WORK LAW

OPEN CASES & MATERIALS

Gali Racabi, ed. (1-*beta*, 2024)

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For my students:

Information wants to be free; education needs to be free

Preface

Welcome!

This textbook accompanies a survey course on US labor and employment law. My emphasis in collecting the materials was on legal and policy highlights underlying key aspects of the law of work in the US circa 2024.

The textbook includes five substantive Parts: 1) Employee Classification; 2) Employment At Will and the Common Law; 3) Constitutional Rights; 4) Antidiscrimination; and 5) Labor Law. At the beginning of the book, there's a short introductory part (i); at its end, Parts (6) – (8) offer movies, shows, documentaries, and book recommendations. In the next phases of the textbook I will add a Statutory Law Part, and a Procedures & Remedies chapter.

For each legal case, I added links to the full opinion, oral argument, docket (if available), and procedural timeline. Following some cases, I added notes reflecting on the opinions.
This book is a living document, which might be updated and modified. A link to the most recent version is here (One Drive) and here (SSRN). A revisions table is available here. This is a beta version of the textbook, use this link to comment or sign up for book updates.

A note on sensitive issues: this book includes descriptions and legal analysis of severe race, sex, and gender-based harassment and discrimination. Law deals with harms; the rationale for including those harms in a book about work law is to explore (often critically) the way law deals with work-related harms.

However, the language judges use to describe various social groups and the harm they suffer at work is often offensive. I redacted such language and replaced it with "* * *." I also edited the cases to match a course's scope. In places of substantive reductions, I added "…." to mark the edit. I redacted technical language without indication. For research purposes, see the original.

*

I thank Sam Beswick, and the TAs and students of ILR2010 for providing crucial inspiration. Special thanks to Lucia Caravella, Eva Egeghy, and Abigail Rothleder for awesome research assistance.

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I. Introductory Materials

i.1. Instead of Introduction: Work Law History Canon in a Nutshell

Here is the canonical work law history lesson in 300 words or less:

> Once upon a time, in a land across the ocean, workers were divided according to custom-made-into-judge-made-law called the common law. Working people had different rights and obligations following what they did, where, when and for whom they worked. Those rights and duties were predetermined by their common law "status," often by birth, sometimes by luck. Some statuses were banned across the ocean, but legal here in the US – like slavery. But of note is the source of law: rights and obligations of workers and their employers came from social-norms-made-law-by-judges.
>
> When work law sailed across the ocean to the colonies, its underlying legal theory remained the same. Rights and obligations of workers and employers were derived mainly from customs and norms immigrated from England through common law categories. However, early Americans were far more lax with contracts as a way to regulate significant aspects of the working relations. So status transformed from a set of hard norms, to a soft, default-like rules on top of which employees and employers could contractually govern their working relations. US courts, and the Supreme Court in particular were vengeful in protecting employment contracts as the right and true vehicle for determining mainstream rights on the job against other encroaching sources of law – like legislation.

> Then came the New Deal. In response to the great depression, one conclusion was that contracts are a poor regulatory device for the labor market. Instead, employers and employees' rights and obligations were now broadly dictated or affected by legislation and a set of specialized agencies. In a series of legislative interventions, first shot down and then OK'd by the Supreme Court, workers gained minimum wages (under the Fair Labor Standards Act), their right to organize in unions (under the National Labor Relations Act) and more. In the post-New Deal-US, unions were flourishing, and a whole host of regulation by collective bargaining agreements was engulfing the labor markets.

This final canonical regime, the New Deal and its collective bargaining governance systems, have lived for about 30-40 years and have been dying (a passive voice describing a very active process) now for about fifty years. And here is where the canonical story stops. From the decline of the new deal, the big meta-narrative canonical work law story fractures into fragments.

One commonly told story is about race, sex and civil rights on the job. Another is about class warfare, means of production, unions, management and the neoliberal state. Another is about the state and its regulatory agencies and its relations with the Supreme Court. Another is about immigration, borders, empires, settlers and colonialism. Another one is about US exceptionalism in comparison with other Western Democracies. Another is about the transition from manufacturing to service-focused economy. Another is about the organizational structure of the firm and the impact of technology on working conditions (*e.g.*, platform work). Another one is about federalism and the role of states and localities. Yet another is about disability, or age, or democracy, or community, or equality or litigation or the Constitution, or transaction costs, or power…

You get the point: there are a lot of stories. A lot of projects trying to compile and make sense of work law. The best ones usually try to tell us something new both about the canonical narrative and about our current problems. For example, how race and sex were always intertwined in all phases of the evolution of work law. Whether those stories are in tension with the canon or complete it, the canon unifies them in some important way. Some of those takes are placed at the end of this textbook.

My own spiel, and the one animating this book, is that the canon is just a bedtime story we tell ourselves. Like a bedtime story it has its functions, but like a bedtime story is severely limited in understanding the world. Status, contracts and legislation are and were part of the legal landscape of work law simultaneously and throughout, alongside other more or less idiosyncratic legal instruments, operating simultaneously with little noticeable breaks or transitions.

For example, farmworkers were a common law status in England, and often slaves (if Black in the US), indentured servants (if White in the US) or something akin to the small farm myth (where work was organized around the family – on a status-basis). Simultaneously, farm work was and is governed by contracts (more or less formal) with varying importance. After the new deal, farmworkers were excluded from the major work laws (FLSA, NLRA) which meant that the combination of status and contract still governs significant aspects of their work to this day. Yet, some legislative interventions on the state and federal levels have had significant effects on farmworkers' work, including some interventions that protect unionization.

Unlike the canon, it would be a mistake to assume that farmworkers are an exception that proves a rule. As if there was a (quantitative? qualitative?) significant majority of workers which experienced the canonical transitions the traditional story suggest. Farmworkers *are the rule* in the sense that many workers operate in a legally hybrid environment that involves varying degrees of common law status-like regulations with contracts, with the state always watching, and with content and context specific legally significant terrain. For those workers and their employers the common law, contracts, and legislation (and the Constitution, agencies, and courts, and unions,…) are everchanging shifting means to some (everchanging? shifting?) ends.

Being sensitive to this messy, pluralistic nature of work law, and to the thousand competing (oh so very human) projects that utilize and move it, is the theme that animates this textbook.

i.2. Orin Kerr, How to Read a Legal Opinion (2007)

Orin S. Kerr, *How to Read A Legal Opinion A Guide For New Law Students*, 11 Green Bag 2D 51 (2007) (link) (license)

I. WHAT'S IN A LEGAL OPINION?

When two people disagree and that disagreement leads to a lawsuit, the lawsuit will sometimes end with a ruling by a judge in favor of one side. The judge will explain the ruling in a written document referred to as an "opinion." The opinion explains what the case is about, discusses the relevant legal principles, and then applies the law to the facts to reach a ruling in favor of one side and against the other.

Modern judicial opinions reflect hundreds of years of history and practice. They usually follow a simple and predictable formula. This section takes you through the basic formula. It starts with the introductory materials at the top of an opinion and then moves on to the body of the opinion.

The Caption

The first part of the case is the title of the case, known as the "caption." Examples include Brown v. Board of Education and Miranda v. Arizona. The caption usually tells you the last names of

the person who brought the lawsuit and the person who is being sued. These two sides are often referred to as the “parties” or as the “litigants” in the case. For example, if Ms. Smith sues Mr. Jones, the case caption may be Smith v. Jones (or, depending on the court, Jones v. Smith). In criminal law, cases are brought by government prosecutors on behalf of the government itself. This means that the government is the named party. For example, if the federal government charges John Doe with a crime, the case caption will be United States v. Doe. If a state brings the charges instead, the caption will be State v. Doe, People v. Doe, or Commonwealth v. Doe, depending on the practices of that state.

<u>The Case Citation</u>

Below the case name you will find some letters and numbers. These letters and numbers are the legal citation for the case. A citation tells you the name of the court that decided the case, the law book in which the opinion was published, and the year in which the court decided the case. For example, “U.S. Supreme Court, 485 U.S. 759 (1988)” refers to a U.S. Supreme Court case decided in 1988 that appears in Volume 485 of the United States Reports starting at page 759.

<u>The Author of the Opinion</u>

The next information is the name of the judge who wrote the opinion. Most opinions assigned in law school were issued by courts with multiple judges. The name tells you which judge wrote that particular opinion. In older cases, the opinion often simply states a last name followed by the initial “J.” No, judges don’t all have the first initial “J.” The letter stands for “Judge” or “Justice,” depending on the court. On occasion, the opinion will use the Latin phrase “per curiam” instead of a judge’s name. Per curiam means “by the court.” It signals that the opinion reflects a common view among all the judges rather than the writings of a specific judge.

<u>The Facts of the Case</u>

Now let’s move on to the opinion itself. The first part of the body of the opinion presents the facts of the case. In other words, what happened? The facts might be that Andy pulled out a gun and shot Bob. Or maybe Fred agreed to give Sally $100 and then changed his mind. Surprisingly, there are no particular rules for what facts a judge must include in the fact section of an opinion. Sometimes the fact sections are long, and sometimes they are short. Sometimes they are clear and accurate, and other times they are vague or incomplete. Most discussions of the facts also cover the “procedural history” of the case. The procedural history explains how the legal dispute worked its way through the legal system to the court that is issuing the opinion. It will include various motions, hearings, and trials that occurred after the case was initially filed. Your civil procedure class is all about that kind of stuff. . . . The procedural history of cases usually will be less important when you read a case for your other classes.

