (4 Feb 1813) F.C.


Metzner v. Bolton (1864) 9 Ex. 518.

Morrison v. Allardyce (27 June, 1823) 2 S. 434.

Moult v. Halliday (1898) 1 Q. B.

O'Neil v. Armstrong (1895) 2 W. B. 418.


Planché v. Colburn (1831), 8 Bing. 14.

Reeston v. Collier (1827) 4 Bing. 309.

Reid v. Explosives Co. (1887) 1 Q. B. D. 264.

Re Rubel Bronze Co. and Vos. (1918) 1 K. B. 315; 34 Digest 71, 496


Ross v. Pender (1874) 1 R. 352.

Smith v. Hayward (1837), 7 A. & E. 544.

Smith v. Kingsford, 3 Scott 279.


Turner v. Mason (1845)

Whittle v. Frankland (1862), 2 B & S 49, 121 E.R. 993, K.B.

Wallis v. Warren (1849) 4 Exch. 361.

Watson v. Burnett (1862), 24 d. 497.

Wilkinson v. Gaston (1846) 9 Q. B. 137.
Table 1

Number and Percent of Displacements by Industry: 1984, 86, 88, and 90 Surveys

<table>
<thead>
<tr>
<th>Industry</th>
<th>79-84</th>
<th>81-86</th>
<th>83-86</th>
<th>85-90</th>
</tr>
</thead>
<tbody>
<tr>
<td>Workers</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mining</td>
<td>314</td>
<td>1079</td>
<td>29.1%</td>
<td>395</td>
</tr>
<tr>
<td>Dur. Manufacturing</td>
<td>3179</td>
<td>12973</td>
<td>24.5%</td>
<td>3098</td>
</tr>
<tr>
<td>Non Dur. Manufacturing</td>
<td>1764</td>
<td>8486</td>
<td>21.0%</td>
<td>1592</td>
</tr>
<tr>
<td>Construction</td>
<td>1189</td>
<td>5907</td>
<td>20.1%</td>
<td>952</td>
</tr>
<tr>
<td>Transport, Utilities</td>
<td>770</td>
<td>6497</td>
<td>11.9%</td>
<td>810</td>
</tr>
<tr>
<td>Agriculture, Forestry</td>
<td>292</td>
<td>3458</td>
<td>7.3%</td>
<td>291</td>
</tr>
<tr>
<td>Total Production</td>
<td>7488</td>
<td>39400</td>
<td>19.5%</td>
<td>7138</td>
</tr>
<tr>
<td>Non Production</td>
<td>203</td>
<td>5128</td>
<td>4.0%</td>
<td>122</td>
</tr>
<tr>
<td>Public Administration</td>
<td>568</td>
<td>3920</td>
<td>14.9%</td>
<td>585</td>
</tr>
<tr>
<td>Wholesale Trade</td>
<td>1276</td>
<td>16129</td>
<td>7.9%</td>
<td>1049</td>
</tr>
<tr>
<td>Retail Trade</td>
<td>259</td>
<td>5997</td>
<td>4.3%</td>
<td>270</td>
</tr>
<tr>
<td>Finance, Insurance ...</td>
<td>685</td>
<td>4044</td>
<td>16.9%</td>
<td>781</td>
</tr>
<tr>
<td>Business &amp; Repair Serv.</td>
<td>200</td>
<td>3810</td>
<td>5.2%</td>
<td>217</td>
</tr>
<tr>
<td>Personal Services</td>
<td>581</td>
<td>19610</td>
<td>2.9%</td>
<td>578</td>
</tr>
<tr>
<td>Professional Services</td>
<td>142</td>
<td>1076</td>
<td>13.2%</td>
<td>99</td>
</tr>
<tr>
<td>Total Non Production</td>
<td>3931</td>
<td>59914</td>
<td>6.6%</td>
<td>3701</td>
</tr>
<tr>
<td>TOTAL</td>
<td>11419</td>
<td>98314</td>
<td>11.6%</td>
<td>10839</td>
</tr>
</tbody>
</table>

Table II(1)

Remedial Action Taken in Unfair Labor Practice Cases
Various Years, 1948-80

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Number of Cases</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Against Employers</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employee Reinstated</td>
<td>n.a.</td>
<td>n.a.</td>
<td>1122</td>
<td>952</td>
<td>1532</td>
<td>2851</td>
</tr>
<tr>
<td>Back Pay Distributed</td>
<td>n.a.</td>
<td>n.a.</td>
<td>1467</td>
<td>1660</td>
<td>2249</td>
<td>3984</td>
</tr>
<tr>
<td>In Favour of Worker</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Reinstatement</td>
<td>1001</td>
<td>1885</td>
<td>5857</td>
<td>3779</td>
<td>3816</td>
<td>10033</td>
</tr>
<tr>
<td>Back Wages Paid</td>
<td>1196</td>
<td>2923</td>
<td>4591</td>
<td>6806</td>
<td>7393</td>
<td>15566</td>
</tr>
<tr>
<td>Thousands of 1948 Dollars</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Back Pay in $</td>
<td>431</td>
<td>926</td>
<td>2123</td>
<td>2324</td>
<td>5048</td>
<td>9388</td>
</tr>
</tbody>
</table>

Source: NLRB, Office of Statistical Services
Aggregate Separations in Early vs. Late UDL Adopter States, 1988-90

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Early (Mass. &amp; Colo.)</td>
<td>(a) 11131</td>
<td>(b) 495667</td>
<td>0.0225</td>
</tr>
<tr>
<td>Late (Wisc. &amp; Geor.)</td>
<td>(c) 5162</td>
<td>(d) 726433</td>
<td>0.0071</td>
</tr>
<tr>
<td>Sum</td>
<td>16293</td>
<td>1222100</td>
<td>0.0133</td>
</tr>
</tbody>
</table>

Point Estimate of Odds Ratio: $\psi = 3.1602$

Approximate Confidence Intervals:
- LL $\psi = 3.0571$
- UL $\psi = 3.2669$
Separations in Early vs. Late UDL Adopter States by Single State and Year

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Seprtd.</td>
<td>Workers</td>
<td>Seprtd.</td>
</tr>
<tr>
<td>Massachusetts (1)</td>
<td>2146</td>
<td>406700</td>
<td>3527</td>
</tr>
<tr>
<td>Colorado (2)</td>
<td>626</td>
<td>88000</td>
<td>315</td>
</tr>
<tr>
<td>Wisconsin (3)</td>
<td>896</td>
<td>215000</td>
<td>788</td>
</tr>
<tr>
<td>Georgia (4)</td>
<td>423</td>
<td>494100</td>
<td>1213</td>
</tr>
</tbody>
</table>

Odds Ratio
(1 & 2) vs (3 & 4):
\[ \psi \text{ mh} = 3.1681 \]
\[ LL \psi \text{ mh} = 3.0649 \]
\[ UL \psi \text{ mh} = 3.2749 \]

