Chapter Two. The Constitution of Employer Discretion

This chapter develops a conception of employer discretion over dismissals based on the political history of labor market policies in Germany and the US in order to explain why workers’ ability to limit employer discretion varies so significantly and so unevenly. I argue that, despite considerable differences in political economic institutions, employers in both Germany and the US have defended their discretion over dismissals by pushing for labor market policy that sets, at best, porous boundaries to the economic sphere. Extending the boundary of the economic sphere to justify property rights that include not just a firm’s physical assets but its strategy, employers constructed institutional regimes that afford them broad discretion to terminate workers. While reinforcing employers’ power, these institutional regimes also set formal limits to employer behavior by allowing workers to defend their jobs against threats of dismissal when they demonstrate that managers’ justifications for dismissal lie outside the economic sphere. In Germany, workers rely on codetermination institutions to mobilize against employer discretion, and in the US, civil rights legislation provides workers the necessary resources, but in both countries, workers’ power to defend against dismissals requires developing credible economic arguments. I conclude the chapter by clarifying the institutional background for this discursive theory of worker power. First, however, I present existing approaches to employer discretion over dismissals in order to demonstrate the centrality of political struggle in shaping the employment relationship in capitalist democracy.

Employer discretion over dismissals: varieties and questions

Employer discretion over dismissals can vary tremendously, but despite its significance for political economy, we lack an adequate conception of how employer discretion is constituted in capitalist democracy. Because defining the practices of discretion requires identifying its concrete limits, abstract theoretical approaches provide
little guidance.\textsuperscript{1} Social scientific approaches likewise either look past politics, treating employer discretion as though it were a characteristic of individual workers, namely job security, or they focus on political dynamics that are no longer relevant, namely strong unions. I present both approaches in this section in order to establish the standards that an adequate conception of employer discretion must meet.

Despite the ubiquity of employer control in the workplace, employer discretion over dismissals varies between different countries according to national patterns of capitalism. In some countries, Germany being the paradigmatic case, employers face extensive restrictions regarding dismissals. In others, such as the US, an employer “normally has unilateral control over the firm, including substantial freedom to hire and fire.”\textsuperscript{2} Scholars substantiate these observations by arguing that different types of dismissal protection legislation lead to distinct varieties of capitalism, because labor market regulations shape the nexus of strategy decisions involving workers and employers.\textsuperscript{3} Workers’ investments in certain skills shape their career paths, which in turn shapes their preferences for social policy, as well as employer behavior, all of which feed into a neat feedback loop of “institutional complementarities.”\textsuperscript{4} Variations in dismissal protection legislation thus lead to different working conditions for workers, and different business conditions for employers, both of which affect national economic performance.

Some economists argue that restrictive dismissal protection legislation harms economic performance,\textsuperscript{5} but many argue that protecting workers from employer discretion

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\textsuperscript{1} Even where it is central to the theory proposed, discretion has a tendency to remain undefined. See, for instance, James D. Thompson, \textit{Organizations in Action: Social Science Bases of Administrative Theory} (New Brunswick, NJ: Transaction Publishers, 2006).


\textsuperscript{3} I use the term “dismissal protection” instead of the more common “employment protection” because, while labor market regulations extend far beyond dismissals, the most significant and contested issue addressed by these regulations is dismissal.


facilitates faster recovery from economic crises. Furthermore, given the centrality of employment to economic distribution, employer discretion over dismissals shapes the type and level of a country’s economic inequality. Clearly, scholars recognize that employers play a critical role in capitalist democracy. In the next section, I show that, nonetheless, we lack a coherent conception of employer discretion.

Is there job security?

Employer discretion over dismissals is often treated as job security, which presents the “likelihood of experiencing involuntary job loss” as a property of individuals, rather than rooted in the relationship between workers and their employers. This approach is attractive because it resonates with our own experiences in the workplace, but trying to develop a reliable indicator for job security poses an insurmountable challenge. Indeed, scholars have developed so many different indicators, each with its own tradeoffs, that there is no stable core to the concept of job security, largely because existing measures overlook the degree to which the “likelihood of experiencing involuntary job loss” depends solely on employer discretion, rather than anything related to an individual worker. After reviewing existing indicators of job security below, I present two alternative conceptions that focus on employer discretion by situating the employment relationship in politics.

The most common approach to job security is based on indexes of countries’ formal legislation for employment protection. The OECD gathers extensive data on legislative developments, as do management consultants. Given the availability of data on public

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policy, the indicators provide a baseline for considering workers’ likelihood of facing dismissal. However, even those approaches that include more extensive information about the surrounding institutional context, such as other labor market regulations that affect dismissals, cannot account for how dismissal protection legislation functions in practice. Labor market institutions exaggerate the standard puzzle of how law becomes effective because the structural conflict between workers and employers gives each party a different set of interests regarding enforcement.

Employers may conform with formal regulations, but they are likely to do so only when the costs of enforcement outweigh the gains of violation. This is especially true in situations where dismissal protection legislation matters most, such as economic crises where an employer’s first-order preference is to remain profitable. Some employers may comply with restrictions on dismissal, but the ease of retaining profits by dismissing workers has historically led employers to “take advantage of their economic and informational power in the workplace to circumvent regulations.” Thus, while aggregate statistics regarding dismissals correlate with certain features of national legislation for employment protection, a worker’s employment status depends entirely on whether his employer decides to comply with that legislation. Job security is thus nothing more than employer discretion, and because formal legislation does not guarantee employer compliance, we must look elsewhere for a meaningful conception of job security.

The most promising approaches to job security show how the employment relationship reverberates throughout the broader institutional and political context of democratic capitalism. Focusing on workers’ and employers’ decisions to invest in certain types of training, asset theory provides a model of institutional complementarities between

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a country’s production processes, training regimes, and management strategies. Scholars argue that workers with firm-specific skills face a greater risk of unemployment due to industry reorganization, so that, in some cases, workers and employers have supported social protection institutions that enable production regimes requiring those specific skills. This approach, however, simply assumes that workers can be dismissed during shifts in production technologies, rather than examining historically why that should be the case. According to Wolfgang Streeck, asset theory is “rooted in an uncritical reception of human capital theory, as well as in a rationalistic misconception of the relationship between politics and the economy, or between social structures and economic pressures for efficiency.” Rather than defining employer discretion over dismissals, asset theory simply refers to this discretion as a baseline assumption of the model.