<u>The Law of the Case</u>

After the opinion presents the facts, it will then discuss the law. Many opinions present the law in two stages. The first stage discusses the general principles of law that are relevant to cases such as the one the court is deciding. This section might explore the history of a particular field of law or may include a discussion of past cases (known as "precedents") that are related to the case the court is deciding. This part of the opinion gives the reader background to help understand the context and significance of the court's decision. The second stage of the legal section applies the general legal principles to the particular facts of the dispute. As you might guess, this part is in many ways the heart of the opinion: It gets to the bottom line of why the court is ruling for one side and against the other.

Concurring and/or Dissenting Opinions

Most of the opinions you read as a law student are "majority" opinions. When a group of judges get together to decide a case, they vote on which side should win and also try to agree on a legal rationale to explain why that side has won. A majority opinion is an opinion joined by the majority of judges on that court. Although most decisions are unanimous, some cases are not. Some judges may disagree and will write a separate opinion offering a different approach. Those opinions are called "concurring opinions" or "dissenting opinions," and they appear after the majority opinion. A "concurring opinion" (sometimes just called a "concurrence") explains a vote in favor of the winning side but based on a different legal rationale. A "dissenting opinion" (sometimes just called a "dissent") explains a vote in favor of the losing side.

….

III. WHAT YOU NEED TO LEARN FROM READING A CASE

Okay, so you've just read a case for class. You think you understand it, but you're not sure if you learned what your professor wanted you to learn. Here is what professors want students to know after reading a case assigned for class:

Know the Facts

Law professors love the facts. When they call on students in class, they typically begin by asking students to state the facts of a particular case. Facts are important because law is often highly fact sensitive, which is a fancy way of saying that the proper legal outcome depends on the exact details of what happened. If you don't know the facts, you can't really understand the case and can't understand the law. Most law students don't appreciate the importance of the facts when they read a case. Students think, "I'm in law school, not fact school; I want to know what the law is, not just what happened in this one case." But trust me: the facts are really important.

Know the Specific Legal Arguments Made by the Parties

Lawsuits are disputes, and judges only issue opinions when two parties to a dispute disagree on a particular legal question. This means that legal opinions focus on resolving the parties' very specific disagreement. The lawyers, not the judges, take the lead role in framing the issues raised

by a case. In an appeal, for example, the lawyer for the appellant will articulate specific ways in which the lower court was wrong. The appellate court will then look at those arguments and either agree or disagree. (Now you can understand why people pay big bucks for top lawyers; the best lawyers are highly skilled at identifying and articulating their arguments to the court.) Because the lawyers take the lead role in framing the issues, you need to understand exactly what arguments the two sides were making.

….

Understand the Significance of the Majority Opinion

Some opinions resolve the parties' legal dispute by announcing and applying a clear rule of law that is new to that particular case. That rule is known as the "holding" of the case. Holdings are often contrasted with "dicta" found in an opinion. Dicta refers to legal statements in the opinion not needed to resolve the dispute of the parties; the word is a pluralized abbreviation of the Latin phrase "obiter dictum," which means "a remark by the way." When a court announces a clear holding, you should take a minute to think about how the court's rule would apply in other situations.

During class, professors like to pose "hypotheticals," new sets of facts that are different from those found in the cases you have read. They do this for two reasons. First, it's hard to understand the significance of a legal rule unless you think about how it might apply to lots of different situations. A rule might look good in one setting, but another set of facts might reveal a major problem or ambiguity. Second, judges often reason by "analogy," which means a new case may be governed by an older case when the facts of the new case are similar to those of the older one. This raises the question, which are the legally relevant facts for this particular rule? The best way to evaluate this is to consider new sets of facts. You'll spend a lot of time doing this in class, and you can get a head start on your class discussions by asking the hypotheticals on your own before class begins. Finally, you should accept that some opinions are vague. Sometimes a court won't explain its reasoning very well, and that forces us to try to figure out what the opinion means.

You'll look for the holding of the case but become frustrated because you can't find one. It's not your fault; some opinions are written in a narrow way so that there is no clear holding, and others are just poorly reasoned or written. Rather than trying to fill in the ambiguity with false certainty, try embracing the ambiguity instead. One of the skills of top-flight lawyers is that they know what they don't know: they know when the law is unclear. Indeed, this skill of identifying when a problem is easy and when it is hard (in the sense of being unsettled or unresolved by the courts) is one of the keys to doing very well in law school. The best law students are the ones who recognize and identify these unsettled issues without pretending that they are easy.

Understand Any Concurring and/or Dissenting Opinions

You probably won't believe me at first, but concurrences and dissents are very important. You need to read them carefully. To understand why, you need to appreciate that law is man-made, and Anglo-American law has often been judge-made. Learning to "think like a lawyer" often means learning to think like a judge, which means learning how to evaluate which rules and explanations are strong and which are weak. Courts occasionally say things that are silly, wrongheaded, or confused, and you need to think independently about what judges say. Concurring and dissenting opinions often do this work for you. Casebook authors edit out any unimportant concurrences and dissents to keep the opinions short. When concurrences and dissents appear in a casebook, it signals that they offer some valuable insights.

....

i.3. Gali Racabi, *Private Ordering Churn*, Excerpt

. . . .

I. Regulated Private Ordering

Beyond the fundamentals of torts, contracts, legislation and regulation, and constitutional law, US law school training on law and work is traditionally located in three courses: employment law, labor law, and antidiscrimination law. The employment law course covers the basics of the at-will termination doctrine and its contractual, tortious, and regulatory exceptions and may touch on antidiscrimination, unemployment insurance basics, and classification issues. Labor law covers the laws and doctrines regulating concerted workers' activities, mainly in the private sector and under the National Labor Relations Act (NLRA) and its agency, the National Labor Relations Board's (NLRB) decisions and doctrines. Antidiscrimination law focuses on the harms and legal remedies of discrimination on the job, primarily under Title VII of the Civil Rights Act (prohibiting discrimination based on sex, race, color, religion, and national origin). Still, it may also touch on claims and procedures under the Americans with Disabilities Act (prohibiting discrimination based on disability).

To this canonical set of work law courses, some law schools add a course on the Employment and Retirement Insurance Security Act (ERISA), and if all the course-scheduling stars align, a course on the Occupational Safety and Health Act (OSHA); the regulation of work in the public sector (the rules governing work for the federal government, states, and localities), and perhaps, somewhat recently, a designated class on antitrust and labor markets.

Despite the increasingly siloed state of academia writ large and in work law's distinct scholarly regions, all work law courses, fields of practice, and thought tread similar ground. This is true, most importantly, because the same workers and employers operate under those different work law regimes simultaneously. It is not the case that we have one distinct group of workers and employers operating under labor law and another wholly different group of workers and employers operating under employment laws. Those are the same workers and the same employers working under both regimes. Unorganized workers may still be covered employees under section 2 of the NLRA and thereby enjoy NLRA Section 7 rights. Unionized employees

are still common law and statutory employees under multiple legal regimes and can access some remedies under state and federal employment, anti-discrimination laws, and so forth.

Those different regimes also share a role in the same particular local and national political economies. According to comparative political economists, the United States writ large is consistently categorized as holding liberal market-oriented labor institutions. All of work law's subject matter, different agencies, and procedures apply to those defined features of US labor markets and are exposed to similar political tensions, lobbying, and ideological premises along with class and identity values.

Following this shared institutional bedrock, labor, employment, and antidiscrimination laws all follow similar legal forms, assumptions, and structures across those fields with very few exceptions. This shared bedrock regards the basic legal building blocks and the particular order, priorities, and deference given to legally constituted actors across all work law domains. Those cross-substantive legal categories and structures constitute work law's paradigm: Regulated Private Ordering.

A. Building Blocks: Employees and Employers

All of work law shares the same legal building blocks that are placed in a certain relation (or order) to one another. In (almost) all work law, the basic legal building blocks are employees and employers. Coverage and per-domain or regulatory scheme definitions differ (never by a great deal), but with very (very) few exceptions, employees and employers (regardless of how specifically defined) are the legal building blocks for all of work law. In all work law, employers and employees are (almost always) the exclusive bearers of legal rights, duties, and immunities.

Classification issues of employers and employees are thus rampant, persistent, and everlasting, across all work law domains. This persistent ambiguity is especially true with regard to any population of workers or employers on the margins of the formal labor market: prisoners, agriculture workers, graduate students, Uber drivers. Examples are too numerous to enumerate, but the persistence of the problem demonstrates the persistence of the feature: employers and employees are the legal building blocks of all work law.

Work law classification is so contested not only because all work law depends on getting classification right. Classification of employers and employees is crucial because work (the hiring and employment of employees by employers) is a principal regulatory tool for the US polity. The US workplace, workers, and employers are the instruments through which welfare, sustenance, health insurance, vocational training, pensions, and educational debt are allocated, subsidized, and regulated. Other regimes, such as immigration and public health, also utilize work law's building blocks to achieve various public-oriented goals. COVID's closures, social distancing, and vaccination mandates are examples of that.

This stable persistence of work law's building blocks and this centrality of work to all public policies in the US is what makes employers and employees such low-hanging fruit for all policy initiatives. Once a policy requires someone to bear a financial or administrative burden on behalf of the public, employers, as a legal category, are a ready-made, usual suspect-like option. Law constitutes employers and employees and cements their fundamental role by using them as policy cliffhangers.

B. Order 1: Contractual Priority

Work law constitutes employers and employees as basic legal building blocks. Following this definitional-constitutive phase, work law designates a governance mechanism, a distinct, institutionalized decision-making order between those two actors and the state's role as a regulator.