Odds Ratio
(1) vs (3 & 4):
\[ \psi \text{ mh} = 3.3160 \]
\[ LL \psi \text{ mh} = 3.2049 \]
\[ UL \psi \text{ mh} = 3.4309 \]

Odds Ratio
(2) vs. (3 & 4):
\[ \psi \text{ mh} = 2.5429 \]
\[ LL \psi \text{ mh} = 2.3943 \]
\[ UL \psi \text{ mh} = 2.7006 \]

Odds Ratio
(1 & 2) vs (3):
\[ \psi \text{ mh} = 2.1409 \]
\[ LL \psi \text{ mh} = 2.0459 \]
\[ UL \psi \text{ mh} = 2.2404 \]

Odds Ratio
(1 & 2) vs. (4):
\[ \psi \text{ mh} = 4.0037 \]
\[ LL \psi \text{ mh} = 3.8412 \]
\[ UL \psi \text{ mh} = 4.1730 \]
Table 3: OLS Regression

Dependent Variables: Relative Layoff Events 1989/1990

<table>
<thead>
<tr>
<th>Model</th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
<th>(4)</th>
<th>(5)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>YEAREX</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>B</td>
<td>-.0005 -.0005</td>
<td>-.0005 -.0005</td>
<td>-.0006 -.0006</td>
<td>-.0007 -.0007</td>
<td>-.0014 -.0013</td>
</tr>
<tr>
<td>t(abs)</td>
<td>.7421 .6912</td>
<td>.8506 .7403</td>
<td>.9681 .8473</td>
<td>1.0898 .9822</td>
<td>3.0488 2.2584</td>
</tr>
<tr>
<td>R²(YEX)</td>
<td>.026 .022</td>
<td></td>
<td>.043 .033</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>PPOLEX</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>B</td>
<td>.0004 .0002</td>
<td>.0004 .0002</td>
<td>.0004 .0004</td>
<td>.0004 .0005</td>
<td>.0004 .0004</td>
</tr>
<tr>
<td>t(abs)</td>
<td>.7335 .3385</td>
<td>.8435 .4479</td>
<td>1.1857 1.1777</td>
<td>1.2807 1.2691</td>
<td>1.3309 1.3000</td>
</tr>
<tr>
<td>R²(PPX)</td>
<td>.025 .005</td>
<td></td>
<td>.063 .062</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R²(RESTCT)</td>
<td>.059 .032</td>
<td></td>
<td>.115 .105</td>
<td>.425 .308</td>
<td></td>
</tr>
<tr>
<td>n</td>
<td>23 23</td>
<td>23 23</td>
<td>23 23</td>
<td>23 23</td>
<td>22 22</td>
</tr>
</tbody>
</table>

(1) unrestricted unweighted model (reg. with each var. separately)
(2) restricted unweighted model (mult. reg. with both vars.)
(3) unrestricted weighted model (wght-size of state’s service workforce)
(4) restricted weighted model
(5) unrestricted weighted model excluding outlier Minnesota
(6) restricted weighted model excluding Minnesota -- R² only given
Table IV(4)

Dependent Variables: Layoff Events 1989/1990

<table>
<thead>
<tr>
<th>Model</th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
<th>(4)</th>
</tr>
</thead>
<tbody>
<tr>
<td>YEAREX</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>B</td>
<td>0.2234</td>
<td>0.2423</td>
<td>0.2104</td>
<td>0.2423</td>
</tr>
<tr>
<td>t</td>
<td>6.8464</td>
<td>8.5282</td>
<td>8.0441</td>
<td>8.5283</td>
</tr>
<tr>
<td>PPOLEX</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>B</td>
<td>0.0821</td>
<td>0.0975</td>
<td>0.0689</td>
<td>0.0947</td>
</tr>
<tr>
<td>T</td>
<td>2.2621</td>
<td>2.4681</td>
<td>2.0633</td>
<td>2.4681</td>
</tr>
<tr>
<td>NMLF</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>B</td>
<td>na</td>
<td>na</td>
<td>0.4043</td>
<td>0.0755</td>
</tr>
<tr>
<td>t</td>
<td>2.3558</td>
<td>2.1552</td>
<td>na</td>
<td>na</td>
</tr>
</tbody>
</table>

(1) partially unrestricted unweighted model (separate reg. eq. for YEAREX+NMLF; PPOLEX+NMLF)
(2) restricted unweighted model (multiple reg. with all variables)
(3) partially unrestricted weighted model (as (1) with wght=size of state's servview workforce)
(4) restricted weighted model (wght=size of state's review workforce)
### Tables IV(5)a,b,c,d

#### Exploratory Data Analysis

**LOGWGE (1) = f [UNEMP (2); UNMBR (3); MANAD (4); POL (5)];**

where

1. **LOGWGE:** dec. log. of nonsupervisory hourly wage in manufacturing (by state)
2. **UNMBR:** percent union members in manufacturing (by state)
3. **MANAD:** percent workers employed in occupation classified as managerial or administrative
4. **POL:** dummy variable measuring republican v. democratic control of state governments