Other scholars base inferences about employer discretion on workers’ job tenure, for which there is ample data to make compelling historical and cross-national analyses. Correlating data on variation in job tenure with a firm’s stock price or investigating how tenure has shifted among different types of workers provides a picture of how employer discretion over dismissals has developed over time. Data on job tenure, however, is not detailed enough to generate reliable inferences about employer discretion, largely because most cannot distinguish between separations that were initiated by the worker and those that were initiated by an employer. Even when reported, the distinction is difficult to

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defend, due to employers’ power of persuasion in the workplace.\textsuperscript{19} Rather than outright dismissing a worker, an employer can easily make working conditions unpleasant enough that a worker chooses to leave on what appears to be his own accord, leading some to insist that, in employment relations, “consent and conflict should thus not be viewed as antinomies but rather as compliments.”\textsuperscript{20} Data on job tenure shed light on patterns of job security, but cannot help constitute an adequate concept of employer discretion because doing so requires distinguishing between involuntary and voluntary separations.

Survey research on the labor market is more likely, although not guaranteed, to distinguish between involuntary and voluntary separations because it provides access to workers’ own perceptions of the employment relationship. Combining survey results, such as workers’ expectations regarding job tenure, can help add depth to the approaches discussed above.\textsuperscript{21} However, given the character of coercion in the employment relationship, there is an important sense in which workers can be wrong about whether their separation was voluntary.\textsuperscript{22} The larger problem, aside from concerns about the character of consent under capitalism, is that employer discretion over dismissals is categorically an employer behavior. Employers exercise discretion whether workers perceive it or not, suggesting that a more accurate approach to employer takes a more direct route.

Measuring variation in the severance packages that employers offer dismissed workers captures how employers weigh the benefits of violating dismissal protection legislation against the risks of enforcement. When triangulated with information about what legislation formally requires, such approaches reflect the degree to which formal legislation shapes, and thereby limits, employer discretion. Eligibility for severance pay can

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decrease workers’ likelihood of dismissal, and a worker’s membership in a union often increases the likelihood of receiving severance pay.\(^{23}\) One drawback to this approach is data. Because employers often keep severance packages confidential, scholars have relied on collaborating with management consultants to gather data. Furthermore, just as workers can incorrectly perceive an employer’s discretion, so can an employer be incorrect about the degree of discretion they can exercise. When they correctly estimate the threat of enforcement, employers pay dismissed workers enough to discourage legal challenges. But underestimating the threat of enforcement leads an employer to offer severance packages too low, and they may find themselves in court. Measuring employer discretion via court cases that challenge dismissals, however, introduces a massive selection bias by including only those cases where an employer was incorrect about the threat of enforcement. Such an approach would overlook all “normal” dismissals, which constitute the everyday practices of employer discretion.\(^{24}\)

The variety of approaches to job security demonstrates not just the difficulty of constructing an adequate concept of employer discretion, but that such a conception is essential to understanding the political economy of capitalist democracy. This imperative is underlined by the shift to management strategies based on shareholder value, which increase managers’ use of mass dismissals, and by evidence that employer discretion is rising across the OECD’s wealthy democracies.\(^{25}\) On the basis of the approaches presented


above, I propose discarding the concept of job security in order to focus directly on employer discretion. Doing so reorients political economy to the fundamental conflict underlying the capitalist employment relationship and reframes questions involving individuals’ characteristics to questions concerning the political history of power relations between workers and employers. In the next section, I present two such approaches to employer discretion before introducing my own in the section that follows.

*Employer discretion in an era of union strength*

Approaching employer discretion as a power relation between workers and employers highlights how discretion is always defined by its limits. State capacity and union strength have historically set these limits by defining the sphere in which employers can make unilateral decisions. However, as I show in this section, existing approaches to employer discretion that incorporate political struggle are rooted in the political dynamics from another era, when unions were much stronger and provided meaningful representation of workers’ interests.

The state plays a powerful role in limiting employer discretion over dismissals, both through formal labor market institutions as well as resources to enforce those institutions. State resources alone are insufficient for effective enforcement. Certainly this is the case in many developing countries, but wealthy states also fail to provide resources for enforcing labor market regulations because resources are channeled according to political contests, which do not tend to favor labor.26 In the US, for instance, federal agencies are unable to prevent wage theft because they face “decreasing funding with an expanding mandate.”27 With the turn to austerity, many countries have replaced state agencies with private

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service providers based on competitive principles that evade direct state oversight. The growing popularity of active labor market policies, for instance, has replaced social insurance with privately provided training programs linked to employers’ business strategies. The limitations of state capacity in protecting workers from employer discretion are hardly a surprise, but “precisely because democratic capitalism offers the economically powerful so many ways to translate economic power into political and legal power, investigating state capacity to enforce legislation designed to benefit the disadvantaged presents a particularly important research problem.”

Continuing a long tradition, scholars suggest that institutional organization plays a larger role than resources in the state’s regulation of employer discretion. Max Weber argued that effective economic governance required state bureaucracies to remain autonomous from the industries they regulate, but more recent approaches suggest that effectiveness depends on an institution having close linkages with civil society. Evans describes this relationship as “embedded autonomy,” and while others emphasize that the state is the central actor in economic governance, state capacity is a “moving target” that depends on interlocking enforcement mechanisms with civil society. This is particularly true for labor market regulations, where the state can access the employment relationship only through civil society actors, primarily unions. In the US, civil rights organizations played a central role in regulating the workplace, but much regulation of employer

discretion has nonetheless depended on unions. In other countries, state capacity to regulate employer discretion over dismissals reduces directly to unions, because effective regulation of the labor market depends on integrating unions into state institutions.

