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Time to Retire: Is Lifetime Employment in Japan Still Viable?

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Abstract

Given the rich literature regarding lifetime employment, the purpose of this Comment is to provide an overview of the evolution of this system as well as highlight broader policy implications for the Japanese economy and society. Part I will provide background information on lifetime employment including an overview of the main theories that explain the origins of lifetime employment, its relationship to labor laws in Japan, and provide a comparison between employment systems in the United States and Japan. Part II attempts to answer the frequently asked question, “is lifetime employment disappearing?” by considering existing quantitative studies as well as analyzing the possible reasons that aim to explain why the system has or has not changed. Finally, Part III will provide general comments and broader policy implications.

KEYWORDS: Employment, Japan, Retirement, Norms, Policy

COMMENT

TIME TO RETIRE: IS LIFETIME EMPLOYMENT IN JAPAN STILL VIABLE?

*Sayuri A. Shimoda**

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INTRODUCTION

In Japan, lifetime employment is a popular topic among scholars; in fact, “[s]ome researchers regard these employment practices as one of the most important characteristics of the Japanese economic system.”¹ Lifetime employment refers to the system in Japan where both the employer and employee expect that the employee will work for the employer until retirement age.²

The viability of lifetime employment is particularly relevant today given the widespread changes in Japan.³ Specifically, Japan is facing a population crisis and has been experiencing a recession for years.⁴ Additionally, significant changes in Japan’s corporate governance are likely to impact lifetime employment.⁵ As such, topical questions to consider are whether lifetime employment is

1. Naohito Abe & Satoshi Shimizutani, *Employment Policy and Corporate Governance: An Empirical Comparison of the Stakeholder Versus the Profit-Maximization Model*, HI-STAT DISCUSSION PAPER SERIES, no. 92, 1-2 (June 2005); see also Ronald J. Gilson & Mark J. Roe, *Lifetime Employment: Labor Peace and the Evolution of Japanese Corporate Governance*, 99 COLUM. L. REV. 508, 509 (1999) (“[L]ifetime employment for core workers is said to be at the center of Japanese corporate governance and labor relations . . . and is said to be central enough to be supported by other Japanese governance institutions, such as cross-shareholdings, inside boards of directors and the main bank system.”).

2. See *infra* Part I.A.

3. See *infra* Part II.B.

4. See Stephen Mulrenan, *Population Crisis: Can Japan Lead the Way in Finding a Solution?*, 68 NO. 1 IBA GLOBAL INSIGHT 33, 33 (2014) (explaining that Japan will have a “top-heavy population and a diminished workforce, which is unable to support its elderly citizens”); see also Michael A. Witt, *Japan: Coordinated Capitalism Between Institutional Change and Structural Inertia* in THE OXFORD HANDBOOK OF ASIAN BUSINESS SYSTEMS 100-22 (Michael A. Witt and Gordon Redding, eds., 2014) (noting the “shrinking and rapidly ageing population”).

5. See *infra* Part II.B. Generally, corporate governance refers to the “system by which companies are directed and controlled.” See Klaus J. Hopt, *Introduction and Questionnaire for the Country Reports*, in COMPARATIVE CORPORATE GOVERNANCE: A FUNCTIONAL AND INTERNATIONAL ANALYSIS 1095, 1096 (Andreas M. Fleckner & Klaus J. Hopt eds., 2013).

changing, and, perhaps more importantly, whether lifetime employment is still a useful and efficient system in Japan.⁶

Given the rich literature regarding lifetime employment, the purpose of this Comment is to provide an overview of the evolution of this system as well as highlight broader policy implications for the Japanese economy and society. Part I will provide background information on lifetime employment including an overview of the main theories that explain the origins of lifetime employment, its relationship to labor laws in Japan, and provide a comparison between employment systems in the United States and Japan. Part II attempts to answer the frequently asked question, “is lifetime employment disappearing?” by considering existing quantitative studies as well as analyzing the possible reasons that aim to explain why the system has or has not changed. Finally, Part III will provide general comments and broader policy implications.

I. LIFETIME EMPLOYMENT IN JAPAN

Part I will provide a broad overview of the lifetime employment system in Japan. First, Part I.A. will highlight the main mechanisms of lifetime employment. Second, Part I.B. will explore the origins of lifetime employment. Third, Part I.C. will provide an overview of Japanese labor law and how it relates to lifetime employment. Lastly, Part I.D. compares employment practices in the United States and Japan.

A. *A Brief Overview of the Lifetime Employment System*

“Lifetime employment” refers to the system that emerged in Japan after World War II where, the “mutual expectation of employer and employee is that the employee will enjoy continuous employment until mandatory retirement age.”⁷ While long-term employment is

6. See Ryo Kambayashi & Takao Kato, *The Japanese Employment System After the Bubble Burst: New Evidence* 3 (COLUMBIA U. CTR. ON JAPANESE ECON. & BUS., Working Paper No. 268, 2009) (“There are currently lively debates among scholars and policy makers surrounding the viability of the practice of ‘lifetime employment.’”); see also Hiroshi Ono, *Lifetime Employment in Japan: Concepts and Measurements*, 24 J. JAPANESE & INT’L ECONOMIES 1, 3 (2010) (“Most recently, the debate focuses on the ‘Lost Decade’ of the 1990s and its impact on the lifetime employment system.”).

7. Curtis J. Milhaupt, *Creative Norm Destruction: The Evolution of Nonlegal Rules in Japanese Corporate Governance*, 149 U. PA. L. REV. 2083, 2092 (2001); see also Witt, *supra* note 4 (explaining that the retirement age has been increased from fifty-five to sixty).

found in other developed countries such as Germany, France, and the United States, it is more common in Japan, and “on average, Japanese workers stay in the same firm for longer periods than American workers, and . . . the turnover rate of the former [has been] lower.”⁸ The expectation of lifetime employment is typically not memorialized in a contract.⁹ While there is a general consensus that lifetime employment applies most commonly to employees at large companies, there is some disagreement over whether smaller and medium-sized companies also use lifetime employment policies.¹⁰ Furthermore, lifetime employment generally applies to white-collar workers and only sometimes to blue-collar workers.¹¹

Additionally, lifetime employment is reinforced by Japan's salary structure, which focuses more on seniority than performance.¹² Specifically, “semi-annual bonuses, an integral part of the salary structure, are loosely tied to firm performance and pensions are generally not portable.”¹³ In addition, scholars almost unanimously agree that “non-standard” workers are excluded from the lifetime employment system.¹⁴ For instance, part-time employees are considered non-standard employees and therefore do not enjoy the

8. Atsushi Tsuneki & Manabu Matsunaka, *Labor Relations and Labor Law in Japan*, 20 PAC. RIM L. & POL'Y J. 529, 532 (2011); see also *infra* Part I.D (comparing the employment practices in Japan and the United States).

9. See Witt, *supra* note 4; see also Ono, *supra* note 6, at 2 (“Lifetime employment is not a contractual state. . . . The employment contract includes no explicit clause mentioning this policy, and employers are under no obligation to guarantee employment.”).

10. See Milhaupt, *supra* note 7, at 2087 (explaining that lifetime employment covers employees at large firms); see also Witt, *supra* note 4 (“[M]ost small and medium-sized enterprises tended to follow the same basic norm of long-term employment.”).

11. See Milhaupt, *supra* note 7 (explaining that lifetime employment covers white-collar firms and most blue-collar workers); see also Tsuneki & Matsunaka, *supra* note 8, at 532 (“[W]hite-collar, and at least some blue-collar workers are embraced within the same system of long-term employment.”).

12. See Witt, *supra* note 4 (explaining that the seniority system has not changed significantly).

13. Milhaupt, *supra* note 7; see also Andrew Pollack, *Japanese Starting to Link Pay to Performance, Not Tenure*, N.Y. TIMES (Oct. 2, 1993), <http://www.nytimes.com/1993/10/02/world/japanese-starting-to-link-pay-to-performance-not-tenure.html> (“Salary depends much more on how long one has worked for the company than on how much one contributes to it.”).

14. *The Japanese Employment System After the Bubble Burst*, *supra* note 6, at 8 (“[T]he literature almost unanimously considers non-standard employment workers outside of the ‘lifetime employment’ system.”); see Witt, *supra* note 4 (noting that there has been a rise in non-regular workers who do not have guarantees of lifetime employment); see also Tsuneki & Matsunaka, *supra* note 8, at 534 (“[T]here are many non-regular workers (atypical workers) such as part-time workers and dispatched workers that are differentiated from regular workers in promotion, payment, and employment guarantee.”).

benefits of lifetime employment.¹⁵ Lastly, women historically have been excluded from the lifetime employment system.¹⁶

B. *The Origins of Lifetime Employment*

There are three main theories that have developed to explain why lifetime employment emerged in Japan: (1) economics; (2) politics; and (3) culture and social norms. This Section explores each theory in turn. While scholars focus on different factors to explain the emergence of lifetime employment, they tend to agree that the law is not the sole reason for its emergence.¹⁷

1. Economic Theory

Some scholars contend that lifetime employment arose as a business strategy to incentivize workers to stay at one company.¹⁸ Specifically, lifetime employment “give[s] workers the proper incentive to invest in human capital” and “encourage[s] skill acquisition on the part of workers and to maintain a high level of effort.”¹⁹ Generally, both employers and employees are motivated to invest in training because lifetime employment “gives both sides reasonable assurance that their investments will pay off.”²⁰ For

15. For a discussion on the distinction between standard and nonstandard work, see *The Japanese Employment System After the Bubble Burst*, *supra* note 6, at 8.

16. Akira Kawaguchi & Kimitaka Nishitani, *Corporate Governance and the Role of Women*, 39 JAPANESE ECON. 49, 50 (2012) (explaining how women “have been excluded from the core of the Japanese-style employment system” because they are responsible for most housework and cannot meet typical work demands); see also Ono, *supra* note 6, at 6 (stating how women were historically “systematically excluded from lifetime employment”).

17. See Milhaupt, *supra* note 7, at 2093; see also *infra* Part I.C (explaining that lifetime employment is not legally mandated).

18. Caslav Pejovic, *Japanese Corporate Governance: Behind Legal Norms*, 29 PENN ST. INT’L L. REV. 483, 494 (2011) (“Long-term employment in its present form developed as a result of economic benefits.”). See generally Gilson & Roe, *supra* note 1 (explaining possible economic arguments).

19. Gilson & Roe, *supra* note 1, at 509-10; see *The Japanese Employment System After the Bubble Burst*, *supra* note 6, at 2 (“[L]ocal knowledge accumulated through collaboration of workers is often firm-specific in nature, and its value will be considerably lower outside of the firm. As such, in the absence of the practice of ‘lifetime employment,’ workers will have less incentive to accumulate such firm-specific human capital.”).