**Range:** 0 (all offices--up.hs, low.hs, governor--republican controlled) 3 (all offices democratic)

### 5 a)

<table>
<thead>
<tr>
<th>Dependent Variable</th>
<th>Independent Variables:</th>
</tr>
</thead>
<tbody>
<tr>
<td>LOGWAGE (0 YEAR LAG)</td>
<td>CIV.</td>
</tr>
<tr>
<td>Year</td>
<td>Year</td>
</tr>
<tr>
<td>1975</td>
<td>1975</td>
</tr>
<tr>
<td>1976</td>
<td>1976</td>
</tr>
<tr>
<td>1977</td>
<td>1977</td>
</tr>
<tr>
<td>1978</td>
<td>1978</td>
</tr>
<tr>
<td>1979</td>
<td>1979</td>
</tr>
<tr>
<td>1980</td>
<td>1980</td>
</tr>
<tr>
<td>1981</td>
<td>1981</td>
</tr>
<tr>
<td>1982</td>
<td>1982</td>
</tr>
<tr>
<td>1983</td>
<td>1983</td>
</tr>
<tr>
<td>1984</td>
<td>1984</td>
</tr>
<tr>
<td>1985</td>
<td>1985</td>
</tr>
<tr>
<td>1986</td>
<td>1986</td>
</tr>
<tr>
<td>1987</td>
<td>1987</td>
</tr>
<tr>
<td>1988</td>
<td>1988</td>
</tr>
<tr>
<td>Year</td>
<td>Year</td>
</tr>
<tr>
<td>------</td>
<td>------</td>
</tr>
<tr>
<td>1975</td>
<td>1975</td>
</tr>
<tr>
<td>1976</td>
<td>1975</td>
</tr>
<tr>
<td>1977</td>
<td>1976</td>
</tr>
<tr>
<td>1978</td>
<td>1977</td>
</tr>
<tr>
<td>1979</td>
<td>1978</td>
</tr>
<tr>
<td>1980</td>
<td>1979</td>
</tr>
<tr>
<td>1981</td>
<td>1980</td>
</tr>
<tr>
<td>1982</td>
<td>1981</td>
</tr>
<tr>
<td>1983</td>
<td>1982</td>
</tr>
<tr>
<td>1984</td>
<td>1983</td>
</tr>
<tr>
<td>1985</td>
<td>1984</td>
</tr>
<tr>
<td>1986</td>
<td>1985</td>
</tr>
<tr>
<td>1987</td>
<td>1986</td>
</tr>
<tr>
<td>1988</td>
<td>1987</td>
</tr>
<tr>
<td>1989</td>
<td>1988</td>
</tr>
<tr>
<td>1990</td>
<td>1989</td>
</tr>
<tr>
<td>1991</td>
<td>1990</td>
</tr>
<tr>
<td>1992</td>
<td>1991</td>
</tr>
<tr>
<td>1993</td>
<td>1992</td>
</tr>
<tr>
<td>1994</td>
<td>1993</td>
</tr>
<tr>
<td>1995</td>
<td>1994</td>
</tr>
<tr>
<td>1996</td>
<td>1995</td>
</tr>
<tr>
<td>1997</td>
<td>1996</td>
</tr>
<tr>
<td>1998</td>
<td>1997</td>
</tr>
<tr>
<td>1999</td>
<td>1998</td>
</tr>
<tr>
<td>2000</td>
<td>1999</td>
</tr>
<tr>
<td>Year</td>
<td>Slope (t-Value)</td>
</tr>
<tr>
<td>------</td>
<td>----------------</td>
</tr>
<tr>
<td>1975</td>
<td>1975</td>
</tr>
<tr>
<td>1976</td>
<td></td>
</tr>
<tr>
<td>1977</td>
<td></td>
</tr>
<tr>
<td>1978</td>
<td></td>
</tr>
<tr>
<td>1979</td>
<td></td>
</tr>
<tr>
<td>1980</td>
<td></td>
</tr>
<tr>
<td>1981</td>
<td></td>
</tr>
<tr>
<td>1982</td>
<td></td>
</tr>
<tr>
<td>1983</td>
<td></td>
</tr>
<tr>
<td>1984</td>
<td></td>
</tr>
<tr>
<td>1985</td>
<td></td>
</tr>
<tr>
<td>1986</td>
<td></td>
</tr>
<tr>
<td>1987</td>
<td></td>
</tr>
<tr>
<td>1988</td>
<td></td>
</tr>
</tbody>
</table>
## Table 1: Regression Results for Log Wages

<table>
<thead>
<tr>
<th>Year</th>
<th>Year</th>
<th>Stats.</th>
<th>CIV. UNEMPL. RATE</th>
<th>% UNION MEMBERS MANUFACT.</th>
<th>% WRKFRG. MANAGERIAL ADMINISTR.</th>
<th>COMPOSITION OCCUPATIONS</th>
<th>DUMMY VAR. PARTY STATE GOV.</th>
<th>CONSTANT</th>
<th>R-SQUARE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975</td>
<td>1975</td>
<td>--- Slope (t-Value)</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>1977</td>
<td>1977</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>1978</td>
<td>1978</td>
<td>0.084</td>
<td>(0.150)</td>
<td>(5.472)</td>
<td>0.583</td>
<td>(2.394)</td>
<td>0.200</td>
<td>0.001</td>
<td>0.803</td>
</tr>
<tr>
<td>1979</td>
<td>1979</td>
<td>0.045</td>
<td>(0.082)</td>
<td>(6.033)</td>
<td>0.456</td>
<td>(2.323)</td>
<td>0.258</td>
<td>0.001</td>
<td>0.825</td>
</tr>
<tr>
<td>1980</td>
<td>1980</td>
<td>0.062</td>
<td>(1.465)</td>
<td>(6.053)</td>
<td>0.474</td>
<td>(2.323)</td>
<td>0.258</td>
<td>0.001</td>
<td>0.825</td>
</tr>
<tr>
<td>1981</td>
<td>1981</td>
<td>0.084</td>
<td>(0.150)</td>
<td>(5.472)</td>
<td>0.583</td>
<td>(2.394)</td>
<td>0.200</td>
<td>0.001</td>
<td>0.803</td>
</tr>
<tr>
<td>1982</td>
<td>1982</td>
<td>0.045</td>
<td>(0.082)</td>
<td>(6.033)</td>
<td>0.456</td>
<td>(2.323)</td>
<td>0.258</td>
<td>0.001</td>
<td>0.825</td>
</tr>
<tr>
<td>1983</td>
<td>1983</td>
<td>0.062</td>
<td>(1.465)</td>
<td>(6.053)</td>
<td>0.474</td>
<td>(2.323)</td>
<td>0.258</td>
<td>0.001</td>
<td>0.825</td>
</tr>
<tr>
<td>1984</td>
<td>1984</td>
<td>0.084</td>
<td>(0.150)</td>
<td>(5.472)</td>
<td>0.583</td>
<td>(2.394)</td>
<td>0.200</td>
<td>0.001</td>
<td>0.803</td>
</tr>
<tr>
<td>1985</td>
<td>1985</td>
<td>0.045</td>
<td>(0.082)</td>
<td>(6.033)</td>
<td>0.456</td>
<td>(2.323)</td>
<td>0.258</td>
<td>0.001</td>
<td>0.825</td>
</tr>
<tr>
<td>1986</td>
<td>1986</td>
<td>0.062</td>
<td>(1.465)</td>
<td>(6.053)</td>
<td>0.474</td>
<td>(2.323)</td>
<td>0.258</td>
<td>0.001</td>
<td>0.825</td>
</tr>
<tr>
<td>1987</td>
<td>1987</td>
<td>0.084</td>
<td>(0.150)</td>
<td>(5.472)</td>
<td>0.583</td>
<td>(2.394)</td>
<td>0.200</td>
<td>0.001</td>
<td>0.803</td>
</tr>
<tr>
<td>1988</td>
<td>1988</td>
<td>0.045</td>
<td>(0.082)</td>
<td>(6.033)</td>
<td>0.456</td>
<td>(2.323)</td>
<td>0.258</td>
<td>0.001</td>
<td>0.825</td>
</tr>
</tbody>
</table>

Note: The table presents regression results with t-values in parentheses. The dependent variable is log wages (3 YEAR LAG), and the independent variables include various socio-economic factors.
### Tables IV(6) a, b, c, d

**Exploratory Analysis**

LYFF (1) = f [LGPI (2); UNMB (3); MANAD (4); PSUE (5); PWIN (6)]

where

1) LYRF: number of layoffs in manufacturing by manufacturing employees (by state)
2) LGPI: dec. log. of state per capita personal income
3) UNMB: percent union members in manufacturing (by state)
4) MANAD: percent workers in occupation classified as managerial or administrative
5) PSUE: approximate probability of a worker entering a dismissal suit
6) PWIN: approximate probability of plaintiff winning a dismissal suit