While mobilizations against mass dismissals are the most visible expression of unions’ involvement, particularly their use of strikes or work stoppages, these discrete instances of mobilization represent extreme versions of unions’ more general role. Over the twentieth century, unions in many capitalist democracies built durable institutions to regulate employer discretion by trading workplace efficiency for job security. From the postwar period onward, German unions, for instance, have supported employers’ rationalization efforts in order to protect workers who were currently employed. More recently, unions have protected workers against mass dismissals by negotiating for flexible working times, and unions have traditionally negotiated with employers for seniority clauses in collective agreements that dictate the terms of dismissals. While these agreements reduce employers’ propensity to dismiss individual workers, they do not affect employers’ decision to execute mass dismissals during economic crises, and even when unions do mobilize workers against dismissals, their efforts are rarely effective. However, the main problem with conceiving of employer discretion through the limits placed on it by unions is that unions are less relevant to the politics of contemporary capitalism than they have been for decades.

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35 Thelen, Union of Parts, 150.


Whether their tactics include mobilization or negotiation, unions’ involvement with employer discretion over mass dismissals has always relied on their ability to stop production. Strong unions helped workers build this economic power by providing the grounds for solidarity,\footnote{Erik Olin Wright, “Working-Class Power, Capitalist-Class Interests, and Class Compromise,” \textit{American Journal of Sociology} 105, no. 4 (2000): 976.} and it is hardly a coincidence that the approaches to employer discretion that focus on unions are concentrated in once heavily unionized industries, such as steel. However, union strength has declined so dramatically over the past four decades in all OECD countries that explaining employer discretion over dismissals under the conditions of contemporary capitalism requires looking elsewhere.\footnote{In 2003, union membership in the private sector was 7.9\% in the US and 21.9\% in Germany. These percentages represent an 11\% and 9.5\% drop, respectively, since 1970. See Jelle Visser, “Union Membership Statistics in 24 Countries,” \textit{Monthly Labor Review}, January 2006, 45–46.} Furthermore, as I show in the next section, while unions can provide the necessary link between formal institutions and civil society, enforcing dismissal protection legislation in Germany and the US does not require union involvement.

This section presented existing approaches to employer discretion over dismissals in order to make the case that explaining employer discretion requires situating the employment relationship in the broader context of political struggles. Some approaches to employer discretion rely on unfounded assumptions about enforcing formal legislation because they overlook the politics of employment, while others are based on political dynamics that have long passed. The next section builds on these existing approaches in order to propose a conception of employer discretion that is based in the political struggles over the constitution of employer discretion in German and American labor market institutions. I show that employers in each country defended their unilateral decisions over dismissals by defining those decisions as economic, and thus protected by constitutional guarantees of property rights. This comparative analysis reveals that, despite radically different institutions for dismissal protection, workers can limit employer discretion in both countries by challenging employers’ economic justifications for dismissal.
Employer discretion and its limits

In this section, I show that employer discretion is constituted by actions taken in the name of an autonomous economic sphere to which employers have privileged access. Employer discretion is rooted in the national institutions they shaped to define an economic sphere independent from social concerns. Over the course of the twentieth century, employers in both Germany and the United States warded off labor’s attempt to regulate fundamental aspects of employment, particularly dismissals. Their success rests in large part on defending managerial prerogative in the workplace by claiming that economic phenomena are driven by dynamics that are external and prior to politics. One upshot of this argument is the claim that managers are better situated than others to perceive and direct firm strategy in a manner that is efficient, and therefore most beneficial to the general welfare. This section traces the political struggles through which institutions for dismissal protection took shape in Germany and the US to show that the degree of employer discretion over dismissals depends on negotiations between employers and workers in the workplace regarding the character of the economic sphere. I demonstrate that struggles over the autonomy of the economic sphere shaped the constitution of employer discretion in each country’s formal institutions. The chapter concludes by showing that, due to the enforcement regime for each set of dismissal protection institutions, employer discretion in the workplace depends on whether workers challenge employers’ claims of privileged access to an autonomous economic sphere.

Employer Discretion in Germany

Despite a relatively strong labor movement, German employers succeeded in grounding national institutions for economic governance on the notion of an autonomous economic sphere. By arguing that managers have superior access to economic phenomena and are in the best position to guide economic development, German employers pushed for national institutions that protect managers’ discretion over economic matters. As a result, limiting employer discretion through formal institutions requires that workers show that employer behavior extends beyond the economic sphere to affect social concerns. Employers are much less constrained than one would expect from the work of comparative political economy scholars who emphasize the strictness of German economic institutions. Indeed,
the feudal model of employer discretion, captured by the term, "Herr im Haus" persisted up through the Weimar Republic, when German labor unions pushed for factory councils to regulate employer behavior in the workplace.\textsuperscript{41} However, it was not until after World War II that workers succeeded in developing durable national institutions to limit employer discretion.

Germany's Dismissal Protection Act (\textit{Kündigungsschutzgesetz}) was first passed in 1951, after years of negotiations between employers, unions, and political parties. Amidst the rubble of reconstruction, all parties recognized the pressing necessity posed by the postwar economic emergency. Employers readily acknowledged that workers were literally starving in the streets, but at the same time, they defended their discretion to close factories.\textsuperscript{42} During economic emergencies, such as the postwar currency crisis, employers were simply unable to pay workers, let alone buy supplies, and they wanted to avoid being punished for external economic conditions.\textsuperscript{43} Labor unions did not deny the severity of the "economic emergency," but they insisted that, "no worker should be dismissed without ample factual evidence" that the economic emergency really did require closing a plant.\textsuperscript{44} While workers insisted that the state should have oversight concerning dismissals, and that the standards for justification should be codified, employers argued that the state was hardly equipped to handle economic matters. According to what later became Germany's peak employer association, the \textit{Bundesvereinigung der Deutschen Arbeitgeberverbände} (BDA), "this is about economic decisions, which the labor office certainly cannot decide alone."\textsuperscript{45} Employers proposed solving this problem by forming a committee composed of employers and workers to advise the state labor office on mass dismissals. Employers'


\textsuperscript{43} Sozialpolitische Arbeitsgemeinschaft der Arbeitgeber, “Bericht über Die Sitzung Des Arbeitsrechtsausschusses Am 9./10.12. in Bremen” (Archive of the BDA, 1948), 2.


critique and their policy suggestion both echo the view that managers occupy a superior position in the economic sphere, which affords them the most accurate perception of economic matters, as well as the means to guide future developments.