20. Witt, *supra* note 4, at 11; see also Tomohiko Noda, *Determinants of the Timing of Downsizing among Large Japanese Firms: Long-term Employment Practices and Corporate Governance*, 64 JAPANESE ECON. REV. 363, 368 (2013) (“Unless some degree of job security is credibly assured, workers will have less incentive to accumulate such firm-specific skills; thus firms, invest in their reputation of not renegeing on implicit contracts by issuing arbitrary dismissals.”).

instance, 70.5 percent of employers will provide regular workers with on-the-job training.²¹ Similarly, 57.8 percent of firms implemented “deliberately-planned” on-the-job training for regular employees but only 27.7 percent of firms have similar training for non-regular employees. “”²² Furthermore, “67.1 percent of firms reported implementing [off-the-job training] for regular employees” but only 31.4 percent of firms provide the same training for non-regular employees.²³ Moreover, “the quality and intensity of [on-the-job training] offered to regular employees is higher than that of [training] for non-regular employees.”²⁴ Additionally, “employees are willing to train their own successors if they benefit from lifetime employment because there is no risk that he will be replaced.”²⁵ In other words, employees may not share valuable knowledge about the company without lifetime employment “” because they may fear that their own job could be eliminated.²⁶

Classical human capital theory highlights the importance of lifetime employment for ensuring that an “efficient level of investment in firm-specific human capital.”²⁷ For a labor market without lifetime employment, firms will not have the proper incentives to invest in their employees if they are free to change jobs after being trained.²⁸ Consequently, employees are not incentivized to invest in the company since their employers are also not incentivized to compensate their employees for their investment

21. Witt, *supra* note 4.

22. *Id.*

23. *Id.*

24. *Id.*; see also Randall S. Jones, *Income Inequality, Poverty and Social Spending in Japan* 10 (OECD Econ. Dep’t Working Papers, Working Paper No. 556, 2007) (“[N]on-regular workers receive less on-the-job training.”).

25. See Gilson & Roe, *supra* note 1, at 513; see also Tsuneki & Matsunaka, *supra* note 8, at 536 (“Such a system succeeds only when workers are offered incentives for making efforts to accumulate strictly firm-specific intellectual skills including the willingness to rotate among various types of jobs depending on the economic environment or the process of OJT, and the willingness of senior workers to accept and train young workers on the job.”).

26. *The Japanese Employment System After the Bubble Burst*, *supra* note 6, at 2. See generally Gilson & Roe, *supra* note 1 (explaining firm-specific human capital).

27. Tsuneki & Matsunaka, *supra* note 8, at 536. See generally GARY S. BECKER, *HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS WITH SPECIAL REFERENCE TO EDUCATION* (3d ed. 1994).

28. See Gilson & Roe, *supra* note 1, at 511; see Tsuneki & Matsunaka, *supra* note 8, at 536 (“[A] competitive labor market does not ensure an efficient level of investment in firm-specific human capital.”).

effort.²⁹ Although, in a fluid external labor market, “employees could pay for their general skills themselves . . . either directly, by paying the tuition for training programs and education, or indirectly, by accepting a lower wage while they are being trained,” they generally are ill informed of what skills are required for the future.³⁰ Contracts also cannot solve this human capital investment problem because “courts cannot observe the level of human capital investment” and an employee therefore will not invest in training if he is paid beforehand.³¹ The worker also “will be less motivated to invest as he cannot rely on a firm’s promise to pay later for the same reason of verifiability.”³² As such, without lifetime employment, both employers and employees will underinvest in human capital.³³

Some scholars conclude that the efficient level of investment in human capital due to lifetime employment has enhanced productivity and helped the Japanese economy grow.³⁴ Specifically, scholars contend that this labor system “can be naturally understood as a superior economic system in adjusting to an uncertain and changing economic environment.”³⁵ Furthermore, “game-theoretic contributions argue that labor relations in both the United States and Japan can be characterized as two possibly efficient equilibria of the

29. See Tsuneki & Matsunaka, *supra* note 8, at 536; see also Gilson & Roe, *supra* note 1, at 512 (explaining that neither side will invest in human capital because the “employer fears losing its investment if the external labor market is fluid; the employee fears losing his or her investment if the employer reneges on the promised return”).

30. Gilson & Roe, *supra* note 1, at 511. See generally Tsuneki & Matsunaka, *supra* note 8.

31. Tsuneki & Matsunaka, *supra* note 8, at 536. See generally Gilson & Roe, *supra* note 1.

32. Tsuneki & Matsunaka, *supra* note 8, at 536. See generally Gilson & Roe, *supra* note 1.

33. Interestingly, Gilson and Roe argue that employers “invest in their employees’ skills not because of the friendly Japanese institution of firms promising their employees lifetime employment – an institution often viewed admiringly in the American literature. Rather, a dark and gloomy closing of the external labor market played a key role: Employees cannot change jobs, because the Japanese external labor market is weak, and deliberately weak.” Gilson & Roe, *supra* note 1, at 513.

34. *The Japanese Employment System After the Bubble Burst*, *supra* note 6, at 1 (explaining that there is “some evidence that the aforementioned Japanese employment system indeed helped Japanese firms enhance their productivity”); see also Pejovic, *supra* note 18, at 494 (stating that “[i]t contributed to a greater productivity that benefited both the shareholders and management through higher profits, as well as labor through greater employment security”).

35. Tsuneki & Matsunaka, *supra* note 8, at 531; see also Abe & Shimizutani, *supra* note 1, at 2 (arguing that Japan’s employment practices “achieve[] an efficient allocation of resources”).

same game played by similarly rational players facing different institutional environments.”³⁶

This Section explored the economic explanation for the emergence of lifetime employment. It discussed how some scholars suggest that lifetime employment arose to incentivize workers to stay at one company and to ensure an efficient level of human capital investment. In addition, this Section highlighted how some scholars argue that lifetime employment results in greater productivity and has helped the Japanese economy.

2. Political Theory

Ronald Gilson and Mark Roe, professors at Stanford Law School and Harvard Law School, respectively, contend that “lifetime employment resulted more from political than from human-capital based economic forces.”³⁷ They rule out a purely economic rationale because lifetime employment started at a time when there was a labor surplus, which is counterintuitive since employers could hire employees for lower wages and did not have an incentive to make commitments to keep workers for a long time.³⁸ Gilson and Roe conclude that politics can explain this contradiction.³⁹ During World War II, the Japanese government tried to reduce the high turnover rate by strictly regulating “hiring, firing and voluntary termination.”⁴⁰ However, despite government intervention, “skilled workers . . . remained ready to shift jobs, even illegally, throughout World War II.”⁴¹ After World War II, organized labor became prevalent, primarily because the United States occupation authorities encouraged it.⁴² For instance, the Supreme Commander of the Allied Powers implemented the Trade Union Law of 1945 “to guarantee[]

36. Tsuneki & Matsunaka, *supra* note 8, at 531.

37. Gilson & Roe, *supra* note 1, at 516; *see also* Pejovic, *supra* note 18, at 494 (explaining that “[t]he government supported lifetime employment because it contributed to reducing the tensions between employers and employees”).

38. Gilson & Roe, *supra* note 1, at 520-21 (explaining that “labor was abundant, people without jobs starved, and firms could hire at low wages and fire at will”).

39. *Id.*; *see also* Tsuneki & Matsunaka, *supra* note 8, at 534 (explaining that before World War Two, the Japanese economy had a classical market system with a competitive labor market . . .”).

40. Gilson & Roe, *supra* note 1, at 520.

41. Andrew Gordon, *THE EVOLUTION OF LABOR RELATIONS IN JAPAN: HEAVY INDUSTRY, 1853-1955* 274 (1985).

42. *Id.*; *see also* Gilson & Roe, *supra* note 1, at 521.

workers the right to form unions and to strike.”⁴³ This law proved to be overwhelmingly successful, as union membership increased thirteen-fold by the end of 1946.⁴⁴

Given this background, Gilson and Roe hypothesize that lifetime employment emerged through a “‘deal’ that allowed restructuring while at the same time bringing social peace, suppressing radical labor and reducing the chance of a socialist electoral victory by privileging one sector of labor.”⁴⁵ Furthermore, on a more local level, “[w]hen managers sought to rationalize production in a restructured firm, they might have privileged the surviving employees with lifetime employment, to reduce post-restructuring labor unrest.”⁴⁶ In other words, companies used lifetime employment as a mechanism to downsize without exacerbating the threat of organized labor, which had already become a concern.⁴⁷ Gilson and Roe also acknowledge that the emergence of lifetime employment could be interpreted in a more positive manner; managers finally gave in to “‘some workers’ demands for security . . . that [made] the favored workers more willing to cede control to management.”⁴⁸ They conclude their argument by explaining that lifetime employment later attracted its complements, such as seniority wages, main bank monitoring, and mandatory retirement.⁴⁹

Curtis Milhaupt, a professor specializing in Japanese law at Columbia Law School, supports this hypothesis but frames it as a social norm rather than focusing solely on political motivations.⁵⁰ He explains that, although Gilson and Roe characterized the emergence of lifetime employment as “‘political’ to emphasize the noneconomic rationale,” lifetime employment should be understood as part of a

43. Gilson & Roe, *supra* note 1, at 521; *see also* Gordon, *supra* note 41.

44. Gilson & Roe, *supra* note 1, at 521; *see also* Gordon, *supra* note 41.

45. Gilson & Roe, *supra* note 1, at 522.

46. *Id.*; *see also* Nobuhiro Hiwatari, *The Origins of Lifetime Employment, in EMPLOYEES’ ROLE IN CORPORATE GOVERNANCE* (Margaret Blair & Mark J. Roe eds., 1999) (stating that “[m]anagement then carried out massive layoffs and a purge of radical union leaders Then to reunite the [remaining] employees, management and new unions emphasized employment security. . . .”).

47. Gilson & Roe, *supra* note 1, at 522; *see also* Pejovic, *supra* note 18, at 494 (explaining that lifetime employment “was allegedly designed as a result of a compromise entered in to between management and unions aimed at overcoming existing labor problems”).

48. Gilson & Roe, *supra* note 1, at 523.

49. *Id.* at 531; *see also supra* Part I.A.

50. *See* Milhaupt, *supra* note 7.

“larger social pact to bring stability to postwar Japan.”⁵¹ He concludes that new corporate governance norms, such as lifetime employment, “emerged as both low-cost substitutes for legal rules in the institutional turmoil of the immediate postwar period and as a fount of private benefits for the few organized groups left intact after the war and Allied occupation.”⁵² Regardless of what label scholars attach to the theory, this “political” explanation focuses more generally on Japanese society at the time lifetime employment emerged rather than on economic factors.