<table>
<thead>
<tr>
<th>Dependent Variable: LAYOFF RATE (0 YEAR LAG)</th>
<th>Independent Variables:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year</td>
<td>Year</td>
</tr>
<tr>
<td>------</td>
<td>------</td>
</tr>
<tr>
<td>1975</td>
<td>1975</td>
</tr>
<tr>
<td>1976</td>
<td>1976</td>
</tr>
<tr>
<td>1977</td>
<td>1977</td>
</tr>
<tr>
<td>1978</td>
<td>1978</td>
</tr>
<tr>
<td>1979</td>
<td>1979</td>
</tr>
<tr>
<td>1980</td>
<td>1980</td>
</tr>
<tr>
<td>1981</td>
<td>1981</td>
</tr>
<tr>
<td>1982</td>
<td>1982</td>
</tr>
<tr>
<td>1983</td>
<td>1983</td>
</tr>
<tr>
<td>1984</td>
<td>1984</td>
</tr>
<tr>
<td>1985</td>
<td>1985</td>
</tr>
<tr>
<td>1986</td>
<td>1986</td>
</tr>
<tr>
<td>1987</td>
<td>1987</td>
</tr>
<tr>
<td>1988</td>
<td>1988</td>
</tr>
<tr>
<td>1989</td>
<td>1989</td>
</tr>
<tr>
<td>1990</td>
<td>1990</td>
</tr>
<tr>
<td>1991</td>
<td>1991</td>
</tr>
<tr>
<td>1992</td>
<td>1992</td>
</tr>
<tr>
<td>1993</td>
<td>1993</td>
</tr>
<tr>
<td>1994</td>
<td>1994</td>
</tr>
<tr>
<td>Year</td>
<td>Slope (t-Value)</td>
</tr>
<tr>
<td>------</td>
<td>----------------</td>
</tr>
<tr>
<td>1975</td>
<td>0.003 (0.47)</td>
</tr>
<tr>
<td>1976</td>
<td>0.013 (1.116)</td>
</tr>
<tr>
<td>1977</td>
<td>-0.013 (3.101)</td>
</tr>
<tr>
<td>1978</td>
<td>0.021 (2.710)</td>
</tr>
<tr>
<td>1979</td>
<td>0.017 (3.655)</td>
</tr>
<tr>
<td>1980</td>
<td>-0.042 (4.565)</td>
</tr>
<tr>
<td>1981</td>
<td>-0.069 (5.959)</td>
</tr>
<tr>
<td>1982</td>
<td>-0.075 (6.028)</td>
</tr>
<tr>
<td>1983</td>
<td>-2.728 (4.339)</td>
</tr>
<tr>
<td>1984</td>
<td>-2.224 (4.263)</td>
</tr>
<tr>
<td>1985</td>
<td>0.012 (1.607)</td>
</tr>
<tr>
<td>1986</td>
<td>0.041 (1.807)</td>
</tr>
<tr>
<td>1987</td>
<td>-1.070 (3.879)</td>
</tr>
<tr>
<td>1988</td>
<td>-0.112 (3.082)</td>
</tr>
<tr>
<td>Year</td>
<td>Year</td>
</tr>
<tr>
<td>-------</td>
<td>------</td>
</tr>
<tr>
<td>1975</td>
<td></td>
</tr>
<tr>
<td>1976</td>
<td></td>
</tr>
<tr>
<td>1977</td>
<td>1975</td>
</tr>
<tr>
<td></td>
<td>1976</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>1978</td>
<td>1977</td>
</tr>
<tr>
<td></td>
<td>1978</td>
</tr>
<tr>
<td>1979</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1980</td>
</tr>
<tr>
<td>1981</td>
<td></td>
</tr>
<tr>
<td>1982</td>
<td>1980</td>
</tr>
<tr>
<td></td>
<td>1981</td>
</tr>
<tr>
<td>1983</td>
<td></td>
</tr>
<tr>
<td>1984</td>
<td></td>
</tr>
<tr>
<td>1985</td>
<td></td>
</tr>
<tr>
<td>1986</td>
<td></td>
</tr>
<tr>
<td>1987</td>
<td></td>
</tr>
<tr>
<td>1988</td>
<td></td>
</tr>
<tr>
<td>Year</td>
<td>Year</td>
</tr>
<tr>
<td>------</td>
<td>------</td>
</tr>
<tr>
<td>1975</td>
<td>----</td>
</tr>
<tr>
<td>1976</td>
<td>----</td>
</tr>
<tr>
<td>1977</td>
<td>----</td>
</tr>
<tr>
<td>1978</td>
<td>1975</td>
</tr>
<tr>
<td>1979</td>
<td>1976</td>
</tr>
<tr>
<td>1980</td>
<td>1977</td>
</tr>
<tr>
<td>1981</td>
<td>1978</td>
</tr>
<tr>
<td>1982</td>
<td>1979</td>
</tr>
<tr>
<td>1983</td>
<td>1980</td>
</tr>
<tr>
<td>1984</td>
<td>1981</td>
</tr>
<tr>
<td>1985</td>
<td>1982</td>
</tr>
<tr>
<td>1986</td>
<td>1983</td>
</tr>
<tr>
<td>1987</td>
<td>1984</td>
</tr>
<tr>
<td>1988</td>
<td>1985</td>
</tr>
<tr>
<td>1989</td>
<td>1986</td>
</tr>
<tr>
<td>1990</td>
<td>1987</td>
</tr>
<tr>
<td>1991</td>
<td>1988</td>
</tr>
<tr>
<td>1992</td>
<td>1989</td>
</tr>
<tr>
<td>1993</td>
<td>1990</td>
</tr>
<tr>
<td>1994</td>
<td>1991</td>
</tr>
<tr>
<td>1995</td>
<td>1992</td>
</tr>
<tr>
<td>1996</td>
<td>1993</td>
</tr>
<tr>
<td>1997</td>
<td>1994</td>
</tr>
<tr>
<td>1998</td>
<td>1995</td>
</tr>
<tr>
<td>1999</td>
<td>1996</td>
</tr>
</tbody>
</table>
Pooled Time Series Analysis: TESTS FOR STRUCTURAL CHANGE IN DETERMINANTS OF WAGE RATES

Equation:

\[ \text{LOGWAGE}_t = f(\text{UNION MEMBERS}_{t-3}; \text{UNEMP RATE}_{t}; \text{MANAG \& ADMIN. WRKRS.}_{t-2}; \text{PARTY COMP. GOVT.}_{t-1}) \]