In (almost) all of work law, employers and employees are given first dibs in contractually negotiating and allocating workplace goods and risks. This rule is maintained except for issues that parties are prohibited from bargaining over (slavery is a big one) or unless something awful is expected to happen as a consequence of parties negotiating specific clauses (sub-minimum wage work, for example). Note that those prohibitions exist almost exclusively in the domain of work law's internal world. In an employer-employee relationship, it is prohibited to contract subminimum wage contracts. For non-employers or non-employees, doing so is completely fine.

The preference for contractual allocation of workplace goods, risks, and procedures is enshrined in social practices and mythologies about work as a contractual relation. But also, and more importantly, for our purpose, contracts are enshrined in the legal fabric of work law.

The existence of a contractual relationship between the parties and its legal superiority as a default rule is a primary first ordering principle for all of work law. The Restatement of Employment Law tells us that employment is, at its core, a contractual relationship. The Restatement seems to mean that contractual arrangements play a primary governance role in employment relations – the first and foremost legal institution wherein all things work-related are allocated.

In resolving work law disputes, courts often first turn to the contractual language of the employment contract. Increasingly, courts give priority to contractual terms (for example, dispute resolution procedures) above all other regulatory and common law premises. Courts also routinely return to contractual negotiations as a centerpiece for employer-employee regulated activities. For example, contractual violations were considered reasonable justification to excuse workers from Section 7 protections for years and perhaps to this day.

C. Order 2: The Employer Prerogative

After constituting employers and employees as the building blocks for all of work law, the first decision-making authority work law allocates is with contractual negotiations of employers and employees. But on issues wherein no negotiations occurred nor was a contractual clause signed; or in cases in which a new, unexpected decision has to be made; or in some business issues –

work law allocated default decision-making authority to the employer. Someone must govern the workplace, and that someone is the boss.

Employer prerogative is the second decision-making stage. Yes, work law constituted two major legal actors, but endowed only one of those legal actors with a unilateral governance authority. Only employers get a chance, if a contractual arrangement is lacking, to determine the allocation of workplace goods and risks: to govern. Employees cannot govern unilaterally, on anything-work-related at all, whatsoever. This is a legal remnant of the hierarchical, common law, master-servant, status-based history of work law. This persistent feature is also work law's major break from symmetric free market exchange-type fantasies of labor relations.

Employee subordination to employers is an existing legal reality in all of work law. The employer's prerogative, as the contractual aspect of work, is culturally, organizationally, economically, and politically enshrined. But, and important for our purposes here, it is also legally enshrined. When one steps into a workplace, any workplace, and asks, "Who is in charge here?" lacking an alternative contractual agreement, the *legally* correct answer is "the boss." Hiring, termination, tenure, wages, safety and health, sexual harassment procedures, what is made, to whom it is sold, all decision-making authority about all of those, lacking a contrary contractual arrangement, lies with the boss.

These two parts: the contractual-agreement default and the employer prerogative default, make the private ordering component of work law. Almost all workplace-related decisions are made in this subaltern, yet legal, domain. These are the institutions in which labor markets and workplaces are governed. In all of work law we find significant legal deference to contracts and (in the lack thereof) to employers' judgment values and priorities. In (almost) all of work law, statutes and court doctrines act as an exception to this general private ordering rule.

D. Order 3: The State

Work law constitutes employers and employees and endows them with a first-refusal right to contractually distribute the authority of the workplace. As a failsafe, work law establishes the employers' prerogative. This prerogative allocates governance over everything concerning work to employers. In (almost) all of work law, the state (with its courts or agencies) is placed in charge of establishing and policing those "private" rules and exceptions on behalf of employers, workers, and their communities. The exceptions to the repeating "almost" here are legally isolated minutia and are only meaningful in highlighting the contours of the paradigm.

Other than enforcement of the authority of contracts and employers, in extreme cases, the state intervenes and bars contracts or employers' decision-making on a specific issue. Minimum wage laws exist. The existence of minimum wage laws entails that the legal authority to determine a wage below a certain threshold is not with parties' contractual authority or with employers' unilateral prerogative. Parties can agree contractually on a higher salary. Lacking a contract, employers can offer any wage setting they please (above the mandated minimum). Lacking contractual arrangements to the contrary, employers can interfere with the activities of their

employees. But the NLRA prohibits employers from interfering with the rights of employees to engage in "concerted action … for mutual aid or protection." The state prohibits (usually) signing contracts to contrary or similar unilateral employer actions. Such cases of explicit relocation of decision-making authority from the "private" side of work law's governance paradigm to the "public" side are rare, achieved after decades of political naming, blaming, and claiming. Getting the state to remove authority from employment contracts and employers is an uphill battle.

And yet state intervention does exist. This exception to the private ordering rule is the primary substantive input taught in law schools. Thus, state enforcement and interventions constitute the third and final stage of workplace governance. A private ordering regime, encapsulated within state institutions.

. . . .

i.4. Guy Mundlak, *The Third Function of Labour Law* (2011)

Mundlak, Guy, 'The Third Function of Labour Law: Distributing Labour Market Opportunities among Workers', in Guy Davidov, and Brian Langille (eds), *The Idea of Labour Law* (Oxford, 2011; online edn, Oxford Academic, 22 Sept. 2011) (link)

….

Two functions are commonly attributed to labour law, recognized as a distinct corpus of law. The first is that labour law determines where norms that govern work are written, who their authors are, and by which process they come about.

This function stems from the fact that labour law governs all interactions in the labour market and within the firm that concern the activity of work. …. The importance of labour law as a distinct area of law lies in its attempt to draw the lines between public regulation, private ordering, and various forms of collective and autonomous self-regulation. Labour law prescribes a 'division of labour' between different forms of governance and the method of interests' representation in each.

Vertically beneath the first function is the second common function, which holds labour law to be the brokerage of power that is distributed between labour and capital. In economic terms, labour law regulates the distribution of economic rent between labour and capital and therefore influences labour's share in firms' profits. Protection of rights at work has similar, albeit indirect effects on the distribution of economic gains. Otherwise stated, labour law's second function can also be identified in terms of distributing property rights and their derivative – namely, the managerial rights – between labour and capital. The importance of the second function is that scholars and political agents cannot ignore the way labour law has developed against the backdrop of social and economic developments.

Traditionally, this function of labour law has been strongly correlated with the oft repeated claims that workers are ‘weak’ while employers are ‘strong’; the former are ‘contract takers’, while the latter are ‘contract makers’. Labour law seeks to redress this imbalance. Currently, some dispute the strong/weak dichotomy, or the assumption that labour law, by its nature, must protect the workers. Nevertheless, whether or not it has a pro-labour tilt, labour law has an intrinsic distributive function that must take into consideration the economic and social consequences of the labour market’s asymmetries.

….

Like the second function, the third seeks to describe and prescribe the substance of labour law. However, I propose that labour law seeks not only to influence the distribution of rents, power, rights, resources, and economic risks among labour and capital, but also between workers (broadly defined to include all people of employment age, hence those who can work).The third function is therefore horizontally aligned with the second, and both are distinct from the first, in that they observe substance and simultaneously interact with process.

. . . .

The relevance of the third function is particularly easy to demonstrate when there is a blunt distinction (for example, two-tiered collective bargaining) or competition (for example, affirmative action in promotions) between different groups of workers. However, I argue that the third function is much more pervasively relevant in the governance of work, and diverse appearances of this cleavage can be identified throughout the whole panoply of labour market institutions.

B. The problem of intra-labour distribution

The common narrative of labour law is that labour and capital are not on equal grounds and therefore law should even the playing field. In this narrative, labour and capital are held to be like two ‘black boxes’, monolithic in their interests, and the objective is centred on how to bring them on par. However, the literature in political economy emphasizes the divergence of interests within each side of the labour–capital cleavage. This may imply one of two things. First, it can be argued that if both sides are not monolithic, it is necessary to equally unpack each of them.

Second, it can be argued that despite the divergence, tensions within labour or capital are merely instrumental to the fundamental cleavage between the two. The proposed (‘third’) function rejects both of these claims. It holds that the labour side must be treated differently from the capital side, and that conflicts within labour’s side must be discussed separately from the labour-capital conflict.

….

1. WHO IS AN EMPLOYEE?

Introduction

In the past hundred years or so, to be covered by work law doctrines, regulations and statutes you had to be classified as an employee working for an employer. Like most rules, this classification had its exceptions, but as a rule of thumb the definition of who counts as an employee and who counts as an employer carries significant rights and obligations with it. Thus, classification issues have pervaded work law for centuries.

This Part will examine some background as well as modern components of the legal struggles around classification in the US.

1.i. Blackstone Commentaries on the Laws of England (1765), Of Master and Servant

Chapter XIV

Having thus commented on the rights and duties of persons as standing in the *public* relations of magistrates and people, the method I have marked out now leads me to consider their rights and duties in *private* economical relations.

The three great relations in private life are, 1. That of *master and servant:* which is founded in convenience, whereby a man is directed to call in the assistance of others, where his own skill and labour will not be sufficient to answer the cares incumbent upon him. 2. That of *husband and wife;* which is founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated. 3. That of *parent and child;* which is consequential to that of marriage, being its principal end and design: and it is by virtue of this relation that infants are protected, maintained, and educated. But, since the parents, on whom this care is primarily incumbent, may be snatched away by death before they have completed their duty, the law has therefore provided a fourth relation. 4. That of *guardian and ward;* which is a kind of artificial parentage, in order to supply the deficiency, whenever it happens, of the natural. Of all these relations in their order.