3. Cultural and Social Norms Theory

Some scholars argue that lifetime employment is rooted in Japanese history and culture.⁵³ According to this theory, lifetime employment originates from the Tokugawa period, where “business entities functioned like family businesses.”⁵⁴ Companies, or *kaisha*, “symbolize[] the organization where people are not united by contractual relationships, but it includes an element of association resembling that of a family.”⁵⁵ Consequently, by operating businesses like a *kaisha*, the employer can “achieve[] a greater level of loyalty between management and employees.”⁵⁶

Caslav Pejovic, a professor at Kyushuu University in Japan, slightly alters this argument by focusing on how Japanese culture and social norms helped make the implementation of corporate governance practices successful.⁵⁷ He argues that lifetime employment is “perfectly congruent with Japanese social values,” and therefore was implemented more smoothly because it was “familiar to employees based on their experiences and education outside the company.”⁵⁸ In other words, while Pejovic does not attribute the emergence of lifetime employment solely to Japanese culture, he

51. *Id.* at 2093-94.

52. *Id.* at 2087.

53. See Pejovic, *supra* note 18 (explaining that Japanese culture and social norms helped with the implementation of lifetime employment); see also Tsuneki & Matsunaka, *supra* note 8, at 534 (referring to the cultural theories to explain the origin of lifetime employment).

54. Pejovic, *supra* note 18, at 496. See generally Yasuzo Horie, *The Role of IE in the Economic Modernization of Japan*, 36 KYOTO UNIV. ECON. REV. 1 (1966).

55. Pejovic, *supra* note 18, at 497. See generally Horie, *supra* note 54.

56. Pejovic, *supra* note 18, at 497. See generally Horie, *supra* note 54.

57. Pejovic, *supra* note 18, at 502.

58. *Id.*

maintains that it was critical in lifetime employment's "successful implementation and functioning in practice."⁵⁹

However, many scholars have discredited the cultural argument because historically, workers have not continuously enjoyed stable, long-term employment in Japan.⁶⁰ In fact, workers often changed jobs after World War I: "Yearly turnover rates of around seventy-five percent were the norm in most industries during World War I."⁶¹ Moreover, Tsuneki and Matsunaka point out that "these culture-based explanations . . . are inconclusive because . . . lifetime employment exist[s] in all developed capitalist countries."⁶²

This Section provided an overview of the three main arguments that scholars have put forth to explain the emergence of lifetime employment. First, scholars have provided an economics explanation that focuses on how lifetime employment resulted in an efficient level of human capital investment. Second, scholars have suggested that lifetime employment emerged as part of an effort to stabilize postwar Japan. Lastly, while some scholars contend that lifetime employment is rooted in Japanese culture and history, other scholars have discredited this theory because lifetime employment exists in other developed countries and was not always prominent in Japan.

C. Labor Law in Japan

Milhaupt explains that Japanese labor law did not necessitate lifetime employment, but rather that a legal framework emerged to reinforce the system later on.⁶³ Specifically, "it is unlikely that the threat of legal sanction was the primary motivation [for lifetime employment because] [w]hile some cases of abusive dismissal predate the emergence of lifetime employment practices, the Supreme Court did not affirm the standards developed in the lower courts until

59. *Id.*

60. See Gilson & Roe, *supra* note 1, at 517 (stating that "the conventional claim that lifetime employment is rooted in Japanese culture (and needs no more explanation) is not enough."); see also Milhaupt, *supra* note 7, at 2087 (discrediting the cultural argument as misstating Japanese history); Tsuneki & Matsunaka, *supra* note 8, at 534-35 (explaining that "[t]he cultural theories are also questionable from a historical point of view. The customs discussed did not exist from the beginning of the Japanese economy.").

61. Gilson & Roe, *supra* note 1, at 518; see also Gordon, *supra* note 41.

62. Tsuneki & Matsunaka, *supra* note 8, at 534.

63. See Milhaupt, *supra* note 7, at 2094 (stating that "lifetime employment is a social norm that has been sanctioned and diffused by the state").

1975.”⁶⁴ In fact, prior to the doctrine of abusive dismissal, the Civil Code provided little employee protection and specified that “employment was terminable at will.”⁶⁵ However, the labor laws in Japan have changed since this time to help reinforce lifetime employment. This Section will provide an overview of labor law in Japan and how it relates to the lifetime employment system.

Courts generally determine that a dismissal is illegal if it is “not based on reasonable cause or [is] viewed as improper from the general viewpoint of society.”⁶⁶ Courts will typically find that a dismissal is abusive unless one of the following situations apply:

- (1) a worker [was] incapable of providing service, (2) a worker [was] incompetent or lack[ed] ability to work, (3) a worker violate[d] his or her job duties or [was] engaged in misconduct, (4) there [was] a compelling business necessity such as financial difficulties, or (5) a union shop agreement compel[ed] the employer to discharge a worker who [left] or [was] dispelled from the union.⁶⁷

Additionally, courts have developed four requirements to determine whether “there was a compelling business necessity” for a dismissal.⁶⁸ The four requirements are:

- (1) a reduction of the workforce was necessary; (2) the employer made a good-faith effort to avoid dismissals, such as using transfers, temporary closings, and soliciting voluntary early retirements; (3) the employer established and followed a reasonable standard for choosing which workers would be dismissed; and (4) the employer made attempts to explain to the employees or union the reasons for the dismissals and how they

64. *Id.* at 2093; *see also* Tsuneki & Matsunaka, *supra* note 8, at 545 (explaining that “the Supreme Court finally endorsed the doctrine” in the late 1970s).

65. Samuel Estreicher & Jeffrey M. Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 N.C. L. REV. 343, 421 (2014); *see also* Tsuneki & Matsunaka, *supra* note 8, at 543 (explaining that “[u]nder the Civil Code, both employers and employees can terminate this type of labor contract at will with two weeks’ notice.”).

66. Estreicher & Hirsch, *supra* note 65, at 421; *see also* Milhaupt, *supra* note 7, at 2093 (explaining that “judicial precedent places substantial constraints on an employer’s ability to dismiss workers even where layoffs are motivated by economic necessity”); Tsuneki & Matsunaka, *supra* note 8, at 543 (stating that “[u]nder the doctrine, employers can dismiss workers only when there are reasonable and objective grounds to do so.”).

67. Estreicher & Hirsch, *supra* note 65, at 421.

68. *Id.*; *see also* Tsuneki & Matsunaka, *supra* note 8, at 544 (explaining that the Doctrine of Abusive Dismissal requires four conditions to be met in the case of adjustment dismissal).

would be carried out.⁶⁹ The doctrine of abusive dismissal has since been codified in the Labor Standards Act and Labor Contract Act, which apply to all private-sector employees.⁷⁰

In addition to the doctrine of abusive dismissal, other Japanese labor laws provide protection to employees. Specifically, labor laws “emphasize the protection of employment as its basic objective . . . [and] explicitly states the need for active intervention by the government in the labor market.”⁷¹ For instance, there are stringent regulations of private employment agencies.⁷² The Public Employment Security Office, a government agency, has “monopolized placement and vocational guidance activities.”⁷³ Additionally, if requested by the employee, the employer is required to provide a written explanation for why the employee was dismissed under the Labor Standards Act.⁷⁴ Companies that have more than ten employees must inform the employees of all rules, including dismissal rules.⁷⁵ Furthermore, “[b]efore implementing a collective dismissal, an employer must notify a government agency and consult with a relevant union or employee representative over the reasons for the layoffs, their timing, the identity of affected employees, and the nature of any re-employment assistance.”⁷⁶ The government also provides subsidies to certain companies facing financial problems.⁷⁷

69. Estreicher & Hirsch, *supra* note 65, at 422; *see also* Tsuneki & Matsunaka, *supra* note 8, at 544 (listing the four requirements).

70. Estreicher & Hirsch, *supra* note 65, at 422 (explaining that “Japan codified part of this unjust dismissal regime under the Labor Standards Act of 1947”); *see also* Tsuneki & Matsunaka, *supra* note 8, at 543 (explaining that the doctrine of abusive dismissal has been codified).

71. Tsuneki & Matsunaka, *supra* note 8, at 552; *see also* Estreicher & Hirsch, *supra* note 65, at 421 (stating that “[o]ver the past half-century, Japan’s employment law has changed gradually to provide more protection to employees.”).

72. Tsuneki & Matsunaka, *supra* note 8, at 552 (explaining that “private employment agencies had been strictly regulated”); *see also* Rodo Kijunho [Labor Standards Law], Law No. 49 of 1947, art. 6 (Japan).

73. Tsuneki & Matsunaka, *supra* note 8, at 552; *see also* Rodo Kijunho [Labor Standards Law], Law No. 49 of 1947, art. 6 (Japan).

74. Estreicher & Hirsch, *supra* note 65, at 423; *see also* Rodo Kijunho [Labor Standards Law], Law No. 49 of 1947, art. 22 (Japan).

75. Estreicher & Hirsch, *supra* note 65, at 423; *see also* Rodo Kijunho [Labor Standards Law], Law No. 49 of 1947, art. 89 (Japan).

76. Estreicher & Hirsch, *supra* note 65, at 425; *see also* Koyo Taisaku [Employment Measures Act], Law No. 132 of 1966, art. 24 (Japan).

77. Estreicher & Hirsch, *supra* note 65, at 424-25 (noting the requirements of the Employment Adjustment Subsidy Program); *see also* Chad Steinberg & Masato Nakane, *To*

For instance, “[t]he Employment Adjustment Subsidy Program requires that the firms spend this assistance on wage subsidies to workers on temporary leave, to workers temporarily transferred to a different company, or to educate and train dismissed workers.”⁷⁸

Consequently, labor laws and government intervention have helped to reinforce lifetime employment. Lifetime employment has also been generally accepted by society because there is a “general sense among many Japanese employers that, irrespective of the formal legal regime, dismissals without cause are something to be avoided, if possible.”⁷⁹ As such, employers typically do not view dismissals as the first option during recessions and financial difficulties.⁸⁰ Rather, “dismissals [are] avoided by restricting overtime work, suspending mid-career hiring, transferring and farming out workers to related companies, terminating the employment of non-regular workers, and soliciting voluntary retirements by old workers.”⁸¹

D. Comparing Japanese and United States Employment Practices

Many scholars are interested in comparing employment in Japan and the United States because the two countries “represent[] two contrasting employment systems.”⁸² Notably, many employers in Japan guarantee lifetime employment whereas “in the United States, employment is typically at will, although actual tenure is often long-lasting.”⁸³ In addition, employees in the United States “have neither

Fire or to Hoard? Explaining Japan’s Labor Market Response in the Great Recession 12 (IMF Working Paper 2011) (discussing the subsidy program that developed in 1975 in Japan).

78. Estreicher & Hirsch, *supra* note 65, at 424; *see also* Steinberg & Nakane, *supra* note 77, at 12.

79. Estreicher & Hirsch, *supra* note 65, at 424; *see also* Kazuo Sugeno, *The Birth of the Labor Tribunal System in Japan: A Synthesis of Labor Law Reform and Judicial Reform* 25 *COMP. LAB. L. & POL’Y* 519, 523 (2004) (stating that “[f]irms still maintained the policy of not dismissing core workers as a commitment to the long term employment system.”).