The postwar environment required employers to include workers in their designs for institutions for dismissal protection, because they were hardly in a position to make political demands. Extensive collaboration between leading industrialists and the Nazi regime weakened employers’ legitimacy in the eyes of the German public, as well as the occupying powers, who played a central role in reconstruction.46 Furthermore, conceding to the demands of German labor unions allowed employers to avoid negotiating with political parties who advocated more radical proposals to regulate dismissals. The BDA reasoned that, “as soon as we have agreed upon a draft [bill] with the unions, we will no longer need to fear a surprise attempt by the parties.”47 The resulting law, the Dismissal Protection Act, institutionalized the compromise reached between workers and employers and has remained largely unchanged since its passage in 1951. Employers may dismiss employees in only three circumstances: when an employee is no longer able to fulfill the functions of his position, when an employee has broken the employer’s trust, and in the event of “urgent operational conditions.”48 While each exception to the general prohibition against dismissal gives employers a certain degree of discretion, this last condition, known as economically justified dismissal (Betriebsbedingte Kündigung), represents a significant triumph for employers because it allows an employer dismiss a worker in situations that the employer finds justified on economic grounds. With employer discretion defined in terms of economic judgment, the exception threatens to overshadow the rule.

Workers enforce the Dismissal Protection Act in the workplace through the codetermination system, the other institution for economic governance passed after the War. While unions negotiate collective agreements at the industry level, the Works Constitution Act (Betriebsverfassungsgesetz), first passed in 1952, allows workers to form a council of worker representatives to consult with management on issues affecting the

47 Sozialpolitische Arbeitsgemeinschaft der Arbeitgeber, “Bericht über Die Sitzung Des Arbeitsrechtssausschusses Am 9./10.12. in Bremen.”
48 Kündigungsschutzgesetz (Protection Against Dismissal Act), 1951, §1.2.
workplace. Modeled on the original factory council movement of the Weimar Republic, codetermination is designed to give workers a voice in economic governance, but workers’ powers under the Act are significantly constrained.49 Works council members cannot engage traditional methods of labor mobilization, such as strikes and work stoppages,50 and in the original formulation of the law, workers outside the coal and steel industries were barred from sitting on firms’ supervisory boards, which have oversight concerning fundamental firm strategy, including personnel planning.

In 1976, however, labor unions and the Social Democratic Party passed reforms that allowed workers to participate on firms’ supervisory boards, and thus to shape firm strategy at the highest level. Employers recognized that the reform could directly limit managers’ discretion, and the BDA filed a constitutional complaint that eventually made its way to the Supreme Court. The BDA’s argument and the Court’s judgment demonstrate how employer discretion in Germany is legally constituted in the notion of an autonomous economic sphere, but that the law sets particular limits to employer discretion by bounding the economic sphere.

The BDA argued that placing workers on a firm’s supervisory board would undermine employers’ property rights.51 Property is a constitutional right in Germany, with the Basic Law guaranteeing that, “property and inheritance will be protected. Its content and framework are affirmed by law.”52 The president of the BDA, Otto Esser, articulated the general argument for employer discretion in the economic sphere by equating production decisions with property: “The power of last decision must belong to the representatives of property on the supervisory board in order to uphold a market economic order where private property is inviolable.”53 According to the BDA, firms are defined as a specific type of ownership over a specific type of asset, namely the productive power inhering in

50 Works Constitution Act, n.d., §74.2.
workers’ organized activities in the workplace. In the midst of the Cold War, the BDA’s appeal to private property represented one more weapon in the fight against communism.

Despite these appeals, the Court ultimately ruled against the BDA. At the same time, the Court did confirm that the constitutional guarantee of property prevents workers from interfering with employer discretion in the economic sphere. According to the Court, the BDA’s assertion was correct that employers’ property rights extend to firm strategy, but the Court argued that the BDA had overlooked the social aspects of this particular type of property. Property may be a constitutional right, but it can be limited when its use threatens social concerns. Employer discretion in the workplace falls into this category. The Court’s general rule was that, “The more the use of property is the expression of a free and independent way of life, the stronger the constitutional protection of property; the more that property stands in social context and social function, the more intensely are those legal boundaries abandoned.”54 The Court thus affirmed employer discretion in the economic sphere, where the economic sphere is understood to be autonomous from social concerns. In the Court’s view, workers’ participation on a supervisory board would not undermine employer discretion, so long as managers’ decisions remained within the economic sphere. If workers did interfere with managers’ decisions in economic matters, however, they would be violating employers’ property rights. Under German law, employer discretion is constituted by managers’ ability to define a particular realm as economic and therefore subject to their unilateral direction.

Despite the success of the German labor movement in building durable institutions for dismissal protection and codetermination, employers have been able to establish a sphere of discretion over economic matters. German institutions for economic governance prevent workers from limiting employer discretion over dismissals as long as those dismissals are perceived as purely economic. However, because employer discretion is legally protected only in economic matters, workers can challenge dismissals when they show that a manager’s personnel decisions extend beyond the economic sphere to include social concerns.