In discussing the relation of *master and servant,* I shall *firstly* consider the several sorts of servants, and how this relation is created and destroyed; *secondly,* the effect of this relation with regard to the parties themselves; and, *lastly,* its effects with regard to other persons.

...

1. The first sort of servants acknowledged by the laws of England, are *menial servants;* so called from being *intra moenia*, or domestics. The contract between them and their masters arises upon the hiring. If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity

that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons; as well when there is work to be done, as when there is not. But the contract may be made for any larger or smaller term: 'and is by custom determinable by a month's notice, or what is an equivalent in the case of the servant, a month's wages.'

2. Another species of servants are called *apprentices*, from apprendre, to learn, and are usually bound for a term of years, by deed indented, or indentures, to serve their masters, and be maintained and instructed by them…
3. A third species of servants are *'workmen;* an expression which includes' *labourers, 'servants in husbandry, journeymen, artificers, handicraftsmen, miners,* and any person *engaged in manual labour,'* who are only hired by the day or the week, and do not live *intra moenia,* as part of the family.

Concerning *labourers* the statute 5 Eliz. c. 4, made many regulations: 1. Directing that all persons having no visible effects might be compelled to work: 2. Defining how long they should continue at work in summer and in winter: 3. Punishing such as left or deserted their work: 4. Empowering the justices at sessions, or the sheriff of the county, to settle their wages: and, 5. Inflicting penalties on such as either gave or exacted more wages than were so settled. …

The law, however, imposes certain restraints in particular instances, upon the natural freedom to contract for the value of his labour which every person ought to enjoy. Thus the employment of children in factories is regulated by statute; as is also the employment of women and children in mines; and that of children in agriculture under eight prohibited, and, above that age, made conditional on their having previously received a certain amount of education.

4. '*Merchant seamen* are, from the increase of commerce and the consequent number of persons employed in this service, entitled to be and are classed as a distinct species of servants, whose contracts and conduct are in a great measure regulated by recent acts of parliament.'
5. There is yet a fifth species of servants, if they may be so called, being rather in a superior, a ministerial, capacity; such as *stewards, factors,* and *bailiffs*; whom however the law considers as servants, *pro tempore*, with regard to such of their acts as affect their master's or employer's property.

….

It is said that' a master may by law correct his apprentice for negligence or other misbehaviour, so it be done with moderation: but that if the master or master's wife beats any other servant of full age, it is good cause of departure. On the other hand, a master entitled to have from his servant the proper performance of his duties as servant, and obedience to all lawful orders in reference thereto, on failure of which, he may put an end to the hiring. A servant therefore may

be dismissed without notice for wilful disobedience to a lawful order; or neglect of duty; and in such cases he is not entitled to any wages from the day he is discharged, except those then due: and a domestic servant may also be sent away for moral misconduct. If wrongfully discharged, the servant is entitled to wages up to the end of the current period of his service. But if a servant, who is to be paid quarterly, or yearly, or at any other fixed time, improperly leaves his service, or is guilty of such misconduct as to justify his discharge during the currency of any such period, he is not entitled to wages for any part thereof, even to the day his quits.

…

And wages must as a rule be paid in money, for by the *Truck Act*, the payment of wages in goods or otherwise than in the current coin of the realm, is prohibited. In like manner the payment of the wages of persons employed in mines or collieries at public houses is forbidden; so that wages so paid may in either case be recovered as if not paid at all. Statutory provisions have also been made for the decision by arbitration of disputes as to wages between masters and workmen.
….

1.1. Restatement of Employment Law, § 1.01
(link)

§ 1.01. Conditions for Existence of Employment Relationship

(a) . . . . an individual renders services as an employee of an employer if:

(1) the individual acts, at least in part, to serve the interests of the employer;
(2) the employer consents to receive the individual's services; and
(3) the employer controls the manner and means by which the individual renders services, or the employer otherwise effectively prevents the individual from rendering those services as an independent businessperson.

(b) An individual renders services as an independent businessperson and not as an employee when the individual in his or her own interest exercises entrepreneurial control over important business decisions, including whether to hire and where to assign assistants, whether to purchase and where to deploy equipment, and whether and when to provide service to other customers.

1.1.1. What is a Restatement?

Restatements are useful tools in summing complicated areas of common law into rule-like structures. Note, however, that the status, standing, and accuracy of this rule-like summation is not unitary- and varies across jurisdictions and substantive issues.

From Wex Definitions:

> Restatements of the Law, aka Restatements, are a series of treatises that articulate the principles or rules for a specific area of law. They are secondary sources of law written and published by the American Law Institute (ALI) to clarify the law. ….
>
> The ALI created Restatements to help courts understand and interpret the current common law. Thus, Restatements synthesize and restate existing case law and statutes from various jurisdictions. Restatements contain the Black Letter, Comments, Illustrations, and Reporter's Notes. ….
>
> As secondary sources, Restatements are only a source of persuasive authority and do not replace precedents and controlling statutes. However, courts may choose to adopt or cite approvingly to Restatement provisions as law, thereby making that provision mandatory authority….

1.2. Employee Classification under a State Labor Code - the Case of California

Cal. Lab. Code § 350 (West) (2022)
(link)

§ 350. Definitions

….

> (a) "Employer" means every person engaged in any business or enterprise …. that has one or more persons in service under any appointment, contract of hire, or apprenticeship, express or implied, oral or written….
>
> (b) "Employee" means every person, including minors and persons who are not citizens or nationals of the United States, rendering actual service in any business for an employer, whether gratuitously or for wages or pay, whether the wages or pay are measured by the standard of time, piece, task, commission, or other method of calculation, and whether the service is rendered on a commission, concessionaire, or other basis.
>
> (c) "Employing" includes hiring, or in any way contracting for, the services of an employee.
>
> (d) "Agent" means every person other than the employer having the authority to hire or discharge any employee or supervise, direct, or control the acts of employees.
>
> (e) "Gratuity" includes any tip, gratuity, money, or part thereof that has been paid or given to or left for an employee by a patron of a business over and above the actual

amount due the business for services rendered or for goods, food, drink, or articles sold or served to the patron. ….

§ 351. Gratuities; disposition

No employer or agent shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee by a patron, or deduct any amount from wages due to an employee on account of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer. ….

1.2.1. S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations (1989)

48 Cal. 3d 341, 256 Cal. Rptr. 543, 769 P.2d 399 (1989)

Full decision: (link); **Docket**: (link); **Oral argument**: ()

Opinion by: EAGLESON

We ordered review to decide whether agricultural laborers engaged to harvest cucumbers under a written "sharefarmer" agreement are "independent contractors" exempt from workers' compensation coverage. Our answer has implications for the employer-employee relationship upon which other state social legislation depends.

The grower claims the "sharefarmer" harvesters are independent contractors under the statutory "control-of-work" test, because they manage their own labor, share the profit or loss from the crop, and agree in writing that they are not employees. After taking evidence on the nature of the work relationship, the Division of Labor Standards Enforcement (Division) of the Department of Industrial Relations rejected these contentions. The superior court found that the Division's decision was supported by the evidence. However, these rulings were reversed by the Court of Appeal.

Like the Division and the superior court, we find the grower's arguments unpersuasive. The grower controls the agricultural operations on its premises from planting to sale of the crops. It simply chooses to accomplish one integrated step in the production of one such crop by means of worker incentives rather than direct supervision. It thereby retains all necessary control over a job which can be done only one way.

Moreover, so far as the record discloses, the harvesters' work, though seasonal by nature, follows the usual line of an employee. In no practical sense are the "sharefarmers" entrepreneurs operating independent businesses for their own accounts; they and their families are obvious members of the broad class to which workers' compensation protection is intended to apply.

We therefore conclude as a matter of law on the undisputed facts that the "sharefarmers" are "employees" entitled to compensation coverage. Accordingly, we reverse the judgment of the Court of Appeal.

Facts

On August 14, 1985, a deputy labor commissioner issued a stop order/penalty assessment against S. G. Borello & Sons, Inc. (Borello), a Gilroy grower, for failure to secure workers' compensation coverage for the 50 migrant harvesters of its cucumber crop. Borello appealed the citation to the Division. At the administrative hearing, Borello admitted the failure to secure coverage. It contended only that the workers were independent contractors excluded from the workers' compensation law.

A preprinted agreement signed by the heads of harvester families was introduced in evidence. The agreement, printed in English and Spanish, designates the signatory worker as a "Share Farmer" and states that his function is to "prepare for and harvest the cucumbers." Borello agrees to "furnish and prepare the land; plant the crop; cultivate, spray, and fertilize the crop; and pay all the costs incurred with respect thereto." The grower also agrees to furnish the boxes and bins into which cucumbers will be loaded, and to transport the harvest to the buyer.

The "Share Farmer" agrees "to furnish himself and the members of his family, *but only the members of his own family*, to harvest the crop. . . . Harvest is agreed to mean the placing of the crop, clean and free from rubbish and debries, in the boxes or bins supplied by [Borello]." The method and manner of accomplishing this task are left "solely" to the "Share Farmer," who nonetheless "agrees to utilize accepted agricultural practices in order to provide for the maximum harvest . . . and . . . to devote the necessary time to accomplish the harvest." The "Share Farmer" must supply his own tools and his own transportation to and from the field.