<table>
<thead>
<tr>
<th>Years</th>
<th>Number of fixed effects estimators</th>
<th>Pooled Blocks</th>
<th>Pooled Series</th>
<th>Chow Test</th>
</tr>
</thead>
<tbody>
<tr>
<td>1978 thru 1988</td>
<td>: Complete Series (slope)</td>
<td>:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a) 1978 thru 1981</td>
<td>: 1st possible</td>
<td>: 4</td>
<td>: 0.4701 **</td>
<td>: 0.7042 **</td>
</tr>
<tr>
<td>b) 1982 thru 1988</td>
<td>: strct. break</td>
<td>: 7</td>
<td>: 0.4712 **</td>
<td>: 0.8815 **</td>
</tr>
<tr>
<td>a) 1978 thru 1982</td>
<td>: 2nd possible</td>
<td>: 5</td>
<td>: 0.4723 **</td>
<td>: 0.7097 **</td>
</tr>
<tr>
<td>b) 1983 thru 1988</td>
<td>: strct. break</td>
<td>: 6</td>
<td>: 0.4871 **</td>
<td>: 0.6722 **</td>
</tr>
<tr>
<td>a) 1978 thru 1983</td>
<td>: 3rd possible</td>
<td>: 6</td>
<td>: 0.4539 **</td>
<td>: 0.7219 **</td>
</tr>
<tr>
<td>b) 1984 thru 1988</td>
<td>: strct. break</td>
<td>: 7</td>
<td>: 0.4904 **</td>
<td>: 0.6635 **</td>
</tr>
<tr>
<td>a) 1978 thru 1984</td>
<td>: 4th possible</td>
<td>: 5</td>
<td>: 0.4396 **</td>
<td>: 0.7676 **</td>
</tr>
<tr>
<td>b) 1985 thru 1988</td>
<td>: strct. break</td>
<td>: 4</td>
<td>: 0.5903 **</td>
<td>: 0.6871 **</td>
</tr>
<tr>
<td>a) 1978 thru 1985</td>
<td>: 5th possible</td>
<td>: 8</td>
<td>: 0.5015 **</td>
<td>: 0.7568 **</td>
</tr>
<tr>
<td>b) 1986 thru 1988</td>
<td>: strct. break</td>
<td>: 3</td>
<td>: 0.4694 **</td>
<td>: 0.6524 **</td>
</tr>
</tbody>
</table>

+ T value: * significant at .05 level (one tailed) ** significant at .01 level (one tailed)
Pooled Time Series Analysis: TESTS FOR STRUCTURAL CHANGE IN DETERMINANTS OF LAYOFF RATES

Equation:

\[
\text{LAYOFF RATE}_t = f \left( \text{UNIONS}_t-3, \text{PERS INC}_t-2, \text{MANAG. & ADMIN. WRKRS}_t-2, \text{PARTY COMP.}_t-1, \text{GOVT}_t-1, \text{PROB. SUING}_t, \text{PROB. WINNING SUIT}_t \right)
\]

<table>
<thead>
<tr>
<th>Dependent Variable</th>
<th>Independent Variables</th>
</tr>
</thead>
<tbody>
<tr>
<td>LAYOFF RATE</td>
<td>Stats.</td>
</tr>
<tr>
<td>Years</td>
<td>Number of fixed effects estimators</td>
</tr>
<tr>
<td>Pooled Effects</td>
<td>1</td>
</tr>
</tbody>
</table>

1978 thru 1980: Complete Series (slope)

<table>
<thead>
<tr>
<th></th>
<th>Coefficients</th>
<th>Std. Errors</th>
<th>t-values</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>a) 1978 thru 1981</td>
<td>0.05773</td>
<td>0.05222</td>
<td>10.97</td>
</tr>
<tr>
<td>1st possible</td>
<td>0.05424</td>
<td>0.00251</td>
<td>20.12</td>
</tr>
<tr>
<td>b) 1982 thru 1980</td>
<td>-0.02939</td>
<td>-0.00928</td>
<td>-3.22</td>
</tr>
<tr>
<td>7 strict. break</td>
<td>-0.19619</td>
<td>-0.00241</td>
<td>-8.02</td>
</tr>
<tr>
<td></td>
<td>0.00002</td>
<td>0.00253</td>
<td>0.07</td>
</tr>
<tr>
<td></td>
<td>-0.00013</td>
<td>-0.00098</td>
<td></td>
</tr>
<tr>
<td>a) 1978 thru 1982</td>
<td>0.07174</td>
<td>0.04182</td>
<td>17.19</td>
</tr>
<tr>
<td>2nd possible</td>
<td>-0.03194</td>
<td>0.00265</td>
<td>-12.02</td>
</tr>
<tr>
<td>b) 1983 thru 1983</td>
<td>-0.15093</td>
<td>0.00185</td>
<td>-8.15</td>
</tr>
<tr>
<td>6 strict. break</td>
<td>-0.19325</td>
<td>0.00189</td>
<td>-10.15</td>
</tr>
<tr>
<td></td>
<td>0.00002</td>
<td>-0.00099</td>
<td></td>
</tr>
<tr>
<td>a) 1978 thru 1984</td>
<td>0.07573</td>
<td>0.03171</td>
<td>23.97</td>
</tr>
<tr>
<td>3rd possible</td>
<td>-0.05013</td>
<td>0.00169</td>
<td>-30.01</td>
</tr>
<tr>
<td>b) 1985 thru 1985</td>
<td>-0.12312</td>
<td>0.00227</td>
<td>-54.86</td>
</tr>
<tr>
<td>7 strict. break</td>
<td>-0.19431</td>
<td>0.00253</td>
<td>-76.43</td>
</tr>
<tr>
<td></td>
<td>0.00002</td>
<td>0.00098</td>
<td></td>
</tr>
<tr>
<td>a) 1978 thru 1986</td>
<td>0.08219</td>
<td>0.01667</td>
<td>50.01</td>
</tr>
<tr>
<td>4th possible</td>
<td>-0.04401</td>
<td>0.00185</td>
<td>-23.61</td>
</tr>
<tr>
<td>b) 1986 thru 1986</td>
<td>-0.17043</td>
<td>0.00164</td>
<td>-104.43</td>
</tr>
<tr>
<td>1 strict. break</td>
<td>-0.00002</td>
<td>-0.00099</td>
<td></td>
</tr>
<tr>
<td></td>
<td>0.00002</td>
<td>-0.00098</td>
<td></td>
</tr>
<tr>
<td>a) 1978 thru 1987</td>
<td>0.06168</td>
<td>0.01332</td>
<td>49.01</td>
</tr>
<tr>
<td>5th possible</td>
<td>-0.00466</td>
<td>0.00171</td>
<td>-27.32</td>
</tr>
<tr>
<td>b) 1987 thru 1988</td>
<td>-0.23216</td>
<td>0.00172</td>
<td>-136.32</td>
</tr>
<tr>
<td>2 strict. break</td>
<td>-0.00002</td>
<td>-0.00099</td>
<td></td>
</tr>
<tr>
<td></td>
<td>0.00002</td>
<td>-0.00098</td>
<td></td>
</tr>
</tbody>
</table>

Sign. of F: (F<sub>0.05</sub) (F<sub>0.01</sub>)

R-Square: 0.9986

Significant at 0.05 level (one tailed)
Significant at 0.01 level (one tailed)
(a) Life cycle wages and productivity. (b) Life cycle (implicit) bonding.