80. Tsuneki & Matsunaka, *supra* note 8, at 544 (explaining that “[d]ismissing typical workers was not regarded as the first option employers should take in recessions.”); *see also infra* Part II.A.1.

81. Tsuneki & Matsunaka, *supra* note 8, at 544; *see also infra* Part II.A.1.

82. Ryo Kambayashi & Takao Kato, *Trends in Long-term Employment and Job Security in Japan and the United States: the Last Twenty-Five Years* 1 (Columbia U. Center on Japanese Econ. & Bus. Working Paper No. 302, 2012); *see also* Ono, *supra* note 6, at 23 (explaining that “[c]omparisons of job mobility between these two countries should thus be understood as a comparison of two extremes.”).

83. Gilson & Roe, *supra* note 1, at 509; *see also* Henry Farber, *Labor Market Adjustment to Globalization: Long-Term Employment in the United States and Japan* 3 (Princeton U.

explicit nor implicit guarantees of permanent employment and the corporate governance system rarely involves labor.”⁸⁴ Henry Farber, a professor at Princeton University, notes that “[t]he role of ‘life-time jobs’ has been highlighted as an important institutional, economic, and even cultural difference between the two countries and it is worthwhile to understand the degree to which this difference is real and the extent to which these relationships are changing.”⁸⁵ Lastly, scholars are interested in determining whether there is a convergence of the United States and Japanese employment systems.⁸⁶ This Section will provide qualitative observations as well as an overview of quantitative studies comparing long-term employment in Japan and the United States.⁸⁷

Scholars generally agree that “job mobility is much higher in the [United States] than in Japan.”⁸⁸ Since the 1960s, long-term employment has been more common in Japan than in the United States.⁸⁹ Specifically, “in the early 1980s, 74% kept the same job 15 years later in Japan whereas only 48% did so in the United States.”⁹⁰ Interestingly, Ryo Kambayashi and Takao Kato find that “the job stability gap for core employees between the two nations

Working Paper 519, 2007) (explaining that “most workers find a job . . . that lasts for a long period of time. . .”).

84. Gilson & Roe, *supra* note 1, at 509; *see also* Estreicher & Hirsch, *supra* note 65, at 347 (stating that “[i]n the United States – absent a constitutional, statutory, or public-policy provision or ruling restricting the grounds for termination – nothing prevents the employer or employee from terminating the employment relationship without cause or notice”). There is some disagreement over whether the United States should “reconsider a rule – the at-will default – that differs so substantially from the approach taken by most other countries.” Estreicher & Hirsch, *supra* note 65, at 348. However, “[t]he counterargument suggests that the at-will rule permits greater labor-market flexibility and hence a more efficient productive economy.” Estreicher & Hirsch, *supra* note 65, at 348-49.

85. Farber, *supra* note 83, at 2.

86. *See* Kambayashi & Kato, *supra* note 82. *See generally* Farber, *supra* note 83.

87. It is important to keep in mind that similar to the quantitative studies about lifetime employment in Japan, studies about employment in the United States are mixed. *See* Matissa Hollister, *Employment Stability in the U.S. Labor Market Rhetoric versus Reality*, 37 ANN. REV. SOC. 305, 306 (2011) (explaining that “views on the question of job stability are split”).

88. Ono, *supra* note 6, at 23; *see also* Farber, *supra* note 83, at 2 (stating that “[t]here has historically been more long-term employment in Japan than in the U.S.”).

89. Takao Kato, *The End of Lifetime Employment in Japan?: Evidence from National Surveys and Field Research*, 15 J. JAPANESE & INT’L ECON. 489, 498 (2000); *see also* Farber, *supra* note 83, at 2 (explaining “[o]ver the last twenty-five years, job tenure has declined in the United States while remaining stable or even increasing somewhat in Japan, increasing the ‘tenure gap’ between the two countries.”).

90. *The End of Lifetime Employment in Japan?*, *supra* note 89, at 498.

remains considerable” at over twenty percentage points.⁹¹ Specifically, the ten-year job retention rates remained at approximately “70% in Japan whereas “the rates dropped from “over 50% in the 1980s to below 40% [in the late] 1990s” in the U.S.”⁹²

This is particularly interesting because, as Kambayashi and Kato note, it was the “U.S. with the longest economic expansion [and] not Japan with [the] ““Lost Decade”” that showed more pronounced weakening of job stability. . . . ”⁹³ Similarly, Farber finds that “[o]ver the last twenty-five years, job tenure has declined in the United States while remaining stable or even increasing somewhat in Japan.”⁹⁴ Both scholars ultimately conclude that the employment systems in the United States and Japan are not converging.⁹⁵

There are some interesting differences when comparing certain categories of workers in the United States and Japan. First, there has been relatively little change in the tenure rates for women in the United States, but this is not so in Japan.⁹⁶ Farber explains that there has “been very little movement over time” for females in the United States, while “[t]here has been a relatively small increase over time for Japanese females.”⁹⁷ In Japan, the fraction of female workers between thirty-five and sixty-four years old with at least ten-year tenure increased from 38.4% in 1979 to 44.5% in 2002.⁹⁸ In addition, in Japan, “[f]orty percent were female in 1982 and by 2007, female employees constituted 47 percent of all employees age 18-54.”⁹⁹

Farber also found that there has been a noticeable increase in female workers in Japan as part-time workers.¹⁰⁰ For instance, “19.3 percent of employed women in Japan worked part-time in 1980 while

91. *Trends in Long-term Employment and Job Security in Japan and the United States: the Last Twenty-Five Years*, *supra* note 82, at 8. Ryo Kambayashi is the W.S. Schupf Professor of Economics and Far Eastern Studies at Colgate University. Takao Kato is an Associate Professor for the Institution of Economic Research at Hitotsubashi University.

92. *See id.*

93. *Id.*

94. Farber, *supra* note 83, at 2.

95. *See id.*; *Trends in Long-term Employment and Job Security in Japan and the United States: the Last Twenty-Five Years*, *supra* note 82.

96. *See* Farber, *supra* note 83, at 21; *Trends in Long-term Employment and Job Security in Japan and the United States: the Last Twenty-Five Years*, *supra* note 82, at 18 (explaining that “female employees face higher job loss probability” in both countries).

97. Farber, *supra* note 83, at 21.

98. *Id.*

99. *See Trends in Long-term Employment and Job Security in Japan and the United States: the Last Twenty-Five Years*, *supra* note 82, at 12.

100. Farber, *supra* note 83, at 21.

fully 39.7 percent worked part-time in 2002.”¹⁰¹ On the other hand, in the United States, “22.6 percent of employed women worked part-time in 1981 while 20.9 percent worked part-time in 2002.”¹⁰² Second, Kambayashi and Kato conclude that while “job stability for mid-career hires and youth employees did deteriorate in Japan over the last twenty-five years,” a similar decline was not observed in the United States.¹⁰³ As such, they conclude that the “job stability gap between Japan and the United States did shrink over the last twenty-five years for these group of workers.”¹⁰⁴

Third, it is generally agreed that there has been a noticeable increase in part-time workers in Japan.¹⁰⁵ For instance, “the share of total employment (male and female) that is part-time increased from 12.6 percent in 1990 to 19.1 percent in 2001. The comparable figures for the United States are 14.38 percent part-time in 1991 and 12.96 percent part-time in 2000.”¹⁰⁶ As such, Farber concludes that while there is evidence that “Japanese employers appear to be making increased use of part-time workers, especially women . . . there has been no such trend in the United States.”¹⁰⁷ However, there is some disagreement over the prevalence of part-time employment in the United States, as Hollister finds an “increase over time in part-time employment, with particularly large increases in involuntary part-time work.”¹⁰⁸ In sum, there are three salient differences in certain categories of workers — female workers, mid-career and youth hires and part-time workers — when comparing employment in the United States and Japan.

Scholars have found that while “both the United States and Japan have been faced with similar global competitive pressures,” employers in each country have responded differently.¹⁰⁹ Scholars who insist that lifetime employment is not disappearing in Japan have

101. *Id.*

102. *Id.*

103. *Trends in Long-term Employment and Job Security in Japan and the United States: the Last Twenty-Five Years*, *supra* note 82, at 9.

104. *Id.*

105. *Id.* at 10; *see also The Japanese Employment System After the Bubble Burst*, *supra* note 6, at 17 (explaining that there has been a rise in non-standard employment such as part-time workers).

106. Farber, *supra* note 83, at 21.

107. *Id.* at 3.

108. Hollister, *supra* note 87, at 312.

109. Farber, *supra* note 83, at 23. *See generally Trends in Long-term Employment and Job Security in Japan and the United States: the Last Twenty-Five Years*, *supra* note 82.

identified a two-tier workforce with core workers, who benefit from lifetime employment policies, and peripheral employees, who do not.¹¹⁰ The second group of employees usually consists of mid-career hires and younger employees.¹¹¹ Furthermore, Farber maintains that the “Japanese labor market is . . . adjusting by reducing the incidence of ‘life-time’ jobs by increasing the role of part-time employment.”¹¹²

However, Farber contends that a two-tier workforce is not found in the United States, and firms simply lay off workers.¹¹³ He attributes this difference between the United States and Japan to the lack of mandatory retirement in the United States, historical differences between the two countries, and stronger job protections in the United States.¹¹⁴ Furthermore, “[r]eassignment to other jobs within firms has not been an important phenomenon” in the United States whereas employers in Japan “have taken the approach of reassigning workers.”¹¹⁵ Therefore, it appears that the employment systems in the United States and Japan remain significantly different and are not converging as has been previously considered.¹¹⁶

II. *LIFETIME EMPLOYMENT MAY NOW BE SHORT-LIVED*

Given the changes in corporate governance and the recessionary period in Japan, many scholars have begun to question whether lifetime employment is still viable.¹¹⁷ Part II will provide an overview

110. See *Trends in Long-term Employment and Job Security in Japan and the United States: the Last Twenty-Five Years*, *supra* note 82, at 23 (explaining that there is a two-tier structure as a built-in shock absorber); see also *infra* Part II.A.3.

111. *Trends in Long-term Employment and Job Security in Japan and the United States: the Last Twenty-Five Years*, *supra* note 82, at 10-11; see also *infra* Part II.A.

112. Farber, *supra* note 83, at 23.

113. *Id.* But see Hollister, *supra* note 87, at 308 (stating that “[t]he first is the adoption of the core-periphery model, in which employers provide greater security for a select group of core workers while using temporary workers and outsourcing to provide the necessary flexibility.”).

114. Farber, *supra* note 83.

115. *Id.* at 23; see also *infra* Part II.A.3.