The agreement further provides that the crop harvested by the "Share Farmer" will be sold to a buyer "acceptable to both parties." Borello will retain title to the crop until it is sold, but the "Share Farmer" and Borello will split the gross proceeds equally. The contract specifies that the amount of the proceeds will depend exclusively upon price, weight, and grading data developed by the buyer. Copies of this data will be furnished to both parties. Borello undertakes to keep all necessary weight, grade, and price records, which shall be open to the "Share Farmer's" inspection.

Finally, the agreement recites that the parties deem themselves principal and independent contractor rather than employer and employee; that the "Share Farmer" is self-employed; that he will follow all child labor laws; that Borello will not withhold taxes; that the "Share Farmer" must file separate tax returns; and that Borello will not provide workers' compensation or disability

insurance coverage. The contract is deemed personal and nonassignable except with the other party's consent.

Richard and Johnny Borello, principals of the company, testified as follows: Borello grows a number of crops, including cucumbers. All the other crops are harvested by employees on a wage basis. In recent years, the only local market for cucumbers is the Vlasic pickle company. Vlasic unilaterally determines the cucumber varieties it will accept and sets the prices it will pay. "The smaller the cucumber, the higher the price" per ton.

The growing cycle for cucumbers is 60 days. Borello plants and cultivates the crop at its own expense, using its own pipe irrigation system and applying pesticides under Vlasic's direction.

The harvest workers—14 migrant families during the 1985 season—arrive around "2-3 weeks" before the harvest begins. They "[want] to go on a sharefarming basis" because "they make a lot more money." Some families have returned to work under the system for several years running, and it is commonly employed for cucumber harvest in the Gilroy area. Vlasic supplies the preprinted "Share Farmer" contract form, which Borello has a family head sign. The contract is read and explained to the workers, in Spanish if necessary.

The sharefarmers may contract for the amount of land they wish to harvest on a first-come, first-served basis. One or two acres or twenty to forty rows is common. The workers are "totally responsible" for the care of the plants in their assigned plots during the harvest period. Besides hoeing and weeding, the harvesters must prevent the vines from growing into the furrows between the rows where they might be stepped on and damaged. The latter task is accomplished simply by laying any errant vine into the proper position. The sharefarmers also collectively decide when to irrigate during this period, but Borello controls the water supply.

Borello maintains no field supervisor and does not direct the harvesters' work. They may set their own hours. The workers decide when to pick each cucumber at the correct size to maximize the profit. Profit incentive is the only guaranty of performance and quality control. Borello's only field employee is a tractor driver. He supplies empty boxes or bins, coded for each sharefarmer, and removes them to a loading area when full. The workers "could" transport their own harvest to Vlasic, but Borello handles the transportation because that is what Vlasic prefers.

Based on the code system, Vlasic keeps records of each sharefarmer's harvest. At Borello's request, the weekly check for the sharefarmer's share of proceeds is issued directly by Vlasic, though Richard Borello "physically" hands over the check and a copy of Vlasic's documentation. The sharefarmer then splits his share as he chooses with other family members working under him.

Borello's witnesses insisted that they have no right to discharge a sharefarmer or his workers during the harvest, and no recourse if the harvesters abandon the field. Despite contract terms which prohibit assignment of the sharefarmer agreement or employment of workers outside the sharefarmer's family, several sharefarmers have unilaterally assigned or sublet their plots when

family emergencies arose. The workers leave once the cucumber harvest is over and do not harvest any other crops for Borello. Richard Borello conceded the grower provides no food or sanitary facilities for its cucumber harvesters.

On this evidence, the Division concluded that because of Borello's predominant control over the cultivation, harvest, and sale of its cucumbers, and the workers' lack of investment in the crop, they cannot be deemed "sharecroppers in the true sense." Hence, it ruled, they are employees rather than independent contractors.

The Court of Appeal reversed. It concluded that Borello's relinquishment of control over the harvesters' work, its lack of authority to discharge them at will, their responsibility for furnishing necessary tools, the "result" method of compensation, the temporary nature of the work, and the mutual understanding embodied in the written contract all combine to render the sharefarmers independent contractors as a matter of law.

Discussion

The Workers' Compensation Act (Act) extends only to injuries suffered by an "employee," which arise out of and in the course of his "employment." (§§ 3600, 3700; see Cal. Const., art. XIV, § 4.) "[Employees]" include most persons "in the service of an employer under any . . . contract of hire" (§ 3351), but do not include independent contractors. The Act defines an independent contractor as "any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." (§ 3353.)

(1) The determination of employee or independent-contractor status is one of fact …. The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced. The Act must be liberally construed to extend benefits to persons injured in their employment. (§ 3202.) One seeking to avoid liability has the burden of proving that persons whose services he has retained are independent contractors rather than employees. (§§ 3357, 5705, subd. (a).)

(2a) Borello and its amici (collectively the growers) urge that the Court of Appeal properly found independent contractorship as a matter of law. By agreement and in actual practice, the growers urge, Borello retains the cucumber sharefarmers for a "specified result"—a completed harvest—relinquishing all "control" over the "means" by which the task is accomplished. Moreover, the growers note, the sharefarmers are paid a "specified recompense" based entirely on results. The growers stress that the harvesters furnish their own tools, exercise specialized skill, cannot be discharged, and have expressly accepted their independent status with its attendant risks and benefits. We disagree both with the growers' premises and with their conclusions.

The distinction between independent contractors and employees arose at common law to limit one's vicarious liability for the misconduct of a person rendering service to him. The principal's supervisory power was crucial in that context because ". . . [the] extent to which the employer had a right to control [the details of the service] activities was . . . highly relevant to the question whether the employer ought to be legally liable for them. . . ." (1C Larson, The Law of Workmen's Compensation (1986) § 43.42, p. 8-20). Thus, the "control of details" test became the principal measure of the servant's status for common law purposes.

Much 20th-century legislation for the protection of "employees" has adopted the "independent contractor" distinction as an express or implied limitation on coverage. The Act plainly states the exclusion of "independent contractors" and inserts the common law "control-of-work" test in the statutory definition. The cases extend these principles to other "employee" legislation as well. (3a) Following common law tradition, California decisions applying such statutes uniformly declare that "[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. . . ."

However, the courts have long recognized that the "control" test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the "most important" or "most significant" consideration, the authorities also endorse several "secondary" indicia of the nature of a service relationship.

Thus, we have noted that "[strong] evidence in support of an employment relationship is the right to discharge at will, without cause." Additional factors have been derived principally from the Restatement Second of Agency. These include (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. "Generally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." (*Germann, supra*, 123 Cal.App.3d at p. 783.)

Moreover, the concept of "employment" embodied in the Act is not inherently limited by common law principles. We have acknowledged that the Act's definition of the employment relationship must be construed with particular reference to the "history and fundamental purposes" of the statute.

The common law and statutory purposes of the distinction between "employees" and "independent contractors" are substantially different. While the common law tests were developed to define an

employer's liability for injuries caused *by* his employee, "the basic inquiry in compensation law involves which injuries *to* the employee should be insured against by the employer.

Federal courts have long recognized that the distinction between tort policy and social-legislation policy justifies departures from common law principles when claims arise that one is excluded as an independent contractor from a statute protecting "employees." Where not expressly prohibited by the legislation at issue, the federal cases deem the traditional "control" test pertinent to a more general assessment whether the overall nature of the service arrangement is one which the protective statute was intended to cover. (E.g., *Bartels* v. *Birmingham* (1947) 332 U.S. 126, 130–132; *Rutherford Food Corp.* v. *McComb* (1947) 331 U.S. 722, 727–730; *United States* v. *Silk* (1947) 331 U.S. 704, 713–718; *Board* v. *Hearst Publications* (1944) 322 U.S. 111, 124–132; but see *United States* v. *Webb, Inc*. (1970) 397 U.S. 179, 183–190 [1948 amendments to Federal Insurance Contributions Act and Federal Unemployment Tax Act providing that employment relationship must be determined by "usual common-law rules."

A number of state courts have agreed that in worker's compensation cases, the employee-independent contractor issue cannot be decided absent consideration of the remedial statutory purpose. [examples omitted]. . . . .

We agree that under the Act, the "control-of-work-details" test for determining whether a person rendering service to another is an "employee" or an excluded "independent contractor" must be applied with deference to the purposes of the protective legislation. The nature of the work, and the overall arrangement between the parties, must be examined to determine whether they come within the "history and fundamental purposes" of the statute.

(5) The purposes of the Act are several. It seeks (1) to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society, (2) to guarantee prompt, limited compensation for an employee's work injuries, regardless of fault, as an inevitable cost of production, (3) to spur increased industrial safety, and (4) in return, to insulate the employer from tort liability for his employees' injuries. The Act intends comprehensive coverage of injuries in employment. It accomplishes this goal by defining "employment" broadly in terms of "service to an employer" and by including a general presumption that any person "in service to another" is a covered "employee."

(6) The express exclusion of "independent contractors" is purposeful, of course, and has a limited but important function. It recognizes those situations where the Act's goals are best served by imposing the risk of "no-fault" work injuries directly on the provider, rather than the recipient, of a compensated service. This is obviously the case, for example, when the provider of service has the primary power over work safety, is best situated to distribute the risk and cost of injury as an

expense of his own business, and has independently chosen the burdens and benefits of self-employment.

This is the balance to be struck when deciding whether a worker is an employee or an independent contractor for purposes of the Act. We adopt no detailed new standards for examination of the issue. To that end, the Restatement guidelines heretofore approved in our state remain a useful reference. The standards set forth for contractor's licensees in section 2750.5 are also a helpful means of identifying the employee/contractor distinction. The relevant considerations may often overlap those pertinent under the common law. Each service arrangement must be evaluated on its facts, and the dispositive circumstances may vary from case to case.