54 BVerfGE, Mitbestimmung, 50 290, C.III.2.b (Bundesverfassungsgericht Entscheidung 1979).
Employer Discretion in the US

American employers defended their discretion in the workplace with the same economic arguments as German employers, but they have been more successful in fending off workers’ attempts to limit their power. Employment in the US is characterized by at-will contracts, which leave the substantive terms of employment entirely up to negotiation between workers and employers.55 Most significantly, the at-will framework precludes national legislation regulating dismissals. Some argue that at-will employment benefits workers, employers, and society at large, because its support for fluid labor markets allows the independent dynamics of the economic sphere to unfold without political interference.56 Others argue that transaction costs inherent to the labor market entail significant inefficiencies, which can be corrected by dismissal protection legislation.57 Despite labor’s repeated attempts to regulate dismissals, American employers have succeeded in defending a high degree of discretion by shaping institutions for economic governance around the notion of an autonomous economic sphere.

In 1935, during the historic high point of its strength in the twentieth century, the American labor movement passed National Labor Relations Act, or Wagner Act. Protecting workers’ rights to form unions and bargain with employers over working conditions, the Wagner Act held considerable promise for limiting employer discretion.58 American employers contested the Wagner Act, but, similar to their German counterparts, they were forced to accept its provisions due to their fragile bargaining position. Some employers took a belligerent stance, but the majority accepted that weak economic conditions and strong union power required them to accept labor’s proposed legislation.59 American employers viewed the Wagner Act as a trade off: accepting formal institutions for workers’

rights to organize unions would allow employers to demand concessions from labor during collective bargaining over the actual conditions of employment. Accepting the Wagner Act could thus allow employers to defend managerial prerogative in the workplace.\textsuperscript{60} While some scholars view the Wagner Act as the end of feudal employment relations in the United States, due to the extension of Congressional oversight to the workplace,\textsuperscript{61} many treat the Wagner Act as more in line with employers’ interests than workers’.\textsuperscript{62}

While the Wagner Act protects workers’ right to organize unions, it does little to strengthen workers’ ability to limit employer discretion, and is particularly ineffective regarding dismissals. The law itself is justified in terms of economic performance rather than workers’ rights, and designed to avoid “strikes and other forms of industrial strife or unrest, which have the intent or necessary effect of burdening or obstructing commerce.”\textsuperscript{63} Furthermore, workers are prohibited from bargaining over dismissals. The 1958 Supreme Court decision in \textit{NLRB v. Borg-Warner} distinguishes between those subjects that must be included in collective agreements, “mandatory subjects,” and those that may be included, or “permissive subjects.”\textsuperscript{64} According to the Court, the conditions surrounding partial or full plant closings, including dismissals, do not constitute a mandatory subject, leaving employers free to evade negotiating with unions over dismissal policies. Relying on a framework of property rights, the Court’s reason for supporting employer discretion over dismissals closely echoes the German Supreme Court’s, because they too “feared that giving workers a voice in whether their jobs were eliminated would impinge on the employer’s property interest.”\textsuperscript{65} Justice Stewart pithily summarized this reasoning in his concurring opinion in \textit{Fibreboard v. NLRB}, where he described employer discretion over dismissals as

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  \item \textsuperscript{60} Ibid., 28.
  \item \textsuperscript{61} Karen Orren, \textit{Belated Feudalism: Labor, the Law, and Liberal Development in the United States} (Cambridge, 1991), 7.
  \item \textsuperscript{63} National Labor Relations Act, §1.
  \item \textsuperscript{64} NLRB v. Borg-Warner, 356 U.S. 342 (1958).
\end{itemize}
falling within the “core of entrepreneurial control.”66 Upholding property rights requires protecting employer discretion within that core.

The Wagner Act represents a significant legislative victory for labor, but its provisions do not meaningfully limit employer discretion over dismissals. The distinction between mandatory and permissive subjects for collective bargaining affords employers a broad sphere where they can make unilateral decisions about workplace conditions, including dismissals, without interference from workers or the state. Since the Wagner Act was passed, however, the character of labor and the labor movement has developed considerably, with workers increasingly focused on protecting their rights in terms of individual identity, such as race, ethnicity, and gender, rather than class.67

Just as employers deployed arguments about the autonomy of the economic sphere in order to defend their discretion over dismissals in the face of the Wagner Act, employers presented similar arguments to uphold their discretion against Title VII of the Civil Rights Act. Congress drafted Title VII in order to prohibit racial discrimination in employment, namely employers’ hiring white workers first and firing them last. Employers’ views of Title VII closely tracked their concern for protecting managerial prerogative over personnel decisions. Many saw benefits in Title VII, because ending discrimination would broaden the labor market: “When an employer is limited in his choice of qualified employees to certain racial or religious groups, he cannot always choose the skilled man for the job. Every time he must hire the poorer man productivity suffers and costs of production are increased.”68 On the other hand, employers feared that the bill would limit their discretion in the economic sphere. The objections lodged by one local Chamber of Commerce illustrate employers’ broader position. On their view, Title VII “would virtually put the Federal Government in control of hiring, firing, and many other employment practices.”69 Concerns such as these can be understood as motivated by racial animus, but employers’ opposition highlights that Title VII could limit their discretion.

69 88th Congress, 2nd Session, 110 Congressional Record Appendix, 1964, A3116.
According to Title VII, an employer may not "refuse to hire or discharge any individual" on the basis of protected categories, including race, color, and religion.\textsuperscript{70} While these provisions do formally limit employer discretion, Title VII contains significant exceptions, namely that an employer may treat workers differently on the basis of protected categories as long as the treatment corresponds to a "bona fide occupational qualification."\textsuperscript{71} The Court has further broadened this exception by formulating the "business necessity defense," whereby employer behavior may have discriminatory effects as long as that behavior is necessary for the business to function.\textsuperscript{72} Title VII's standards are important for limiting employer discretion over dismissals because they have been applied to a wide range of other categories, including disability and age.\textsuperscript{73}

National legislation like the Wagner Act and the Civil Rights Act could significantly constrain employer discretion over dismissals, but employers carved out exceptions by placing dismissals within the legal boundaries of an apparently autonomous economic sphere. Despite these limitations, Title VII differs from the Wagner Act in that it defines the boundaries of the economic sphere in greater detail by offering standards to determine where employer behavior crosses the line into social concerns. These standards provide resources for workers to limit employer discretion over dismissals by enforcing Title VII to ensure that employer behavior remains within a restricted economic sphere. Enforcement, however, is uneven, so that employer discretion over the employment relationship varies considerably. At the high end of employer discretion, we observe cases where managers are nearly unrestrained in how they shape the fundamental terms of the employment relationship,\textsuperscript{74} and at the low end of employer discretion, we observe cases where workers are able to stop or alter employer behavior by bringing a legal case.\textsuperscript{75} By providing enforceable standards allowing workers to determine where employer discretion can be limited, the relevant institutional background for limiting employer discretion in the US associated is the Civil Rights Act, rather than the Wagner Act.