116. There are many other interesting components of each employment system, such as changes in the quality of work. Farber explains that there is a “concern regarding a decline in the quality of jobs” in the United States.” Farber, *supra* note 83, at 4. However, the quality of employment, as well as many other components of employment, is beyond the scope of this Note.

117. See Daiji Kawaguchi & Yuko Ueno, *Declining Long-term Employment in Japan*, 28 *J. JAPANESE INT’L ECON.* 19, 20 (2013) (noting that “academics have debated whether long-term employment practices have survived through long-term stagnation”); see also *The*

of quantitative studies that measure whether lifetime employment is in fact disappearing as well as address the possible reasons for why it is or is not changing. First, Part II.A. explores the various quantitative studies, which are separated into studies that conclude that (1) lifetime employment is declining; (2) lifetime employment is not changing; or (3) lifetime employment is not disappearing but faces major changes. Second, Part II.B. highlights the main explanations for why lifetime employment has persisted. Lastly, Part II.C. covers the various explanations for why lifetime employment has changed.

A. Quantitative Studies

After the lost decade, “academics have debated whether long-term employment practices have survived through the long-term stagnation.”¹¹⁸ The results of these quantitative studies generally fall into one of three categories: (1) lifetime employment is declining; (2) lifetime employment is not changing; and (3) lifetime employment is not disappearing but faces significant changes. Each category will be explored in turn.

1. Lifetime Employment is Declining

While there are many studies that explore the demise of lifetime employment, three especially interesting studies are explored in this Section. Masahiro Abe and Takeo Hoshi find that, while “it is too soon to declare the death of lifetime employment system, there [is] some evidence that suggests the popularity of the practice is indeed declining.”¹¹⁹ First, it appears that “mid-career hiring, which is not a usual practice for Japanese corporations, is becoming more standard.”¹²⁰ Second, “employment adjustment by means of voluntary

Japanese Employment System After the Bubble Burst, *supra* note 6, at 3 (stating that “there is currently a lively debate among scholars and policy makers surrounding the viability of the practice of ‘lifetime employment.’”).

118. The Lost Decade refers to the 1990s, when the Japanese economy stagnated. See Fumio Hayashi & Edward C. Prescott, *The 1990s in Japan: A Lost Decade* 5 REV. OF ECON. DYNAMICS, 206, 206 (2002). See Kawaguchi & Ueno, *supra* note 117, at 20; see also Ono, *supra* note 6, at 2 (stating that “[m]ost recently, the debate focuses on the ‘lost decade’ of the 1990s and its impact on the lifetime employment system.”).

119. Masao Abe & Takeo Hoshi, *Corporate Finance and Human Resource Management*, RIETI DISCUSSION PAPER SERIES (Aug. 2004), <http://www.rieti.go.jp/jp/publications/dp/04e027.pdf>.

120. *Id.* at 6; see also *The End of Lifetime Employment in Japan?*, *supra* note 89, at 507 (finding that one of the firms he studied engaged in more mid-career hiring). At the time of

retirement and dismissal has been increasing after 1998.”¹²¹ Third, Abe and Hoshi suggest that there are changes in salary structures.¹²² For instance, “firms that took into account the performance and achievement of management level employees in wage determination rose from 55.1% in 1998 to 64.2% in 2000.”¹²³ Based on the foregoing, Abe and Hoshi conclude that these fundamental changes signal a decline in lifetime employment.

Similarly, Daiji Kawaguchi and Yuko Ueno find that lifetime employment is declining due to the decrease in mean tenure among workers in Japan.¹²⁴ This differs from other studies, explored below, that mostly focus on job retention rates.¹²⁵ Kawaguchi and Ueno contend that the decrease in mean tenure is the “natural consequence of the low growth rate after the high-growth period ended by the early 1970s, because the Japanese employment system is considered to foster firm-specific human capital and the lower growth rate decreases the rate of return to all types of assets, including firm specific human capital.”¹²⁶ Specifically, they find that “[m]ale workers who were born in 1970 have about 20% fewer years of job tenure than workers who were born in 1944.”¹²⁷ In response to the argument that lifetime employment is only declining in certain industries or smaller firms, they determined that “male workers in all industries and firm sizes almost uniformly have experienced declining long-term employment.”¹²⁸

In addition, Kawaguchi and Ueno ruled out other explanations that scholars have argued could account for the decrease in lifetime employment.¹²⁹ First, they found that different levels of education and

publication, Masahiro Abe was an academic at Dokkyo University and the Research Institute of Economy, Trade & Industry (“RIETI”) in Japan. Takeo Hoshi was an academic at the University of California, San Diego as well as RIETI and the National Bureau of Economic Research.

121. Abe & Hoshi, *supra* note 119, at 7; *see also The End of Lifetime Employment in Japan?*, *supra* note 89, at 511 (concluding that the firms in the study used an early retirement incentive plan to induce employees to retire early).

122. Abe & Hoshi, *supra* note 119, at 8-9.

123. *Id.* at 8.

124. Kawaguchi & Ueno, *supra* note 117, at 19. At the time of publication, Daiji Kawaguchi was an academic at Hitotsubashi University in Japan, and Yuko Ueno was part of the Cabinet in the Japanese government.

125. *See infra* Part III.A.3.

126. Kawaguchi & Ueno, *supra* note 117, at 20.

127. *Id.*

128. *Id.* at 21.

129. *Id.* at 26-32.

the recessionary period are not major causes of a decrease in the mean tenure among workers.¹³⁰ In addition, Kawaguchi and Ueno note that “this time-series suggests that declining long-term employment is not a byproduct of a positive change of Japanese labor market that allows its workers to enjoy more opportunities for voluntary job hopping.”¹³¹ However, they do find that the decrease in lifetime employment can partially be attributed to the increase in nonpermanent workers.¹³² They find that the “increase of nonpermanent-regular workers and the decrease of mean tenure among regular workers [both] reflect the declining trend of the Japanese employment system.”¹³³

Third, Zenichi Shishido contends that “each Japanese company is now struggling to find a new direction of corporate governance.”¹³⁴ He explains that after 1997, “[e]mployees began to feel that the implicit promise of lifetime employment had been breached or would be breached.”¹³⁵ This was particularly pronounced “when some big companies, including Yamaichi Securities Firm, went bankrupt, and responding to the pressure of capital markets, many big companies were forced to lay off employees.”¹³⁶ In sum, these scholars argue that lifetime employment is decreasing in Japan as evidenced by changes in hiring, retirement age, salary structure, a decrease in mean tenure and a sense among workers that employers were not fulfilling their promise of lifetime employment.

2. Lifetime Employment is Not Disappearing

On the other hand, some scholars point out that “[w]hile the rhetoric of ‘the end of lifetime employment’ is presently rampant, concrete data on changes in traditional employment practices are

130. *Id.* at 26-27.

131. *Id.* at 35.

132. *Id.* at 28.

133. *Id.* at 30.

134. Zenichi Shishido, *Reform in Japanese Corporate Law and Corporate Governance: Current Changes in Historical Perspective*, 49 AM. J. COMP. L. 653, 671 (2001). Zenichi Shishido is a professor of law at Seikei University in Japan.

135. *Id.*

136. *Id.*; see also Elijah Brewer III, Hesna Genay, William Curt Hunter & George G. Kaufman, *Does the Japanese Stock Market Price Bank-Risk? Evidence from Financial Firm Failures*, 35 J. OF MONEY, CREDIT & BANKING, 507, 535 (2003) (explaining that Yamaichi Securities went bankrupt in March 1998).

relatively scarce.”¹³⁷ In fact, Michael Witt finds that “tenure lengths have actually increased over the past decade.”¹³⁸ In 1998, which is the earliest date with available data, the average tenure rate was 17.6 years for middle-school graduates, 13.4 years for high-school graduates, 9.2 years for graduates from junior and technology colleges, and 11.9 years for college and university graduates.¹³⁹ In 2010, the average tenure rate was 18.4 years, 14.8 years, 11.7 years and 12.8 years, respectively.¹⁴⁰ Consequently, Witt concludes, “changes have not been as revolutionary as suggested in the early years of the debate.”¹⁴¹ In sum, Witt argues that lifetime employment is not declining because the tenure length for groups sorted by educational level has increased in the past decade.

3. Lifetime Employment is Resilient but Faces Major Changes

The majority view is that lifetime employment is resilient, but major changes have occurred within the system. For instance, Hiroshi Ono found that “[a]lthough the population of workers who are ex-ante covered by lifetime employment may be shrinking, the likelihood of job separations has remained stable for those who are already in the system.”¹⁴² Specifically, Ono finds that approximately only 20% of the workforce enjoys the benefits of lifetime employment, which is a smaller proportion than previously estimated.¹⁴³ Lifetime employment is still resilient as evidenced by how “employers prioritize[] their core workers at the expense of new hires” in response to the economic downturn.¹⁴⁴ Furthermore, “[i]n order to be more flexible and responsive to changes in the global economy, companies are reducing their core, and expanding their periphery labor force.”¹⁴⁵ Employers are therefore able to “honor[] the implicit contract of lifetime

137. *The End of Lifetime Employment in Japan?*, *supra* note 89, at 490; *see also* Milhaupt, *supra* note 7, at 2118 (explaining that “[l]ifetime employment remains the stickiest of all the corporate governance norms.”).

138. Witt, *supra* note 4.

139. *Id.*

140. *Id.*

141. *Id.* at 8 (internal quotation marks omitted).

142. Ono, *supra* note 6, at 23.

143. *Id.* at 2.

144. *Id.* at 23; *see also* *The End of Lifetime Employment in Japan?*, *supra* note 89, at 511 (concluding that the firms in the study “reduced its hiring of new graduates drastically”).

145. Ono, *supra* note 6, at 23; *see also* *Trends in Long-term Employment and Job Security in Japan and the United States: the Last Twenty-Five Years*, *supra* note 82, at 23 (explaining that there is a secondary segment of the labor market in Japan).

employment and protect those who are in the core.”¹⁴⁶ As such, Ono concludes that “[l]ifetime employment is far from dead for those who are in the core.”¹⁴⁷

Similarly, Ryo Kambayashi and Takao Kato conclude that while lifetime employment is resilient, it “does not mean the complete rigidity of the Japanese employment system.”¹⁴⁸ They find that “job stability of regular employees eventually fell during the final years of the Great Recession.”¹⁴⁹ Specifically, “the average regular employees ages 35-39 with 0-4 years of tenure in 1982 had a 63 percent chance of being with the same employer ten years later (1992) whereas the average employee in the same age tenure category in 1992 had only a 49 percent chance of being with the same employer ten years later (2002).”¹⁵⁰

Kambayashi and Kato find that the group most drastically affected by potential deviations from lifetime employment is regular, female employees over the age of 30.¹⁵¹ Further, similar to Ono’s conclusion, Kambayashi and Kato determine that “Japanese firms honor their promise of job security to the original members . . . which in turn contributes to the stability of the Japanese employment system.”¹⁵² In other words, employers generally protect the “original members” who are “typically male regular employees who are new graduates hires” while the “expansion members appeared to have served as an elaborate shock absorber.”¹⁵³

In an earlier study, Kato reached similar results and concluded that there is “little evidence for serious erosion of the practice of lifetime employment.”¹⁵⁴ While the “evidence points to the enduring nature of the practice of lifetime employment in particular for prime

146. Ono, *supra* note 6, at 23; see also *Trends in Long-term Employment and Job Security in Japan and the United States: the Last Twenty-Five Years*, *supra* note 82, at 24 (stating that “[t]he core segment of the labor market weathered the Great Recession rather well, continuing to enjoy strong job security, while the secondary segment of the labor market experienced significant loss in job security. . .”).