We also note the six-factor test developed by other jurisdictions which determine independent contractorship in light of the remedial purposes of the legislation. Besides the "right to control the work," the factors include (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business.

(3b) As can be seen, there are many points of individual similarity between these guidelines and our own traditional Restatement tests. We find that all are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law.

(2b) By any applicable test, we must dismiss the growers' claims here. Despite Borello's elaborate effort to deal with the cucumber harvesters as independent contractors, the indicia of their employment are compelling.

The issue has arisen on several occasions elsewhere. There, as here, growers claimed that migrant harvesters of their cucumber crops were self-employed "sharefarmers," who contracted for a finished job, applied skill and judgment, controlled their own work, and were compensated only for results. Hence, the growers urged, the harvesters were not "employees" for purposes of protective legislation, but excluded "independent contractors."

With one exception, the cases have rejected such contentions. The decisions emphasize that the growers, though purporting to relinquish supervision of the harvest work itself, retained absolute overall control of the production and sale of the crop. Moreover, the cases note, the workers made no capital investment beyond simple hand tools; they performed manual labor requiring no special skill; their remuneration did not depend on their initiative, judgment, or managerial abilities; their service, though seasonal, was rendered regularly and as an integrated part of the grower's business; and they were dependent for subsistence on whatever farm work they could obtain. Under these

circumstances, the authorities reason, the harvesters were within the intended reach of the protective legislation.

The growers emphasize that, with respect to the cucumber harvest, Borello contracts only to obtain a "specified result" for a "specified recompense," retaining no interest in the details of the work. They stress that the sharefarmers work free of Borello's interference, have all legal and actual power over the means of accomplishing their work, and are paid for their production rather than their labor. The job involves considerable skill and judgment, the growers urge, because the crops require final hoeing, weeding, and irrigation; the vines must be "trained" out of the furrows; and care is necessary to pick each maturing cucumber at the most marketable size. Hence, the growers assert, the factor of "control" weighs against a finding of employment.

We are not persuaded. In the first place, Borello, whose business is the production and sale of agricultural crops, exercises "pervasive control over the operation as a whole." Borello owns and cultivates the land for its own account. Without any participation by the sharefarmers, Borello decides to grow cucumbers, obtains a sale price formula from the only available buyer, plants the crop, and cultivates it throughout most of its growing cycle. The harvest takes place on Borello's premises, at a time determined by the crop's maturity. During the harvest itself, Borello supplies the sorting bins and boxes, removes the harvest from the field, transports it to market, sells it, maintains documentation on the workers' proceeds, and hands out their checks. Thus, "[a]ll meaningful aspects of this business relationship: price, crop cultivation, fertilization and insect prevention, payment, [and] right to deal with buyers . . . are controlled by [Borello]."

(2c) Moreover, contrary to the growers' assertions, the cucumber harvest involves simple manual labor which can be performed in only one correct way. Harvest and plant-care methods can be learned quickly. While the work requires stamina and patience, it involves no peculiar skill beyond that expected of any employee. It is the simplicity of the work, not the harvesters' superior expertise, which makes detailed supervision and discipline unnecessary. Diligence and quality control are achieved by the payment system, essentially a variation of the piecework formula familiar to agricultural employment.

Under these circumstances, Borello retains all *necessary* control over the harvest portion of its operations. (8) A business entity may not avoid its statutory obligations by carving up its production process into minute steps, then asserting that it lacks "control" over the exact means by which one such step is performed by the responsible workers.

Other factors also show convincingly that the workers' compensation statute places the risk and cost of work-related injuries upon Borello, rather than the farm workers themselves. The harvesters form a regular and integrated portion of Borello's business operation. Their work, though seasonal by nature, is "permanent" in the agricultural process. Indeed, Richard Borello testified that he has

a permanent relationship with the individual harvesters, in that many of the migrant families return year after year. This permanent integration of the workers into the heart of Borello's business is a strong indicator that Borello functions as an employer under the Act.

By the same token, the sharefarmers and their families exhibit no characteristics which might place them outside the Act's intended coverage of employees. They engage in no distinct trade or calling. They do not hold themselves out in business. They perform typical farm labor for hire wherever jobs are available. They invest nothing but personal service and hand tools. They incur no opportunity for "profit" or "loss"; like employees hired on a piecework basis, they are simply paid by the size and grade of cucumbers they pick. They rely solely on work in the fields for their subsistence and livelihood. Despite the contract's admonitions, they have no practical opportunity to insure themselves or their families against loss of income caused by nontortious work injuries. If Borello is not their employer, they themselves, and society at large, thus assume the entire financial burden when such injuries occur. Without doubt, they are a class of workers to whom the protection of the Act is intended to extend.

The growers suggest that by signing the printed agreement after full explanations, the sharefarmers expressly agree they are not employees and consciously accept the attendant risks and benefits. However, the protections conferred by the Act have a public purpose beyond the private interests of the workers themselves. Among other things, the statute represents society's recognition that if the financial risk of job injuries is not placed upon the businesses which produce them, it may fall upon the public treasury. Of course, a worker's express or implied agreement to forego coverage as an independent contractor is "significant." However, where compelling indicia of employment are otherwise present, we may not lightly assume an individual waiver of the protections derived from that status.

Moreover, there is no indication that Borello offers its cucumber harvesters any real choice of terms. Richard Borello testified only that the family heads sign the preprinted contract. He conceded that recent seasons have brought a surplus of workers to the local cucumber harvest, suggesting further that no real bargaining takes place. Nor is there evidence that nonsignatory members of the sharefarmer's family have accepted Borello's disclaimer of employment responsibilities. The record fails to demonstrate that the harvesters voluntarily undertake an "independent" and unprotected status.[15]

A conclusion that the sharefarmers are "independent contractors" under the Act would suggest a disturbing means of avoiding an employer's obligations under other California legislation intended for the protection of "employees," including laws enacted specifically for the protection of agricultural labor. These include the Agricultural Labor Relations Act (§ 1141 et seq.), statutes requiring the licensure and bonding of farm labor contractors (§ 1682 et seq.), laws governing minimum wages, maximum hours, and (as illustrated in this case) employment of minors (§ 1171 et seq., § 1285 et seq.), the antidiscrimination provisions of the Fair Employment and Housing Act (Gov. Code, § 12940 et seq.), and provisions governing employee health and safety (see, e.g., Lab.

Code, § 6300 et seq. [Occupational Health and Safety Act]; Health & Saf. Code, § 5474.20 et seq. [imposing duty, not followed here, to provide toilet and washing facilities for each 40 or fewer field "employees"].)

We therefore hold as a matter of law that Borello has failed to demonstrate the cucumber sharefarmers are independent contractors excluded from coverage under the Act. Accordingly, the judgment of the Court of Appeal, directing the superior court to grant Borello's petition for writ of mandate, is reversed.

Dissent by: KAUFMAN

This court's sua sponte grant of review and the resulting majority opinion, substantially departing from long and well established statutory and case law, constitute one of the sadder episodes in the history of this court—a wholly unnecessary and inappropriate intermeddling in the affairs of and curtailment of the liberties of California's residents. It requires little foresight to predict that this unfortunate decision declaring illegal a practice followed almost universally in the area for many years, insisted on by the only cucumber purchaser in the area and satisfactory to all concerned, will end up harming the very persons it is paternalistically intended to help. Will Rogers is reported to have articulated the folk wisdom: "If it ain't broke, don't fix it." That is sound advice for any branch of government; it should be adhered to religiously by the judiciary.

At the time we granted review in this case, there was considerable curiosity why no petition for review had been filed by any party. At oral argument the parties told us why; they rather frankly indicated their mutual recognition that the record in this case was entirely insufficient to furnish the basis for a decision of major significance. The entire hearing transcript including exhibits consists of only 60 pages; the department presented no witnesses; not a single sharefarmer testified; the only witnesses were 2 members of the Borello family active in the business. …

There are really two cases being decided today, the one decided by the majority and the one presented by the record before the court. The picture painted by the majority is one of a nefarious subterfuge invented by S.G. Borello & Sons, Inc. (Borello) to evade its responsibilities under the workers' compensation laws and to exploit vulnerable and disadvantaged immigrant farm workers.[2] The uncontroverted evidence in the record establishes an altogether different picture. Neither the Division of Labor Standards (the Division) nor the superior court found a subterfuge,[3] and there is no evidence whatever that Borello originated this arrangement, much less that it concocted it to evade its obligations under the workers' compensation laws. Indeed, unless the sharefarmers are employees under the Workers' Compensation Act (Act), Borello has no obligations thereunder. The reasoning of the majority in this regard is a classic example of begging the question. The same is true of the majority's appeal to "liberal construction" as provided for in

Labor Code section 3202. iberal construction is for the benefit only of persons covered by the Act, employees. . . . .

. . . .