modified from D.O. Parsons
'The Employment Relationship' (1986)
in Handbook of the Labor Economics,
ed. O. Ashenfelter and R. Layard,
Amsterdam: Elsevier.
Employment Fluctuation

Federal

State + Local

thousand

70 72 74 76 78 80 82 84 86 88 90 92

0 5 10 15 20 25
F IV-6

$R^2 = 0.203$
$t = 2.258$

Year of First Public Policy Exemption

Real Incidence of Layoff Events (NM) 90
$R^2 = 0.78$
$t = 1.300$

Rel. Incidence Layoff Events (NM) 90

Numb. of Public Policy Exempt, up to 90
Plot: Slope Coefficient of UNMB by Year

(Equation c-2 year lag; Depvar=LOGWG)
Appendix A

FEDERAL PROTECTIVE LEGISLATION

1. The National Labor Relations Act (1935) (29 U.S.C. Sec. 141-197) prohibits dismissal of employees because of union membership or participation in "protected concerted" activities;

2. The Fair Labor Standards Act (1938) (as amended 29 U.S.C. Sec. 201-219) prevents discharge of an employee who has filed a complaint or otherwise participates in a proceeding for non-compliance with minimum wage and overtime standards;

3. Title VII of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e-2000e-17) prohibits an employer from discharging an individual because of race, color, religion, sex or national origin;


5. The Consumer Protection Act (15 U.S.C Sec. 1674 (1968)) prevents an employer from discharging an employee because of wage garnishment;

6. The Occupational Safety and Health Act (29 U.S.C. Sec. 651-678 (1970)) provides that an employer shall not discharge an employee because that employee has filed a complaint or otherwise participated in a proceeding for violation of occupational safety and health standards;

7. The Employment and Training of Disabled and Vietnam Era Veterans Assistance Act (38 U.S.C. Sec. 2011-2026) (1972) guarantees a person inducted into the military the right to reemployment on satisfactory completion of military service, so long as the person is still qualified to perform his or her job, and protects the reemployed person from discharge without cause for one year after reemployment;

8. The Federal Water Pollution Control Act (33 U.S.C. p 1367 (1972) prohibits discharge of employees who institute or testify at a proceeding against the employer for violation of the Act.

9. The Rehabilitation Act of 1973, as amended (29 U.S.C. Sec. 793, 794), requires employers affirmatively to employ and advance otherwise qualified handicapped individuals, where the employers receive federal funding or government contracts;

10. The Energy Organization Act of 1974 (42 U.S.C. Sec. 5851 (1978)) prohibits the discharge of employees who assist, participate or testify in any proceedings to carry out purposes of the Act or the Atomic Energy Act of 1954;

12. The Clean Air Act (42 U.S.C. Sec. 7622 (1977)) prohibits discharge of employees who commence or testify at proceedings against an employer for violation of the Act.

13. The Civil Service Reform Act of 1978 (5 U.S.C. Sec. 7513(a) (1978)) permits removal of federal civil service employees "only for such cause as will promote the efficiency of the service";

14. The Pregnancy Discrimination Act of 1978 (42 U.S.C. Sec 2000e(k)) expands the meaning of the terms "because of sex" and "on the basis of sex" in Title VII to include "because of...on the basis of pregnancy, childbirth or related medical conditions";

15. The Railway Safety Act (45 U.S.C. Sec. 441 (1980)) prohibits railroad companies from discharging employees because they have filed complaints or otherwise participated in proceedings related to enforcement of federal railroad safety laws, or who refuse to work under conditions they reasonably believe to be dangerous;

16. The Asbestos School Hazard Detection and Control Act (20 U.S.C Sec. 3608 (1982)) prohibits state and local educational agencies receiving assistance under the Act from retaliating against an employee who has made public a potential asbestos problem;

17. The Surface Transportation Assistance Act of 1982 (49 U.S.C. Sec. 2305) prohibits interstate trucking firms from firing employees who refuse to operate an unsafe truck or who report their employer for safety violations;

18. The Judiciar and Judicial Procedure Act (28 U.S.C. Sec. 1875 (as amended, 1983)) prohibits dismissal of employees serving on a jury in federal court;

19. The False Claims Act (31 U.S.C. Sec. 3730(h) (1986)) protects federal contractors' employees from retaliation for exposing fraud against the government;


22. Worker Adjustment Retraining and Notification Act (29 U.S.C. 2101) (1988) requires certain employers to give 60 days' notice to employee of "mass layoff" or "plant closure."