\textsuperscript{70} Civil Rights Act of 1964, Title VII, n.d., §703.
\textsuperscript{74} Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).
Despite significant divergence between political economic institutions in Germany and the US, employer discretion in both countries exists on a spectrum ranging from managers’ ability to unilaterally dismiss employees to situations where workers can exercise voice to shape the path of dismissals, if not stop them outright. Given this variation in employer discretion, both within each country as well as between them, we are struck with a question: what explains this variation in employer discretion?

**Limiting employer discretion**

In the section above, I showed that employer discretion over dismissals varies significantly, but that this variation is not explained by national-level differences in institutions for economic governance. Closely examining the most different institutions governing employer discretion in Germany and the US demonstrates that variation in employer discretion depends on whether employer behavior falls within the legal definition of the economic sphere. I showed that these definitions resulted from struggles between employers and labor. However, this still leaves the question of how some types of employer behavior come to be treated as economic, and thereby left unrestrained, while others are treated in terms of their social effects, and thus come under the purview of national institutions. This section extends the above analysis of national institutions for dismissal protection in Germany and the US in order to explore the dynamics of enforcement and set the institutional background for a discursive theory of worker power. I argue that the enforcement regime in each country enables workers to limit employer discretion over dismissals by making the legal case that dismissals constitute a form of employer behavior that reaches beyond the economic sphere.

**Enforcement in Germany**

Germany’s Dismissal Protection Law has seen little meaningful reform since it was passed in 1951, but enforcement has developed dramatically. Courts can afford employers a broad swath of discretion, under the principle that the state should not interfere with codetermination, and as long as employers demonstrate some effort to include the works council in personnel decisions, they can be given a free hand. Courts can, however, also be considerably stricter in enforcing dismissal protection legislation, and in some cases of

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76 Michael Kittner, Arbeits- Und Sozialordnung (Kölner: Bund-Verlag, 1979), 624.
economically justified dismissals, the employer must "verify the causality for the reduction of jobs."\textsuperscript{77} Demonstrating a causal connection between external economic conditions and internal personnel policy is a challenging requirement for any firm, but is especially difficult for large firms, because they must show that dismissals are the only option for the firm to survive a given set of economic challenges: “Dismissals are valid from the point of view of [economic] necessity only when there is no more benign means other than headcount reduction (ultima ratio principle). Employers may execute economically-justified dismissals only when no other technical, organizational, or economic measures are possible.”\textsuperscript{78} Firms must, for instance, find a way to transfer workers from a troubled division to a stable one before they can consider dismissals. This requirement challenges large and diversified firms, because there will almost always be positions open somewhere in the firm.\textsuperscript{79} German employers thus face considerable uncertainty when they attempt to dismiss workers during economic crises, which is one of the main complaints motivating employers’ continuous calls to reform the Dismissal Protection Act.\textsuperscript{80}

Despite claims that the Dismissal Protection Act is ineffective, employer opposition suggests that the Act does indeed limit their discretion. Döse-Digenopoulos and Höland, for instance, present statistics that works councils object to less than 10% of dismissals, and conclude that, “for the overwhelming majority of dismissed employees this law does not seem to play any practical part.”\textsuperscript{81} Other scholars demonstrate, however, that works councils’ objections have increased, extending to 15% of dismissals by the early 2000s,\textsuperscript{82} but even these findings must be set against the observation that most objections to

\textsuperscript{78} Ibid., 281.
\textsuperscript{82} Kocher, “Effektive Mobiliseriung von Beschäftigtenrechten: Das Arbeitsrecht in Der Betrieblichen Praxis,” 23.
dismissal are settled out of court, so they may not be counted in aggregate statistics.83 Nevertheless, the increase in works councils’ objections is striking, given the decline of union membership among German workers. Works councils are independent from unions in significant ways, but their effectiveness has depended in large part on union resources, particularly those that aid collective action among workers, which can bolster their bargaining position in formal negotiations with management.84 I argue, however, that while mobilizing collective action among workers is critical to limiting employer discretion over dismissals, one necessary condition for mobilization that has been overlooked is workers’ use of economic discourse to challenge employers’ definition of the economic sphere. Workers can activate the Dismissal Protection Act only when they show that an employer’s threat of dismissals reaches beyond the economic sphere, and undermining an employer’s economic justification for dismissals is a crucial step in supporting that claim.