147. Ono, *supra* note 6, at 23.

148. *The Japanese Employment System After the Bubble Burst*, *supra* note 6, at 26.

149. *Id.*

150. *Id.* at 8.

151. *Id.* at 9.

152. *Id.* at 29.

153. *Id.*; see also *Trends in Long-term Employment and Job Security in Japan and the United States: the Last Twenty-Five Years*, *supra* note 82, at 24 (explaining that the two-tier structure in Japan serves as a shock absorber).

154. *The End of Lifetime Employment in Japan?*, *supra* note 89, at 494.

age male employees . . . [t]he burden of downsizing . . . appears to have fallen disproportionately on young employees and middle age employees with short tenure, in particular middle age female employees with short tenure.¹⁵⁵ As an example, Kato points to how “female employees ages 35-39 and 0-4 years of tenure enjoyed an almost 60% chance of 10-year job retention for 1977-87 whereas they enjoyed only about 40% of 10-year job retention for 1987-97.”¹⁵⁶

Kato investigated three large Japanese companies to highlight how the trends he identified in his study work in reality.¹⁵⁷ One of the companies, Firm A, is a large manufacturing company, which is well known both domestically and internationally.¹⁵⁸ Throughout the 1990s, Firm A cut 30% of its workers and accomplished this primarily by limiting hiring and transferring workers, instead of dismissing current employees.¹⁵⁹ For instance, Firm A hired 3,000 college and high school graduates in 1990, but, by the mid-1990s, Firm A only hired between 62 and 482 graduates each year.¹⁶⁰ Kato found that two other firms adopted a similar process of limiting hiring and transferring employees.¹⁶¹

Each of the firms that Kato investigated downsized significantly, from twenty-five to fifty percent, yet “no firm used layoffs as a means to achieve restructuring or downsizing.”¹⁶² These firms were able to do this by using voluntary early retirement plans and inter-company transfers. Voluntary early retirement plans were appealing, and “each firm induced a substantial number of early retirements successfully.”¹⁶³

Kato further found that employers who were using transfers to avoid discharging workers would transfer the employee within the firm, either to a subsidiary or related firm of the company.¹⁶⁴ For example, in Kato’s study, Firm A transferred approximately 2,000

155. *Id.* at 495; see also *The Japanese Employment System After the Bubble Burst*, *supra* note 6, at 9 (explaining that the burden was heaviest on female workers over 30 with relatively short tenure at a large firm).

156. *The End of Lifetime Employment in Japan?*, *supra* note 89, at 495.

157. *Id.* at 498-510.

158. *Id.* at 499.

159. *Id.* at 500-01.

160. *Id.*

161. *Id.* at 504, 507.

162. *Id.* at 510.

163. *Id.* at 511; see also Abe & Hoshi, *supra* note 119, at 7 (noting there has been an increase in voluntary retirement plans).

164. *The End of Lifetime Employment in Japan?*, *supra* note 89, at 501.

employees to related, as well as unrelated, firms each year in 1995 and 1997.¹⁶⁵ Thus, firms have been “downsizing their labor force by expanding the definition of the firm to include the firm’s subsidiaries and related firms . . . [thus] [l]ifetime employment with the firm now often means lifetime employment with the firm and its subsidiaries and related firms.”¹⁶⁶ Rather than viewing this change as the end of lifetime employment, Kato finds that “both HR managers and top union officials tend to view the increasing incidents of permanent transfers in recent years as a necessary modification of the notion of lifetime employment.”¹⁶⁷ It is notable, however, that some “employees were generally unhappy about the prospect of becoming employees of somewhat less prestigious subsidiaries and related firms.”¹⁶⁸

Another study noted that lifetime employment continues to be resilient in Japan because both employees and employers like the system. For example, Ono’s study used data that both employees and employers want to maintain lifetime employment as “counterevidence to the anecdotal view that lifetime employment is a thing of the past.”¹⁶⁹ In a 2007 survey by the Japan Institute for Labour Policy and Training, “almost 90 percent of companies . . . aimed to maintain lifetime employment policies in their current or partially adjusted form.”¹⁷⁰ In addition, a survey in 2010 shows that 60% of new recruits wanted to stay at the same company.¹⁷¹

The quantitative studies that examine lifetime employment fall into three main categories. First, some scholars have found that lifetime employment is disappearing, as evidenced by changes in hiring, retirement age and a decrease in mean tenure, among others.

165. *Id.*

166. *Id.* at 511; *see also* Abe & Hoshi, *supra* note 119, at 25 (explaining “[i]n this sense, permanent *shukko* [or transfers] may be viewed as an attempt to maintain lifetime employment system in the increasing volatile economy.”).

167. *The End of Lifetime Employment in Japan?*, *supra* note 89, at 512.

168. *Id.*; *see infra* Part III for a discussion of whether this is just a modification of lifetime employment or a symptom of the decline in lifetime employment, and furthermore, whether this distinction is important.

169. Ono, *supra* note 6, at 25.

170. Witt, *supra* note 4, at 7; *see also* Ono, *supra* note 6, at 25 (explaining that “survey results from 1999 show that 60.6% of personnel managers intend to ‘maintain lifetime employment as much as possible,’ an increase from the 46.8% reported in 1997”).

171. Witt, *supra* note 4, at 7; *see also* Ono, *supra* note 6, at 24 (stating “[i]n fact, the support base seems to be increasing. A worker survey conducted in 2004 shows that 78% of workers are in favor of lifetime employment, an increase of 5.7% from the first survey conducted in 1999.”).

Second, others contend that lifetime employment is not disappearing. Third, the majority view is that while lifetime employment is resilient, there have been significant changes to the employment system in Japan.

B. Non-Quantitative Studies

1. Explanations for Why Lifetime Employment has Persisted

The following Section discusses the rich literature concerning institutional complementarities in Japanese corporate governance. In his seminal article, Aoki explains that “corporate governance cannot be introduced or maintained in either a piecemeal or autonomous way . . . its effectiveness must be supported by complementary institutional arrangements. . . .”¹⁷² Specifically, “the Japanese employment system . . . is complementary to the Japanese financial system [] characterized by stable financial corporate grouping, such as banks and institutional shareholders[,] as stable, long-term suppliers of capital.”¹⁷³ In other words, Japanese companies “obtain funding from banks, instead of capital markets,” and these banks tend to have “long-term commitments to firms.”¹⁷⁴

Japanese firms therefore generally operate according to the stakeholder system where “stakeholders . . . emphasize strategic interests . . . and are likely to be committed to the long term interests of the firm.”¹⁷⁵ As long-term investors, “main banks and silent shareholders support managers’ decisions to maintain employment, as long as performance ultimately translates into positive profits – even if the firms are facing performance

172. Masahiko Aoki, *The Contingent Governance of Teams: Analysis of Institutional Complementarity*, 35 *INT’L ECON. REV.* 657, 657 (1994).

173. *The End of Lifetime Employment in Japan?*, *supra* note 89, at 491; *see also* Noda, *supra* note 20, at 364 (stating that “[l]ong-term employment practices are considered to have complementarities with the corporate finance and ownership structure, such as the main bank system and cross-shareholding”).

174. Witt, *supra* note 4, at 14; Noda, *supra* note 20, at 365, 370 (noting that the main banks “comprise the typical Japanese stakeholders”); *see also* Abe & Hoshi, *supra* note 119, at 3 (explaining that the bank is typically the corporation’s largest lender and stating that “[a] Japanese corporation has a long-term relationship with a bank. . . .”).

175. Noda, *supra* note 20, at 370; *see also* Abe & Hoshi, *supra* note 119, at 3 (stating that “[m]any researchers have pointed out that the corporate governance of Japanese firms fit the stakeholder view of the corporate governance very well. . . . Corporations seem to be operated in the interests of many types of stakeholders, including employees. . . .”).

declines.”¹⁷⁶ Tomohiko Noda notes that this stakeholder system is the opposite of the Anglo-American model, where shareholders who “emphasize financial interests . . . do not pursue long-term profits . . . [and a]ccordingly take a relatively dispassionate attitude toward implicit long-term employment contracts and do not hesitate to pressure firms to downsize.”¹⁷⁷ Therefore, the corporate governance structure in Japan tends to help reinforce lifetime employment as opposed to corporate governance in Anglo-American States.¹⁷⁸

Additionally, the relative lack of foreign investment has helped maintain Japan’s form of corporate governance, thus helping to maintain lifetime employment. Until the early 2000s, foreign investors were relatively uncommon in Japan.¹⁷⁹ In the early 1990s, the share of foreign ownership in the Tokyo Stock Exchange was four percent.¹⁸⁰ The lack of foreign investment helped maintain lifetime employment because “[f]oreign investors . . . are likely to be strong proponents of shareholder capitalism; [thus] they are likely to have little patience for Japan’s existing system, which protects employees’ interests even at the sacrifice of shareholders’ interests to some extent.”¹⁸¹

Some scholars also argue that the composition of a company’s board of directors has a direct impact on the viability of lifetime employment.¹⁸² Historically, in Japan “boards of directors were rather large and primarily occupied by managers chosen from inside the

176. Noda, *supra* note 20, at 370; *see also* Witt, *supra* note 4, at 14 (stating that “[t]he combination of weak corporate governance and long-term finance enables long term employment. Jointly, they offer at least partial protection against shareholder demands to improve profitability through layoffs.”).

177. Noda, *supra* note 20, at 369.

178. On the other hand, some scholars recognize that “[t]he effects of ownership structure are difficult to interpret a priori.” Abe & Shimizutani, *supra* note 1, at 13. Specifically, “[i]f we consider the monitoring role of large shareholders or banks, a company with concentrated ownership or strong ties with the banking sector is more likely to cut jobs since strong monitoring forces the company to concentrate on profit maximization.” *Id.*

179. Noda, *supra* note 20; *see also* Witt, *supra* note 4, at 5 (explaining that “foreigners increased their share from 5.8 percent in 1980 to 18.8 percent in 2000 and 26.0 percent in 2009”).