from Mendelson
## Appendix B

### Major Bargaining Agreements Including Job Security Provisions or related Concessions

<table>
<thead>
<tr>
<th>Year</th>
<th>Company/Sector</th>
<th>Type of Provisions</th>
<th>Number of Employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980</td>
<td>AMC</td>
<td>14% p.h. raise diverted from COLA to pay for other benefits including job training</td>
<td>estimated 600000</td>
</tr>
<tr>
<td></td>
<td>GM</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Ford</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Chrysler</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1980</td>
<td>AT&amp;T</td>
<td>explicit job security provision related to intro of new technology - joint committee on intro of technology - pay retention for downgraded worker - restrictions on subcontracting</td>
<td>estimated 140000</td>
</tr>
<tr>
<td>1980</td>
<td>Longshoring</td>
<td>clause pledging joint efforts to lessen adverse effects of modernization guaranteed income plan</td>
<td>116000</td>
</tr>
<tr>
<td>1981</td>
<td>UMW - UCOA</td>
<td>protection from layoffs prohibitions on subcontracting to non UMW workers</td>
<td>16000</td>
</tr>
<tr>
<td>1982</td>
<td>GM</td>
<td>renegotiation of 1980 contract cost relief for improved job security</td>
<td>estimated 200000</td>
</tr>
<tr>
<td></td>
<td>Ford</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1982</td>
<td>various airlines</td>
<td>wage cuts to avoid layoffs</td>
<td>estimated 35000</td>
</tr>
<tr>
<td>1982</td>
<td>GE</td>
<td>job security provisions</td>
<td>150000</td>
</tr>
<tr>
<td></td>
<td>Westinghouse</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1983</td>
<td>AT&amp;T</td>
<td>job protection programs career training program job displacement program</td>
<td>525000</td>
</tr>
<tr>
<td></td>
<td>Bell</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1983</td>
<td>Volkswagen</td>
<td>restrictions on outsourcing/job security gains</td>
<td>5000</td>
</tr>
<tr>
<td>1983</td>
<td>Boeing</td>
<td>new technology clause</td>
<td>60000</td>
</tr>
<tr>
<td>1984</td>
<td>GM</td>
<td>explicit job security program: workers with more than 1 year of service will not be laid off due to technology or outsourcing layoffs for other reasons not discussed culling programs for laid off workers improved job bank</td>
<td>67000</td>
</tr>
<tr>
<td>1984</td>
<td>Ford</td>
<td>identical to GM</td>
<td>100000</td>
</tr>
<tr>
<td>1984</td>
<td>UMW BC0A</td>
<td>increased job opportunities for UMW members provisions against subcontracting</td>
<td>160000</td>
</tr>
<tr>
<td>Year</td>
<td>Company</td>
<td>Description</td>
<td>Value</td>
</tr>
<tr>
<td>------</td>
<td>------------------</td>
<td>-----------------------------------------------------------------------------</td>
<td>--------</td>
</tr>
<tr>
<td>1984</td>
<td>United Airlines</td>
<td>Wage cuts for new employees</td>
<td>8500</td>
</tr>
<tr>
<td>1984</td>
<td>Various airlines</td>
<td>Wage cuts to avoid layoffs</td>
<td>35000</td>
</tr>
<tr>
<td>1985</td>
<td>Chrysler AMC</td>
<td>Job security program similar to GM &amp; Ford</td>
<td>78000</td>
</tr>
<tr>
<td>1985</td>
<td>GM Saturn</td>
<td>Permanent job security for 80% of workforce</td>
<td>8000</td>
</tr>
<tr>
<td>1985</td>
<td>GM Toyota</td>
<td>&quot;Actions&quot; before UAW workers can be laid off</td>
<td>1200</td>
</tr>
<tr>
<td>1985</td>
<td>Trucking</td>
<td>Employers must not divert work from teamsters or farm our dock work</td>
<td>140000</td>
</tr>
<tr>
<td>1985</td>
<td>GE Westinghouse</td>
<td>Increasing recall and transfer rights</td>
<td>120000</td>
</tr>
<tr>
<td>1985</td>
<td>Intern. Harvester</td>
<td>Training &amp; retraining programs</td>
<td>?</td>
</tr>
<tr>
<td>1986</td>
<td>AT&amp;T</td>
<td>Cutbacks prompt neg. 4 job security programs, distributon of new jobs among union wrkrs, laid off workers have hiring precedence, training in emerging jobs</td>
<td>150000</td>
</tr>
<tr>
<td>1986</td>
<td>Pacific Telasis</td>
<td>Establishment of job guarantee program and profit sharing plan</td>
<td>44000</td>
</tr>
<tr>
<td>1986</td>
<td>LTV Steel National Steel</td>
<td>Restrictions on subcontracting and overtime estimated</td>
<td>40000</td>
</tr>
<tr>
<td>1986</td>
<td>Armoco</td>
<td>Wage cuts/increased job security</td>
<td>6800</td>
</tr>
<tr>
<td>1986</td>
<td>Caterpillar</td>
<td>Protected employee program</td>
<td>20000</td>
</tr>
<tr>
<td>1987</td>
<td>GM Ford</td>
<td>&quot;Guaranteed Employment numbers&quot; plan restrictions on outsourcing</td>
<td>440000</td>
</tr>
<tr>
<td>1987</td>
<td>LTV Steel National Steel</td>
<td>Further pay cuts/restrictions on plant closings</td>
<td></td>
</tr>
<tr>
<td>1988</td>
<td>GE</td>
<td>Long pay rate retention for downgraded workers, relocation and training allowances, improved pension rights</td>
<td>80000</td>
</tr>
<tr>
<td>1988</td>
<td>Westinghouse</td>
<td>Modeled after GE agreement</td>
<td>30000</td>
</tr>
<tr>
<td>1988</td>
<td>Chicago &amp; NW Western Transp. Co.</td>
<td>Congress imposes settlement which cuts number of breakmen to 1 from 2 estimated</td>
<td>3000</td>
</tr>
<tr>
<td>1988</td>
<td>Grand Trc. &amp; Western Rrd.</td>
<td>Union agrees to operating with 1 conductor on up to 35 years, 1 conductor + 1 breakman on younger trains; loss of 687 vs over 1000 jobs</td>
<td>3600</td>
</tr>
</tbody>
</table>
1988 United Motors pledge of Japanese style job retention guarantees except in case of sever downturns 2100
1988 Mazda wage & benefit parity with Ford estimated ban on layoffs except under specific circumsta 3000 prohibits outsourcing
1988 Uniroyal Goodrich Tire co. ban on closure of 3 plants estimated 4th is kept open for 3 years 10000 in exchange for wage cuts and state aid
1988 Deere & Co. protected employee group program estimated - protects employees from layoff except for decline in sales - 90% of protected employees are exempt from layoffs for any reason
1988 Caterpillar modeled after Deere agreement 17500
1988 Caterpillar Trucking Mgmt. Inc. - 'adequate' limit on use of non-union labor 1000 - ban joint union non-union
1989 Northeast Airlines - two tier salary system 5200 - no layoff guarantee for current pilots until March 199 promotion guarantees
1989 Diamond Star Motors layoffs only if 'longtime viability' of comp. requires all job reclassified in three categories 2400
1989 Bethlehem Steel pay cuts and profit related pay career development plan/job creation thru overtime cut 20000
1989 Armco (Balt. & KC) long term small increases/less layoffs 3000
1989 Armco (Ashland) wage cuts to go into fund to aid company 3200
1989 American Airlines low pay rise/productivity payments 21000 life time job guarantees to workers hired before 1987
1990 Pittston Coal Co. laid off workers have right 4 out of 5 jobs in company nonunion plants 1700 19 out of 20 jobs at nonunion offshoots
1990 Wheeling Steel Steel Co. restrictions on contracting out career development programme estimated 2000
1990 Pacific Maritime Assoc. pay guarantee plan for Ore. & Wash. longshore unspecified job preservation programme 9000
1990 NY Shipping Boston Ship. S.E. Florida concessions include smaller workgang estimated in exchange for restriction of subcontracting 10000
<table>
<thead>
<tr>
<th>Year</th>
<th>Company</th>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>Southern Longshore</td>
<td>enhanced job opportunities for longshore men in repair and maintenance</td>
<td>600</td>
</tr>
<tr>
<td>1990</td>
<td>Baltimore-Port</td>
<td>restructuring of job duties</td>
<td>500</td>
</tr>
<tr>
<td>1990</td>
<td>NY Post</td>
<td>8 unions accept job cuts of 100 printers</td>
<td>500</td>
</tr>
<tr>
<td>1990</td>
<td>NY Post</td>
<td>limited job reduction for 20% pay cut</td>
<td>350</td>
</tr>
<tr>
<td>1990</td>
<td>GM</td>
<td>some job security guarantees, supplemental income plans for laid off workers</td>
<td>300000</td>
</tr>
<tr>
<td>1990</td>
<td>Ford</td>
<td>similar to GM/less outsourcing than GM</td>
<td>100000</td>
</tr>
<tr>
<td>1990</td>
<td>Chrysler</td>
<td>similar to GM + accounting breaks</td>
<td>63000</td>
</tr>
<tr>
<td>1991</td>
<td>Deere &amp; Co</td>
<td>low wage increases for next 3 years, layoff protection</td>
<td>14000</td>
</tr>
<tr>
<td>1991</td>
<td>Bridgestone</td>
<td>improved job security provisions</td>
<td>4900</td>
</tr>
<tr>
<td>1991</td>
<td>Firestone</td>
<td>income security provisions as big 3 job bank</td>
<td>2900</td>
</tr>
<tr>
<td>1992</td>
<td>Continental Airlines</td>
<td>job security provisions including restrictions on use of foreigners/ job protection in case of mergers &amp; acquisitions</td>
<td>35400</td>
</tr>
<tr>
<td>1992</td>
<td>Northeast Airlines</td>
<td>pilots agree to concession of $300 mill</td>
<td>5500</td>
</tr>
<tr>
<td>1992</td>
<td>State of Ohio</td>
<td>job security provisions with increased recall and reemployment clauses</td>
<td>35400</td>
</tr>
<tr>
<td>1992</td>
<td>Bell South</td>
<td>shift in work back to bargaining unit leave program to cut surplus labor</td>
<td>62000</td>
</tr>
<tr>
<td>1992</td>
<td>Bell Southwest</td>
<td>transf. surplus employees to subsidiaries</td>
<td>42000</td>
</tr>
<tr>
<td>1992</td>
<td>Bell Atlantic</td>
<td>job protection for workers involuntarily relocated early retirement</td>
<td>51800</td>
</tr>
<tr>
<td>1992</td>
<td>LTV Steel</td>
<td>wage freezes &amp; cutback of 200 jobs</td>
<td>14000</td>
</tr>
<tr>
<td>1992</td>
<td>US Air</td>
<td>prohibition of furloughs through 97 protection in event of breakup</td>
<td>5600</td>
</tr>
</tbody>
</table>
Appendix C