Workers’ ability to enforce the Dismissal Protection Act is grounded in reforms to Germany’s codetermination institutions that were passed in 1972. The general spirit of these reforms, which focused on enforcement in the workplace, as well as their specific content, which provided workers tools to enter the economic sphere, supports the argument that workers must formulate economic arguments in order to regulate employer discretion. Similar to the broad legal definition of employer discretion enacted in American labor law, the original 1951 codetermination law prohibited workers from interfering with management prerogative in economic matters, according no more than the right of consultation in reaction to management decisions. The 1972 reforms, however, extended works councils’ jurisdiction to planning firm strategy, thus enabling workers to play a proactive role in management decisions, rather than simply reacting.85

The most substantive extension of works council jurisdiction was to include dismissal decisions. According to the newly drafted §102.2, “the works council must be consulted

85 These reforms applied to the firm level. The 1976 reforms applied to the supervisory board. See Eduard Gaugler, Betriebliche Personalplanung: Eine Literaturanalyse (Göttingen: Schwartz, 1974), 247.
before every dismissal… Any dismissal performed without consulting the works council is invalid.” Lawmakers were sensitive to the necessary conditions for enforcement, and in addition to extending works councils’ formal jurisdiction, they provided institutional resources to ensure that that jurisdiction would be exercised. The 1972 reforms increased the quantity and quality of what management must report to the works council, so that works councilors may receive more information about firm performance than the supervisory board.86 Section 112 empowers works councils to negotiate with management over general changes to firm strategy that may affect workers. Section 106 calls for the creation of a “sub-committee for economic matters,” consisting in works council members who are specially charged with negotiating more technical management issues with the employer. This subcommittee may hire external economic advisors, at the employer’s expense. Furthermore, section 37 requires employers to pay for works councilors’ training, which must provide each member the skills they need to be effective, such as making decisions about a firm’s economic strategy. In some cases, works councilor training closely resembles the training that managers themselves receive.87

Despite these reforms, works councils’ jurisdiction over a firm’s economic matters remains limited. Auffarth, for instance, emphasizes the significance of extending workers’ codetermination powers, but concludes, “however, there is not a real right to codetermination in economic matters as such,”88 because workers are still barred from participating in a certain realm of economic decisions. Auffarth emphasizes, “the standard is not the level [of participation] that can be exercised, but simply the content.”89 Extending works councils’ jurisdiction to a broader swath of management decisions does not displace the constitutional guarantee of employers’ property rights. Workers may have a voice in shaping the social effects of management’s economic decisions, but the 1972 reforms

89 Ibid., 4.
specify that workers’ interests may, at best, be “balanced” with the firm’s economic interests.90

The interlocking institutions of dismissal protection and codetermination provide workers a set of resources for limiting employer discretion over dismissals, but effective enforcement depends on workers challenging managers’ identification of the economic sphere. So long as an employer makes a legally compelling argument that dismissals are economically justified, a works council can do little. The 1972 reforms to the Works Constitution Act increased works councils’ jurisdiction to cover a range of management issues previously considered economic, including dismissals, and provided institutional support to train works councilors in economic analysis, demonstrating lawmakers’ sensitivity to the necessary conditions for enforcement. The ability of German workers to limit employer discretion over dismissals depends on activating these resources in order to undermine employers’ identification of the economic sphere. As I show in the next section, despite the meaningful institutional differences between Germany and the US, the ability of American workers to limit employer discretion over dismissals similarly depends on their ability to craft legal arguments that undermine employers’ identification of the economic sphere. In both countries, national institutions provide a set of resources, but activating them via economic discourse depends on workers’ mobilization in the workplace.

**Enforcement in the United States**

American employers fought the passage of the Wagner Act more actively than the Civil Rights Act, but it is the latter that provides the resources for workers to limit employer discretion over dismissals. Legislation passed in connection with the Civil Rights Act includes not just specific standards regulating dismissals, as I showed above, but also an effective enforcement regime. Lawmakers designed the enforcement regime of the Civil Rights Act in direct response to the Wagner Act, but its effectiveness is an irony of history. Segregationists rejected proposals that civil rights be enforced through a centralized agency like the Wagner Act’s National Labor Relations Board because they feared that

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90 See, for instance, Works Constitution Act, §112.
federal power would be too effective in ending segregation.\footnote{91}{Sean Farhang, “The Political Development of Job Discrimination Litigation, 1963–1976,” Studies in American Political Development 23, no. 01 (April 2009): 23.} Instead, they suggested that civil rights be enforced through private litigation. In an environment where civil rights lawyers were too intimidated to take cases and local judges unsympathetic to racial equality, private litigation should have helped uphold segregation. This proved, however, not to be the case, due to subsequent reforms incentivizing attorneys to take civil rights cases, in addition to the NAACP’s courtroom talent. I argue that the private litigation framework designed for enforcing the Civil Rights Act is also effective for enforcing workers’ rights because it provides resources for workers to undermine employers’ economic justifications for dismissals.

The enforcement regime under Title VII solves a number of the collective action problems that workers face in limiting employer discretion. Collective action against employer discretion can potentially benefit an entire workforce, so mobilization requires overcoming the problem of free-riders who prefer to keep their jobs but would rather not pay the costs of participation, whether that be employer retaliation or simply the time lost to mobilizing activities.\footnote{92}{David Weil, “Enforcing OSHA: The Role of Labor Unions,” Industrial Relations: A Journal of Economy and Society 30, no. 1 (January 1, 1991): 20–36; Louise Sadowsky Brock, “Overcoming Collective Action Problems: Enforcement of Worker Rights,” University of Michigan Journal of Law Reform 30 (1997 1996): 781.} Unlike the group rights defined under the Wagner Act, however, civil rights are individual, so contesting employer discretion under Title VII is aided by, but does not necessarily require, broad collective action. Furthermore, due to the special importance of civil rights in American constitutional law, Title VII is continuously reformed, and some recent reforms have strengthened workers’ role in enforcement, in part by providing education and outreach.\footnote{93}{Howard Eglit, “The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn’t Bark,” Wayne Law Review 39, no. 3 (1993 1992): 1121.}

The civil rights regime still, however, sets a high bar for workers to meet in order to limit employer discretion. Similar to German institutions for dismissal protections, Title VII allows employers to execute otherwise prohibited dismissals if they can show that business conditions require downsizing. On a strict reading of the “business necessity defense,” “an employer must prove that the goal it seeks to achieve through the practice is crucial to its continued viability and, in turn, that the practice selected is crucial to the achievement of...
that goal.” This formulation emphasizes a tight connection between employer behavior and external economic conditions, but the standard applied is often more lenient to employer interests. As discussed above, Title VII allows employers in some cases to justify apparently discriminatory treatment of workers if they can show that their behavior was motivated by a "bona fide occupational qualification." These standards have been adopted to apply beyond race, to gender and other categories, but they pose a particularly difficult hurdle for age-based claims of discrimination.