180. Abe & Hoshi, *supra* note 119, at 5.

181. Noda, *supra* note 20, at 370; *see also* Witt, *supra* note 4, at 5 (stating that “[i]ncreased foreign shareholdings have meant pressure for changes in corporate governance toward more attention to shareholders’ interests.”).

182. Abe & Shimizutani, *supra* note 1, at 4-5; *see also* Gilson & Roe, *supra* note 1, at 509 (explaining that lifetime employment is supported by institutions such as inside boards of directors).

company.”¹⁸³ Abe and Shimizutani note that a board with more insiders will help maintain lifetime employment because “[b]oth corporate governance theory and macroeconomic theory predict that companies with fewer outside directors are more inclined to pursue the interests of their employees rather than . . . shareholders.”¹⁸⁴

As a result, “insider managers are less likely to lay off current employees and instead are more likely to rely on reducing new hiring to reduce labor costs.”¹⁸⁵ Scholars point out that “[t]his finding is consistent with the “moral hazard view . . . which suggests that in firms where employee influence is strong and directors are selected from among employees of the firm tend to try to provide job security [.]”¹⁸⁶ In conclusion, many scholars contend that Japanese corporate governance has helped maintain lifetime employment.

Scholars have set forth a variety of other reasons to explain why lifetime employment has remained prevalent in Japan. Some scholars note that because the legal framework reinforces lifetime employment, it is possible that Japanese courts have helped maintain lifetime employment.¹⁸⁷ According to the Global Competitiveness Report, Japan has the lowest score of all Asian countries for ease of hiring and firing.¹⁸⁸ Additionally, Gilson and Roe contend that “the Japanese “government may have helped to destroy the external labor market . . . [by] discourag[ing] lateral hiring, thereby helping to keep the external labor market weak. . . .”¹⁸⁹

Additionally, Witt contends that “the existing system has enjoyed a great deal of legitimacy, and the will to effect major changes seems to be weak, not only among people in general, but also among top managers.”¹⁹⁰ With respect to banking institutions, given how intertwined the institutions’ board of directors, shareholders, and

183. Abe & Shimizutani, *supra* note 1, at 5; *see also* Gilson & Roe, *supra* note 1, at 509 (stating that “firms’ board consist of insider-employees”).

184. Abe & Shimizutani, *supra* note 1, at 7.

185. *Id.* at 14; *see also* Witt, *supra* note 4, at 14 (stating that “Japanese firms tends to be run by employees for employees. This means that in the inherent conflict over the distribution of value created in the firm, employees tend to have the upper hand over shareholders.”).

186. Abe & Shimizutani, *supra* note 1, at 4-5; *see also* Witt, *supra* note 4, at 14 (explaining that “[i]n effect, Japanese firms tend to be run by employees for employees.”).

187. *See* Witt, *supra* note 4, at 7; *see also* Gilson & Roe, *supra* note 1, at 525 (explaining that “[t]he second hypothesis is that Japanese courts buttressed lifetime employment.”); *infra* Part III.

188. Witt, *supra* note 4, at 7.

189. Gilson & Roe, *supra* note 1, at 527.

190. Witt, *supra* note 4, at 15.

employees are, it is possible that “the high levels of complementarities in the business system constrain the extent of possible changes.”¹⁹¹ Witt maintains that this constraint on change is also reinforced by the fact that the “consensual nature of decision-making in the Japanese political economy is prone to deadlock.”¹⁹²

Relatedly, Witt further explains that informal changes are infrequent because “such deviant behaviour happens at relatively low levels, which means that they cannot build up sufficient pressure on policy-makers to change the formal institutional structure.”¹⁹³ Lastly, Gilson and Roe point out “that managers feared that poaching employees mid-career from other firms risked adversely affecting the morale of the firm’s existing employees and reducing the effectiveness of the internal labor market.”¹⁹⁴ Furthermore, it has been argued that lifetime employment has persisted because “managers attempt to retain labour in order to avoid any sunk costs associated with human capital investments” and “prefer to maintain existing employment levels, even in times of recession, so that they have ready access to a high-quality workforce.”¹⁹⁵

2. Explanations for Why Lifetime Employment is Changing

Many scholars point to fundamental changes in Japanese corporate governance to explain why the current lifetime employment system is changing.¹⁹⁶ Prior to the Lost Decade, “[m]onitoring by the main bank and other business group members represented the main mechanism of corporate governance.”¹⁹⁷ These long-term investors tended to support management’s employment decisions and did not exert pressure on the company to downsize.¹⁹⁸ However, “shareholding patterns begin to shift during the ‘lost decade’ of the

191. *Id.* at 15; *see also supra* Part II.B.1.

192. Witt, *supra* note 4, at 15.

193. *Id.*

194. Gilson & Roe, *supra* note 1, at 526-27.

195. Noda, *supra* note 20, at 368 *See generally* Gilson & Roe, *supra* note 1.

196. *See* Abe and Shimizutani, *supra* note 1, at 3 (stating that “[f]inancial institutions have been decreasing their shareholdings, while foreign investors have been increasing theirs.”); Noda, *supra* note 20, at 364 (explaining that “[r]ecent changes in bank-firm relationships and ownership structure seem to affect the employment practices of Japanese firms. . .”).

197. Witt, *supra* note 4; *see also supra* Part II.B.1.

198. *See supra* Part II.B.1; Noda, *supra* note 20, at 364 (explaining that stakeholders such as shareholders and banks “support implicit long-term contracts that protect employee interests. . .”).

1990s” when “the importance of bank lending . . . declined and markets . . . bec[a]me more important.”¹⁹⁹ As a result, “[m]any corporations increased their bond issues in domestic as well as foreign markets and reduced their dependence on bank loans, which had previously served as a hallmark of Japanese corporate financing.”²⁰⁰ Further, cross-shareholding decreased from eighteen percent in the early 1990s to less than eight percent by 2003.²⁰¹ Additionally, there was a “sharp decline in proportion held by financial institutions from 34 percent in 1991 to 25 percent in 2001.”²⁰²

Furthermore, “[i]ncreased foreign shareholdings have meant pressure for changes in corporate governance toward[s] more attention to shareholders’ interests.”²⁰³ The proportion of “foreign ownership in the Tokyo Stock Exchange increased from about 4% in the early 1990s to more than 18% in 2002.”²⁰⁴ Abe and Hoshi also find that “firms with high foreign ownership and low bank ownership are more likely to downsize their workforce.”²⁰⁵ In addition, they determine that firms “that show high level[s] of foreign ownership were more likely to have human resource management practices that deviate from the traditional Japanese practice.”²⁰⁶ In sum, these scholars point to these fundamental changes in corporate governance, namely the increased prioritization of shareholder’s interests, to explain changes in the lifetime employment system.

Tomohiko Noda conducted a fascinating study to analyze the relationship between the rate of employment adjustment and changes in corporate governance.²⁰⁷ In the study, Noda finds that, “[a]lthough firms with close main bank ties tended, prior to 1997, to postpone

199. Witt, *supra* note 4; *see also* Abe & Hoshi, *supra* note 119, at 4 (stating that “[d]eregulation in corporate financing that started in the late 1970s allowed many large Japanese firms to use capital markets (rather than banks) for their financing.”); Shishido, *supra* note 134, at 668 (explaining that after the bubble burst, “Japanese corporate governance was forced to change”).

200. Abe & Hoshi, *supra* note 119, at 4-5; *see also* Abe & Shimizutani, *supra* note 1, at 5 (explaining that “[s]ince the beginning of the 1990s, a weakening in the relations between companies and their main banks can be observed.”).

201. Abe & Hoshi, *supra* note 119, at 5.

202. Abe & Shimizutani, *supra* note 1, at 6.

203. Witt, *supra* note 4; *see also* Abe and Shimizutani, *supra* note 1, at 3 (explaining that since the mid-1990s, “[f]inancial institutions have decreased their shareholdings, while foreign investors have been increasing theirs.”).

204. Abe & Hoshi, *supra* note 119, at 5.

205. *Id.* at 2.

206. *Id.* at 28.

207. Noda, *supra* note 20.

downsizing until they had faced 2 consecutive years of losses, after 1997, they became unable to maintain employment levels for this long of a period.”²⁰⁸ Large Japanese firms were able to maintain employment because of their main bank ties and cross-shareholding, which sought to “protect firm-specific human capital investments.”²⁰⁹ Noda notes that main banks only began to pressure firms to downsize when “they face the possibility of there being unrecoverable loan interest.”²¹⁰

Ultimately, Noda concludes that the decline of main bank relationships and increase in foreign investors has had an impact on the speed of employment adjustment.²¹¹ He contends that the “reduced function of main banks and the increased influence of foreign owners have changed the timing of downsizing, so that it occurs earlier than had been the case before 1997.”²¹² In fact, he found that foreign investors have “started to encourage downsizing, even in times of positive profits.”²¹³ Therefore, the combination of the decline of main bank relationships and the increase of foreign investors has resulted in a faster employment adjustment rate.²¹⁴

Furthermore, scholars point to changes in the composition of boards of directors to explain changes in the lifetime employment system. Abe and Shimizutani note that since the mid-1990s, “an increase in the ratio of outside directors in board composition can be observed, though inside directors are still dominant in many companies.”²¹⁵ For example, in 1991, “the median proportion of insiders among all board members was 74 percent, but the figure decreased to 67 percent in 2001.”²¹⁶ Abe and Shimizutani determine that:

208. *Id.* at 387.

209. *Id.* at 364; *see also supra* Part II.B.1.

210. *Id.* at 372.

211. *Id.* at 370.

212. *Id.* at 365.

213. *Id.* at 395.

214. Noda also emphasizes that although his study points to “non-negligible changes,” he does not want to overstate the change in the employment system. *Id.* at 395. Specifically, he explains that “[m]any Japanese firms attempt to maintain employment until they have realized 1 year of losses in order to avoid undermining employees’ incentives to make firm-specific human capital investments.” *Id.* He also notes that “foreign owners are not always opposed to the concept of long-term employment.” *Id.* at 396.

215. Abe & Shimizutani, *supra* note 1, at 3.

216. *Id.* at 6.

[T]he higher the share of outside directors, the more likely are firms with excess employment to implement lay offs and/or use voluntary or early retirement schemes. On the other hand, firms with a large number of inside directors are instead more likely to reduce new hiring to protect incumbent employees.²¹⁷

These results are “consistent with the stakeholder view of the firm, which suggests that inside directors are more concerned with protecting the interests of employees than with profit-maximization as assumed by neoclassical theory.”²¹⁸ Therefore, there is evidence that these fundamental corporate governance changes account for changes in the lifetime employment system in Japan.