The majority states that caring for and harvesting cucumbers are nothing more than manual labor and that Borello "retains all necessary control over a job which can be done only one way." All the evidence in the record is to the contrary. Richard Borello testified without contradiction that experienced sharefarmers will make more than inexperienced ones and that considerable skill was required in caring for and harvesting the cucumbers during the time the sharefarmers are responsible for the crop. Specifically he testified: "He [the sharefarmer] comes in, he pulls the weeds, and he does, he does put the, at that time the vines are just starting to fall into the furrow, and he does take those vines and he slips them under the plant so that way they grow along the row line. That way they're not in furrow, so people don't step on them and you could do a lot of damage by letting the vines grow into the furrows and then as they walk through they step on them. That is you could lose 20% of your cucumbers that way. And it's their responsibility to take care of that plant and put the vines under the plants and pull the weeds." He further testified that from the time they execute their contracts, the sharefarmers "are totally responsible for the harvest and the care of the plants. If that involves weeding or hoeing, then they're responsible for that. They take care of that." "[There] is irrigation and the sharefarmer takes care of his rows and the irregation [*sic*]. The only thing I do is I provide the water. Which means I press the button and start the pump." Asked who would decide when to irrigate, Richard Borello testified: "The sharecroppers work together. They understand that the field cannot be watered so many rows at a time, so they work together as sharefarmers. They all come to an agreement when they're going to pick [*sic*: irrigate?]. I don't have nothnig [*sic*] to do with it." Asked what he would do if he thought a sharefarmer was damaging the crop through improper irrigation, he responded: "I lose, then I lose. There's nothing I can do about it. But it doesn't work that way though because they lose also. They would lose also. Why would they want to damage their crop?"

As an indication of the individual skill needed to train the vines and care for the cucumber crop, Richard Borello testified that "If they [the sharefarmers] abandon the field then I lose.. . . [Then] it's hard to or for another sharecropper to come in a [*sic*] take those rows 'cause they may not like the way the person handled the plants, and if he didn't have the plants right, then the crop is lost." It is also difficult to take over the crop because "It's very important to keep the vine clean of large cucumbers because it stresses the plant. . . ."

As to the time at which the sharefarmers were to do their work Richard Borello testified: "They're experienced cucumber pickers. And they realize that starting too early in the morning is not good for the plants. And they want to keep them [*sic*] plants as healthy and produce as much as possible. It's in their best interest. So they start later on in the day and, many times, some sharecroppers won't show up. Some will start, say at 8:00 and others will come in at 10:00 depending on [*sic*] some people don't care quite as much about the plants. Some people say, 'well I want to get it over

with.' And they go in in the morning and they pick it even when the plant is wet which hurts the plant. But I have no say over that. Others come in at 10:00 when the plant is dry which is better for the plant, and others will come in at 6:00 at night and pick only in the evening. So I have no say over the times or the hours." As to which persons were to do the work he testified: "No, I have no control at all. It, the sharefarmer furnishes, the sharefarmer, it says in the contract here, that they only use family members. It's even underlined in the contract. And being a sharefarmer or a contractor I have no control over who they put in the field other than they should agree with this document that they have only their family members."[6]

Asked whether there was "any type of quality control involved by either Vlasic or Borello," Richard Borello testified: "There is no quality control other than, ya [*sic*] know, self motivation of making the most, by picking the smallest cucumber and taking care of the plants, that is the motivation. That is the quality control. . . . That's right. If they pick big cucumbers, they make less, and I make less. If they pick small cucumbers, then they make good, and I make good."

Again, the majority's assertion that "in no practical sense are the 'sharefarmers' entrepreneurs" is an unsupported conclusion. Two essential facts established by the uncontradicted evidence demonstrate that these sharefarmers are entrepreneurs: One, they cannot be terminated or discharged without cause during the term of the contract or even, according to the testimony, for inadequate performance; second, if the crop fails, is destroyed or for any reason cannot be marketed, the sharefarmers will not be compensated for their labors, no matter how many hours they have worked.

These facts also demonstrate the majority's error in stating that the sharefarmers make no investment in the enterprise. They invest the value of their labor. That may be insignificant to the majority but it is no doubt significant to the sharefarmers, as it is to me. The value of one's labor is ultimately the source of all capital. Many generations of American immigrants have become successful entrepreneurs doing just that—investing the only asset at their command, the value of their labor.

Borello too incurs real and substantial risks and obtains real benefits from the sharefarmer arrangement. Borello saves the cost of hiring supervisors to control the manner and quality of the work. On the other hand, it gives up its right to control the manner in which and the time at which the work is performed. As Richard Borello explained, Borello retains no control over the work and if the sharefarmers lose because of improper care or harvesting of the crop, Borello also loses.

The majority's conclusion that the "record fails to demonstrate that the harvesters voluntarily undertake an 'independent' and unprotected status" is not based on any finding and again is simply contrary to the uncontradicted evidence of record. The written agreement expressly provides that the sharefarmer is an independent contractor and discloses that Borello will not withhold taxes or

carry workers' compensation insurance covering the sharefarmers or their families. It is written in plain language, both in Spanish and English, and was explained to the sharefarmers in Spanish where appropriate before it was signed. Contrary to the implication in the majority opinion, there is no law establishing that a person's decision to enter into a transaction is involuntary unless he or she has been offered alternative arrangements. And the uncontradicted testimony of both Richard and Johnny Borello, the only witnesses, was that the sharefarmers like the sharefarmer arrangement because, for one reason, they can make much more under this arrangement than as hourly laborers. The Borellos' testimony was verified by the fact that families often return year after year and even recommend the arrangement to other families who they bring with them to join in.

The statement by the majority that there is no evidence "that nonsignatory members of the sharefarmer's family have accepted Borello's disclaimer of employment responsibilities" is amazing. The head of the family obviously enters into the sharefarmer agreement for himself and the rest of the family as their authorized agent. There is simply no evidence to the contrary nor is there any other reasonable inference. Significantly, not a single sharefarmer nor any other witness was called by the department to contradict the testimony of the Borellos.

Even more astonishing is the majority's attempt to discredit the uncontradicted evidence that the harvesters are able to earn considerably more as sharefarmers than they could as hourly employees. Richard Borello was asked: "Why is that they like to typically go on a sharefarmer basis, then [*sic*] let's say, paying them an hourly wage?" He responded: "Well they make a lot more money on the sharefarmer basis." Later he was asked: "Now, if they were working on an hourly basis, what would be their typical hourly rate?" He responded: "Probably they'd be $ 4.00 an hour, that's the going rate in Gilroy right now." He was next asked: "Is it fair to say then, that the amount of money they make under this arrangement is typically substantially greater than . . . ." He answered: "Oh yes, it's at least $ 7-8 an hour if you were to break it down."

Johnny Borello's testimony was to the same effect. His testimony germane to the question is as follows:

> Q: Now, are you aware of any farmers in the Gilroy area that are not using the sharefarmer arrangement?
>
> A: There's a few.
>
> Q: Do you have any reason, do you know why, that, why they may not be using that particular sharefarmer arrangement?
>
> A: Well, [if] they use this system, the workers make more. . . .

Q: Based on your experience in having been on the farm there for a while, does it appear that the sharefarmers that come in are happy with that arrangement and that they want to share the sharecropping arrangement?

A: They want to do it. They're happier, that way.

Q: In your opinion would they make more money that way?

A: Way more.

It is true that Richard Borello testified that whatever proceeds of sale were paid each week would be divided among the family members, but no inference can be drawn from that obvious fact that the amount earned would be less than that earned by an hourly employee. The amount of the proceeds of sale would naturally depend on the number and kind of cucumbers harvested and sold during a particular week, and the weekly amounts referred to by the majority do not indicate either the number of hours worked nor the number of persons who picked the cucumbers sold that week. It is thus impossible to draw from the weekly amounts any rational inference as to what average hourly wage would have been equivalent. What is left is the uncontradicted and uncontroverted testimony of Richard and Johnny Borello.

And so I come at last to the law. The controlling law is clear and simple though not always so easy to apply as it is here. On the evidence in the record before us, the unanimous Court of Appeal decision correctly determined that the Division's finding these sharefarmers were employees was incorrect as a matter of law.

As the majority correctly observes: "The Workers' Compensation Act (Act) extends only to injuries suffered by an 'employee,' which arise out of and in the course of his 'employment.' (§§ 3600, 3700; see Cal. Const., art. XIV, § 4) 'Employee[s]' include most persons 'in the service of an employer under any . . . contract of hire' (§ 3351), but do not include independent contractors." (§§ 3353, 3357.)

The meaning and content of the statutory control test has been clear since at least 1947 when this court explained: "An independent contractor is one 'who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.' (Lab. Code, § 3353.) The distinction between the status of an independent contractor and that of an employee rests upon several important considerations. A material and often conclusive factor is the right of an employer to exercise complete and authoritative control of the mode and manner in which the work is performed. The existence of such right of control, and not the extent of its exercise, gives rise to the employer-employee relationship. There are 'other factors to be taken into consideration: '(a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the

kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.

….

[T]he Court of Appeal in this case correctly applied that law to the facts established by the record: "Here, the work to be performed was the care and harvest of the cucumber plants. Borello & Sons did not retain or exercise control over the manner in which those responsibilities were discharged by the share farmers once they were contractually undertaken except to require the share farmers to use their own families to perform the work. The share farmers were free to utilize their own methods and set their own hours. Although the Vlasic's pricing schedule was an economic incentive to pick the cucumbers while they were small, the share farmers were free to pick them at any stage of maturity. The share farmers determined when the cucumber crops would be irrigated.

….

Departing from the statutorily provided and long established standard, the majority opinion makes a strenuous effort to justify its result. First, it discusses at some length the history of the development of the control test in an attempt to demonstrate that it is not as meaningful today as once it was. The answer is that it is statutorily prescribed (§§ 3353 and 3357) and that until today it was as meaningful as ever.

….

I conclude that the majority opinion is incorrect on the facts and the law. If there is some problem with the sharefarmer arrangement that threatens the social policies of the state, which is not established by the record in this case, the Legislature is undoubtedly competent to remedy it. There is no need for this court to render a decision distorting the law and which, to boot, ignores the facts established by the record.