EXTRACTS FROM DRAFT UNIFORM EMPLOYMENT TERMINATION ACT

COMMENT

Subsection (c): Uniformity is less important with regard to public employees and, thus, their coverage is left to local option.

Subsection (d): Examples of "good cause" for a termination include theft, fighting on the job, destruction of property, intoxication, drug abuse, insubordination, excessive absenteeism or tardiness, incompetence, and nonperformance or neglect of duty. In addition to good cause based on employee conduct, a separate and distinct basis for termination may be found in economic conditions or an employer's honest business judgment. Although an employer's cut-back in the number of employees may be economically justified, an individual may still contest his or her selection for layoff on the grounds it was discriminatory or otherwise without good cause. If the employee is in a higher level position or a position that is critical to the success of the enterprise, the employer has greater discretion in terminating the employee while meeting the good cause standard.

Section 3. EMPLOYMENT AT WILL; PROHIBITED TERMINATIONS

(a) If the employment of an individual is for an unspecified duration, either the individual or the employing person may terminate the employment of the individual at any time for any reason, except as provided by this [Act] or by other applicable state or federal law.

(b) A person may not terminate the employment of any individual, whether or not the parties are employer and employee under this [Act], if:

(1) the termination is in retaliation for the individual's compliance with, or refusal to violate, public policy derived from constitutional or statutory law existing at the time and conferring rights or imposing duties on persons in this State; or

(2) the termination is based upon the individual's good faith reporting of facts to the appropriate representatives of the employer or other employing person or to appropriate civil authorities, if the individual is under a legal duty to report those facts and the facts, if proven, would constitute a felony under applicable state or federal law, or if failure to report the facts would adversely affect the safety or health of any fellow worker or of the general public.

(c) An employer may not terminate the employment of an employee, other than an employee who is under a contract of employment having a specified duration, without good cause, if the employee's first date of employment with the employer was at least one year before the date of the termination. However, such an employee shall always be afforded the substantive and procedural guarantees contained in the express provisions of an employer's written personnel policy.
An employer may contract individually with managerial [supervisory, executive, professional, or confidential] employees concerning [reasonable] standards of performance establishing good cause for termination. For purposes of this subsection, an employee's first date of employment is the employee's most recent date of hire, if more than one year elapsed between that latter date and any immediately prior period of employment with the same employer.

COMMENT

Subsection (b)(2): This provision establishes minimum standards regarding an individual's right to report facts without being subject to retaliation. It does not pre-empt or otherwise affect state "whistleblower" statutes which may provide employees greater protections.

Subsection (c): Upon the expiration of a fixed term employment contract, or the completion of the given task for which an individual was employed, there is no continuing right of employment. But the specified duration must be bona fide, as determined by the customs of the particular industry, etc. Thus, an employer could not circumvent the requirements of the statute by entering into a series of one-week contracts.

Unionised employees and employees covered by collective bargaining agreements subject to federal law are entitled to exercise rights under this statute to the extent permitted by the developing law of federal pre-emption. See, e.g., Lingle v. Norge Div. of Magic Chef, Inc., 108 S.Ct. 1877 (1988).

Generally, the [Act] provides a one-year probationary period before "good cause" protections apply. Temporary breaks in service (less than one year) do not necessarily destroy the status of a nonprobationary employee, and thus seasonal workers may be covered. But in all cases an average of 20 hours or more per week must be worked during the six months preceding termination for good cause protections to apply (see Section 1(b)).

Section 6. AWARD AND REMEDIES

(a) Within 30 days after the close of the hearing or after the submission of any post-hearing briefs, or within any further time the parties may agree upon, the arbitrator shall issue an award sustaining or dismissing the complaint in whole or in part. The award will ordinarily include an opinion, unless both parties request otherwise. An opinion will contain the critical facts as found by the arbitrator and the principal reasons for the arbitrator's decision but it need not be lengthy.

(b) The arbitrator may provide any of the following remedies for a violation of this [Act]:

(1) reinstate the employee or employed individual.

(2) award full or partial backpay (including the value of any fringe benefits) to the employee or employed individual, with interest.
but with a deduction of interim earnings or amounts earnable with reasonable diligence.

(3) in the discretion of the arbitrator, award additional liquidated damages in an amount not greater than the backpay awarded, if the arbitrator finds that the termination of employment was a wilful violation of this [Act] and lacking in good faith.

(4) if reinstatement is not granted, award a severance payment equal to a continuation of the pretermination pay (including the value of any fringe benefits) at the rate paid immediately preceding the termination of employment or constructive discharge for a period not to exceed two years beyond the date of the award.

(5) award reasonable attorney's or representative's fees and costs to a prevailing employee or employed individual.

(6) award reasonable attorney's or representative's fees and costs to a prevailing employer or employing person, if the arbitrator finds the complaint was frivolous, unreasonable, and without foundation[;]

(7) award the full amount of the arbitrator's fees and expenses, if the arbitrator finds that the resort to arbitration or the defense in arbitration was vexatious and lacking in good faith[;]

(8) in the discretion of the arbitrator, award punitive damages, if the arbitrator finds the termination of employment was a malicious violation of Section 3(b) (prohibiting terminations contrary to public policy)].

(c) The award of an arbitrator is final and binding.

(d) There is no right to damages for termination of employment under this [Act] for pain and suffering, emotional distress, defamation, fraud, or other injury under the common law, and no right to compensatory damages, punitive damages, or any other form of damages, except as provided in subsection (b).