Scholars also highlight a variety of other factors that may be changing the lifetime employment system. First, there are a variety of external factors, such as the financial crisis, the aftermath of the 2011 earthquake in Japan, competition from other Asian countries, Japan’s struggle with the IT revolution, and the population crisis, all of which might result in drastic changes to systems like lifetime employment.²¹⁹

Second, some scholars contend that lifetime employment has hurt the Japanese economy. Tsuneki and Matsunaka explain that “[c]ritics have pointed to the big efficiency losses associated with a labor market that cannot adapt quickly to changing demands for its products.”²²⁰ However, Tsuneki and Matsunaka contend this argument is not particularly persuasive because it “is unable to explain why post-war Japan succeeded economically at least until the 1980s.”²²¹

Third, dramatic technological improvements can help to explain changes in Japan’s employment system. Given that the value of lifetime employment is partially found in the “accumulation of firm-specific knowledge in the long-run, it is more effective in an economic environment growing at a stable rate and with relatively

217. *Id.* at 4.

218. *Id.* at 15; *see also supra* Part II.B.1.

219. Witt, *supra* note 4, at 15-16; *see also* Mulrenan, *supra* note 4, at 33 (explaining that “[t]here is a need, therefore, for a boost to both the population as a whole and the workforce in particular, and it is becoming increasingly apparent that women are crucial in both these areas.”).

220. Ono, *supra* note 6, at 1. *But see* Abe & Shimizutani, *supra* note 1, at 2 (noting that some researchers argue that Japan’s employment system achieves an efficient allocation of resources).

221. Tsuneki & Matsunaka, *supra* note 8, at 530.

small technical changes.”²²² Consequently, Tsuneki and Matsunaka suggest that the employment system needs to change because new technologies have resulted in the need to “restructure existing industries and develop new industries” which requires “the migration of the labor force from old to new businesses and industries.”²²³

Fourth, while labor law has been cited as a reason for lifetime employment’s persistence, the law does not require long-term employment contracts.²²⁴ In fact, Japanese labor law “allows for various types of labor contracts.”²²⁵ Furthermore, the Labor Standard Law was revised in 1998 to allow Japanese companies to write up multi-year fixed term contracts.²²⁶ Therefore, Kambayashi and Kato maintain that, “the 1998 revision of the Labor Standard Law is potentially a cause for the weakening of the ‘lifetime employment’ system.”²²⁷

Lastly, there are changes to employment and working conditions that may be adding to the impetus for change. For instance, the “wage payment system based on seniority is also being reformed to reflect performance measures more directly.”²²⁸ Tsuneki and Matsunaka also note that “Japanese labor law has recently begun to emphasize the activation of the external labor market by the deregulation of the private employment agency business and public support to the vocational training provided to the unemployed.”²²⁹ This could have a large impact on the viability of lifetime employment because these changes open up the labor market and, as Gilson and Roe explain, a closed external labor market reinforces the norm of lifetime employment.²³⁰ Another explanation points to changes in subsidization policies, where, instead of giving subsidies to industries facing economic difficulties, there is a changed “subsidization policy related to newly created industries such as those pertaining to information, environment, medicine and welfare industries. . . .”

222. *Id.* at 539.

223. *Id.* at 555.

224. *Id.*

225. *Id.*; see also *supra* Part I.C.

226. *The Japanese Employment System After the Bubble Burst*, *supra* note 6, at 5. Prior to this revision, companies had to “choose between indefinite contracts . . . and fixed-term contracts of one year or less [which] . . . allegedly facilitated Japanese firms to hire more workers under indefinite contracts.” *Id.*

227. *The Japanese Employment System After the Bubble Burst*, *supra* note 6, at 5.

228. Tsuneki & Matsunaka, *supra* note 8, at 555; see also *supra* Part II.A.

229. Tsuneki & Matsunaka, *supra* note 8, at 555-56.

230. See *supra* Part I.B. See generally Gilson & Roe, *supra* note 1.

which is a significant departure from the subsidization policies that helped to maintain lifetime employment in existing industries.²³¹

III. *THE END OF LIFETIME EMPLOYMENT? NOT IN MY LIFETIME*

A. Lifetime Employment is Changing But Not Disappearing

A thorough examination of lifetime employment indicates that the system is changing.²³² In many studies, scholars argue that even though the number of workers who enjoy lifetime employment is decreasing, the system is in fact not disappearing because employers are honoring existing promises with core workers.²³³ Hypothetically, however, if the number of employees who enjoy lifetime employment is decreasing now, this likely means that the system will become less prevalent in the future..

Currently, lifetime employment only applies to twenty percent of the working population in Japan.²³⁴ Scholars generally agree that the recession hit younger workers the hardest, and consequently, lifetime employment is increasingly not applying to them.²³⁵ If graduates are entering the workforce without the promise of lifetime employment, this must necessarily mean that as the population ages, fewer workers will be part of the lifetime employment system. This would therefore indicate that lifetime employment is changing and will decline in the future.

Furthermore, the reasons that scholars have set forth to explain the changes in lifetime employment are persuasive. First, the changes in corporate governance in Japan support the idea that lifetime employment is changing.²³⁶ The strength of the main bank and the decline of cross-shareholding, combined with an increase in foreign influence and the proliferation of the use of “outside” board of directors, help to explain why companies are more unwilling to commit to lifetime employment.²³⁷ In addition, there have been major changes in Japanese society, such as the population crisis and

231. Tsuneki & Matsunaka, *supra* note 8, at 556; *see also supra* Part I.C.

232. *See supra* Part II.A.

233. *See supra* Part II.A.

234. Ono, *supra* note 6, at 2.

235. *See supra* Part II.A.

236. *See supra* Part II.C.

237. *See supra* Part II.C.

recession, which necessitate a change in the employment system.²³⁸ This, however, does not necessarily mean that lifetime employment will disappear altogether.

B. Policy Implications

Ultimately, the focus on whether the system is disappearing seems misplaced. Scholars and policy-makers should focus more on the broader societal and economic implications of changes in the employment system generally, without regard to whether it fits into the mold of the lifetime employment system. Japan is experiencing a severe population crisis with a drastically increasing aging population and a decreasing working population.²³⁹ Consequently, policy-makers are becoming more concerned about the aging population and its effect on society, for example as it relates to pension systems.²⁴⁰ Therefore, instead of focusing on the viability of lifetime employment, policy-makers and scholars should focus on figuring out the best employment system for society in Japan today. Since the “Japanese labor market [now] has a dual nature” with regular and non-regular workers, there should be an emphasis on how to make non-regular workers more productive and efficient for the economy.²⁴¹ In addition, as Stephen Mulrenan explains, “[T]he Government is not doing anything to encourage a mid-career job market. It needs to introduce policies that allow companies to shed excess labour when they don’t need it, and hire when they do need it.”²⁴²

Furthermore, the emphasis on lifetime employment has hurt female workers and younger workers more acutely.²⁴³ Scholars

238. See *supra* Part II.C.

239. See Mulrenan, *supra* note 4; see also Hamid Faruqee & Martin Mühleisen, *Population Aging in Japan: Demographic Shock and Fiscal Sustainability* (IMF Working Paper No. 01/40, 2001) (“[B]y 2025, one elderly person will fall on roughly two persons of working age, which will leave Japan with a significantly higher old-age dependency ratio than any other country in the industrialized world.”).

240. See Mulrenan, *supra* note 4; see also Maxime Fourgère & Marcel Mérette, *Population Ageing and Economic Growth in Seven OECD Countries*, 16 *ECON. MODELLING* 411, 420 (1999) (“[P]opulation ageing puts upward pressure on wage income taxes . . . because there are fewer workers to finance public pension systems and tax bases thus diminish.”).

241. Tsuneki & Matsunaka, *supra* note 8, at 534; see also *supra* Part I.D.

242. Stephen Mulrenan is a journalist based in Hong Kong. See Mulrenan, *supra* note 4 at 37.

243. See *supra* Part II.A. See generally Kawaguchi & Nishitani, *supra* note 16, at 49.

generally agree that female workers have historically been excluded from the lifetime employment system.”²⁴⁴ In fact, Ono explains that “the lifetime employment system presumed a complete specialization between the sexes with one spouse fully committed to market work and the other devoted to non-market work.”²⁴⁵ Adhering to this gendered practice, however, is problematic given the diminishing workforce in Japan.²⁴⁶

Encouraging more women to work would be a simple and obvious way to help increase the workforce population in Japan.²⁴⁷ Some contend that this is easier said than done because “it may require a paradigm shift in the cultured norms and mentality among Japanese employers and workers in order to achieve a better balance between work and family in the long run.”²⁴⁸ Still, extending more favorable employment options to women can help to encourage mid-career hires and provide more flexibility in hiring, which generally would “enable women who leave the workforce to start their families to more easily come back into meaningful jobs.”²⁴⁹

In addition, employers have tried to maintain lifetime employment by cutting back on hiring recent graduates.²⁵⁰ As such, this emphasis on honoring lifetime employment promises has disproportionately burdened younger generations. Consequently, lifetime employment has created a “serious youth unemployment problem.”²⁵¹ For instance, “the unemployment rate in Japan has risen most rapidly for those aged 15–24 in the 1990s.”²⁵² Additionally, Kato notes that, “the firm’s labor force is aging rapidly, which weakens the dynamism of the organization.”²⁵³

The emphasis on lifetime employment is exacerbating the consequences of an aging population in Japan. Fewer graduates are able to meaningfully join the workforce while older generations continue to work.²⁵⁴ Consequently, desperate attempts to maintain the

244. See generally Ono, *supra* note 6; Kawaguchi & Nishitani, *supra* note 16.

245. Ono, *supra* note 6, at 25.

246. See Mulrenan, *supra* note 4 at 33-34; see also sources cited *supra* note 245.

247. See Mulrenan, *supra* note 4 at 33; see also sources cited *supra* note 245.

248. Ono, *supra* note 6, at 25. See generally Mulrenan, *supra* note 4.

249. See Mulrenan, *supra* note 4 at 37. See generally Ono, *supra* note 6.

250. See *supra* Part II.A.

251. *The End of Lifetime Employment in Japan?*, *supra* note 89, at 511; see also *supra* Part II.A.

252. *The End of Lifetime Employment in Japan?*, *supra* note 89, at 511.

253. See *id.*

254. See *supra* Part II.A.

lifetime employment system have resulted in hurting younger and female workers, which may be the key to mitigating the aging population problem. Therefore, while lifetime employment has been and continues to be an important institution to study, scholars and policy-makers should focus on making sure that fundamental changes in the employment system help mitigate societal and economic problems in Japan.

CONCLUSION

This Comment has provided an overview of the lifetime employment system and has attempted to answer the question: is lifetime employment disappearing. While lifetime employment has changed significantly, this does not necessarily mean that the system will disappear altogether. Ultimately, however, policymakers and scholars should focus less on whether lifetime employment is disappearing and more on how the employment system can be changed to better fit Japan's economy and society today.