Not all workers are at equal risk for dismissal, with black workers and older workers more likely to be affected by plant closings than others. While employers’ propensity to dismiss black workers is motivated by racial animus, dismissing older workers can, in many cases, meet the standard of economic judgment formulated under Title VII. This standard is particularly difficult to formulate in the Age Discrimination in Employment Act (ADEA), which otherwise extends the protections of Title VII to older workers.

Older workers are often more expensive than younger workers, due to seniority wages and benefits, which makes it rational, from an economic perspective, for employers to dismiss older workers first when faced with challenging economic conditions. Scholars argue that the economic justification for dismissing older workers is likely to hold up in court:

Outsourcing, restructuring, lean manufacturing, RIF [reduction in force], and other business strategies resulting in the downsizing of late-career employees can be justified on cost containment and competitive market rationales. It is highly unlikely that courts would interfere with the efforts of corporations seeking to reduce costs by eliminating employees who earn premium wages as a result of their length of service. Indeed, while the ADEA does prohibit employers from basing personnel decisions explicitly and solely on workers’ identities, the law specifies that these constraints can be relaxed in the face of pressing economic conditions. Section 101 specifies that the ADEA "prohibit[s]...
discrimination against older workers in all employee benefits except when age-based reductions in employment benefit plans are justified by significant cost considerations.” What these significant cost considerations are, and how to balance them against the prohibition on age-based discrimination, depends on workers’ ability to challenge management’s identification of the economic sphere.

Enforcing the ADEA presents a hard test for limiting employer discretion over dismissals because it brings into relief the more general challenge of interpreting and applying legal standards to economic phenomena. Recognizing that older workers face a higher risk of dismissal than others, scholars have proposed increasing the standards that employers must meet, suggesting that courts “inquire under an objective standard, whether the employer’s cost-saving measure ‘significantly serves’ the employer’s legitimate need.”97 However, the fact that older workers do win cases against employers’ threats of dismissal suggests that changing the legal standard is not a necessary condition for workers to limit employer discretion over dismissals. Statistics show that workers are likely to lose ADEA complaints against employer behavior,98 but it is important to note that workers do not lose every case, and, indeed, are significantly more likely to prevail in court if they bring a group case, such as a class action.99 By offering a basic standard to assess the legal limits of employer discretion, the ADEA provides workers a resource for enforcement. Minda, for instance, describes a four part test for identifying where employer behavior constitutes discrimination.100 Winning a case requires that workers show that an employer has falsely identified the economic sphere by demonstrating that dismissals are not in fact justified by economic conditions. Lacking an economic justification for dismissals locates the employer’s decision outside the realm where discretion is protected.

Just as 1972 reforms to Germany’s Works Constitution Act improved workers’ ability to enforce dismissal protection legislation, 1991 reforms to the ADEA bolstered the resources workers need to protect against dismissals. The Older Workers Benefits Protection Act of 1991 (OWBPA) amended the enforcement regime surrounding the ADEA in two ways.

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98 Minda, “Opportunistic Downsizing of Aging Workers.”  
99 Nielsen, Nelson, and Lancaster, “Individual Justice or Collective Legal Mobilization?”  
100 Minda, “Opportunistic Downsizing of Aging Workers,” 541.
While one section of the OWBPA allows employers to make severance benefits contingent on workers’ forfeiture of some rights, another section requires employers to release precisely the information that workers need in order to challenge dismissals on grounds of age discrimination. Section 201.h.ii of the OWBPA requires that employers provide workers “the job titles and ages of all individuals eligible or selected for the [dismissal] program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.” When employers distribute information about the pattern of dismissals across the entire firm they give workers the tools to overcome one the central challenges in responding to a mass dismissal. Armed with a shared understanding of their employer’s behavior, and the data to support that understanding, workers can use this common informational basis to coordinate a collective response.101 The OWBPA allows workers facing dismissal to view their situation from the collective standpoint of the workforce rather than as isolated individuals. Indeed, statistics showing a rise in cases contesting age-based dismissals suggests that the steady decline of unions has not stopped workers from challenging their employers.102 While unions have historically supported workers in defending their rights at work, including defense against unjust dismissals, union involvement is less critical to the challenges particular to economically justified dismissals of older workers. Instead, the necessary conditions for mobilization have shifted to economic discourse in the workplace because workers’ ability to limit employer discretion depends on undermining employers’ economic justification for dismissals.

By specifying distinct limits to employer discretion, Title VII provides workers a set of resources for limiting employer discretion over dismissals. Workers stand a chance of challenging dismissals in court when they demonstrate that an employer’s plans for dismissal are not justified on economic grounds, which suggests that employer behavior extends beyond the protected economic sphere. The ADEA provides a hard test of workers’ ability to mobilize the civil rights enforcement regime because employers can more easily

argue that economic conditions justify dismissals based on age than those based on other characteristics, such as race. Despite these limitations, the private litigation mechanisms under the Civil Rights Act, and particularly reforms to the ADEA that provide workers with firm-level information about dismissals, offer workers meaningful resources for limiting employer discretion.

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Despite significant institutional differences, namely that Germany has national dismissal protection and the US does not, workers in both countries can protect themselves against threats of dismissal by challenging employers’ economic justifications for workforce reductions. The struggles between workers and employers that unfolded over the twentieth century resulted in institutions that constitute employer discretion by defining an economic sphere driven by dynamics privileging employers’ insights and direction. Because that legislation nonetheless provides formal boundaries, workers can limit employer discretion when they demonstrate that managers’ justifications for dismissals lie outside the economic sphere. Workers’ ability to protect themselves from dismissals thus depends on formulating economic discourse that engages the legal definition of the economic sphere. In the next chapter, I build on the institutional analysis presented here in order to offer a discursive theory of worker power, which explains how workers mobilize economic discourse to limit employer discretion over dismissals.