Majority:

[15] Richard Borello testified that the harvesters seek and "prefer" the sharefarmer arrangement because they make more money. However, aside from the absence of evidence that a choice was available, the facts belie any claim of true economic advantage in the sharefarmer arrangement. In the first place, any increase in immediate cash income is offset by the loss of statutory financial protections due employees. In the second place, even the cash advantage appears illusory. Richard Borello testified that the typical

hourly wage rate for harvest work in the Gilroy area during the 1985 season was $ 4 per hour, but that a sharefarmer makes "at least $ 7-$ 8 an hour if you were to break it down." Vlasic's individual harvest summaries for the week ending July 4, 1985, indicate that sharefarmer earnings that week ranged from a high of $ 634.34 to a low of $ 136.04. Richard Borello acknowledged that these amounts must be *split* among all the members of the sharefarmer's family who are working in his plot, sometimes as many as eight or nine people—"[however] large the family is." This may produce an effective hourly rate far below that which each worker would presumably have received as an employee.

Dissent:

[2] The majority makes the gratuitous assumptions that the sharefarmers do not obtain insurance coverage for themselves and would not be able to afford it in any event. The truth is that there is not one iota of evidence in the record supporting these assumptions. For all the record shows, the sharefarmers may be fully covered by health and/or accident insurance. Indeed, it is noteworthy that this is not a workers' compensation proceeding instituted by an injured sharefarmer, nor is there any evidence that any sharefarmer has ever been injured or disabled. It was specifically observed at the hearing that there was no known workers' compensation case arising out of this relationship.

[3] As the majority states, ". . . the Division concluded that because of Borello's predominant control over the cultivation, harvest, and sale of its cucumbers, and the workers' lack of investment in the crop, they [the sharefarmers] cannot be deemed 'sharecroppers in the true sense.' Hence, it ruled, they are employees rather than independent contractors. . . . [The] trial court found the Division's finding supported by the evidence and denied the writ."

[6] The majority find significant that the contract allows for work only by family members, but the reason for that requirement is quite apparent. Otherwise, the head of the family might be illegally acting as a labor contractor. (See § 1140.4, § 1682 et seq.)

1.2.1.1. Timeline

S.G. Borello & Sons, Inc. v. Dep't of Industrial Relations

Date	Case Name	Decision	Notes
August 14, 1985	*S.G. Borello & Sons, Inc. v. State Dep't of Industrial Relations*	DLSE (Division of Labor Standards Enforcement) issued stop order-penalty assessment against Borello & Sons	**First filed October 28, 1985, Borello & Sons filed its writ petition** Prohibits the use of employee labor until the company has secured workers' comp insurance and assesses penalty
August 26, 1985	*S.G. Borello & Sons, Inc. v. State Dep't of Industrial Relations*	DLSE officer affirmed the stop order-penalty assessment	Concluded that sharecroppers are employees, require workers' comp coverage

October 28, 1985	*S.G. Borello & Sons, Inc. v. State Dep't of Industrial Relations*	Borello & Sons filed writ petition	
January 15, 1986	*S.G. Borello & Sons, Inc. v. State Dep't of Industrial Relations*	Trial court found Division's finding supported by evidence and denied the writ	
Decembe r 16, 1987	*S.G. Borello & Sons, Inc. v. State Dep't of Industrial Relations* California Court of Appeals, Sixth District (1987)	Judgment reversed, superior court directed to grant writ petition upon remand	Hearing officer's determination was incorrect, there is no employment relationship but rather an independent contractor • Link
1988	*S.G. Borello & Sons, Inc. v. State Dep't of Industrial Relations* California Supreme Court (1988)	No petition for review of Court of Appeals decision, ordered review on own motion	Determined issue presented to be of "substantial importance"
March 23, 1989	*S.G. Borello & Sons, Inc. v. State Dep't of Industrial Relations* Supreme Court of California (1989)	Court of Appeal judgment directing superior court to grant petition is reversed	Employment relationship is present • Link

1.2.2. O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015)
Full decision: (link); **Docket**: (link); **Oral argument**: ()

EDWARD M. CHEN, District Judge

Plaintiffs filed this putative class action on behalf of themselves and other similarly situated individuals who drive for Defendant Uber Technologies, Inc. .... Plaintiffs claim that they are employees of Uber, as opposed to its independent contractors, and thus are eligible for various statutory protections for employees codified in the California Labor Code, such as a requirement that an employer pass on the entire amount of any gratuity "that is paid, given to, or left for an employee by a patron." Cal. Lab. Code § 351.
Pending before the Court is Uber's motion for summary judgment that Plaintiffs are independent contractors as a matter of law. As is discussed below, the Court first concludes that Plaintiffs are Uber's presumptive employees because they "perform services" for the benefit of Uber. ….

I. *BACKGROUND*

In a nutshell, Uber provides a service whereby individuals in need of vehicular transportation can log in to the Uber software application on their smartphone, request a ride, be paired via the Uber application with an available driver, be picked up by the available driver, and ultimately be driven to their final destination. Uber receives a credit card payment from the rider at the end of the ride, a significant portion of which it then remits to the driver who transported the passenger. ….

Once a prospective driver successfully completes the application and interview stages, the driver must sign contracts with Uber. …. Those contracts explicitly provide that the relationship between the transportation providers and Uber/Raiser "is solely that of independent contracting parties." The parties "expressly agree that this Agreement is not an employment agreement or employment relationship." The relevant contracts further provide that drivers will be paid a "fee" (*i.e.,* fare) upon the successful completion of each ride. According to an Uber 30(b)(6) deponent, Uber sets fares based principally on the miles traveled by the rider and the duration of the ride. Because Uber receives the rider's payment of the entire fare, the relevant contracts provide that Uber will automatically deduct its own "fee per ride" from the fare before it remits the remainder to the driver. presented evidence that Uber typically takes roughly 20 percent of the total fare billed to a rider as its "fee per ride."

In this litigation, Uber bills itself as a "technology company," not a "transportation company," and describes the software it provides as a "lead generation platform" that can be used to connect "businesses that provide transportation" with passengers who desire rides. Uber notes that it owns no vehicles, and contends that it employs no drivers. Rather, Uber partners with alleged independent contractors that it frequently refers to as "transportation providers."

Plaintiffs characterize Uber's business (and their relationship with Uber) differently. They note that while Uber now disclaims that it is a "transportation company," Uber has previously referred to itself as an "On–Demand Car Service," and goes by the tagline "Everyone's Private Driver."("Our tagline and vision is to be 'Everyone's Private Driver.' "). Indeed, in commenting on Uber's planned expansion into overseas markets, its CEO wrote on Uber's official blog: "We are 'Everyone's Private Driver.' We are Uber and we're rolling out a *transportation system* in a city near you." ….

In addition to contending it is a technology company and not a transportation company, Uber argues the drivers are not its employees but instead are independent contractors, and therefore not entitled to the protection of the California Labor Code as asserted herein. In this regard, Uber contends it exercises minimal control over how its transportation providers actually provide transportation services to Uber customers, an important factor in determining whether drivers are independent contractors. Among other things, Uber notes that drivers set their own hours and

work schedules, provide their own vehicles, and are subject to little direct supervision. Plaintiffs vigorously dispute these contentions, and claim that Uber exercises considerable control and supervision over both the methods and means of its drivers' provision of transportation services, and that under the applicable legal standard they are employees. ….

II. ***DISCUSSION***

….

2. *California's Test of Employment*

The parties agree that determining whether Plaintiffs are employees or independent contractors is an analysis that proceeds in two stages. "First, under California law, once a plaintiff comes forward with evidence that he provided services for an employer, the employee has established a prima facie case that the relationship was one of employer/employee." *Narayan v. EGL, Inc.,* 616 F.3d 895, 900 (9th Cir.2010) (citation omitted). "As the Supreme Court of California has held ... the fact that one is performing work and labor for another is prima facie evidence of employment and such person is presumed to be a servant in the absence of evidence to the contrary."

If the putative employee establishes a prima facie case (*i.e.,* shows they provided services to the putative employer), the burden then shifts to the employer to prove, if it can, that the "presumed employee was an independent contractor." *Id.* (citations omitted); *see also Yellow Cab Coop. Inc. v. Worker's Comp. Appeals Bd.,* 226 Cal.App.3d 1288, 1294 (1991) (explaining that under California law there is "a presumption that a service provider is presumed to be an employee unless the principal affirmatively proves otherwise").

For the purpose of determining whether an employer can rebut a prima facie showing of employment, the Supreme Court's seminal opinion in *Borello* "enumerated a number of indicia of an employment relationship." *Narayan,* 616 F.3d at 901. The "most significant consideration" is the putative employer's "right to control work details." *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations (Borello),* 48 Cal.3d 341, 350 (1989). ….

The putative employer's right to control work details is not the only relevant factor, however, and the control test cannot be "applied rigidly and in isolation." *Borello,* at 350. Thus, the Supreme Court has also embraced a number of "secondary indicia" that are relevant to the employee/independent contractor determination. *Id.* These additional factors include:

(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g)

whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.

Id. at 351. *Borello* also "approvingly cited" five additional factors (some overlapping or closely related to those outlined immediately above) for evaluating a potential employment relationship. *Narayan,* 616 F.3d at 900. These additional factors include:

(1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business.

Borello, 48 Cal.3d at 355. While the Supreme Court explained that all thirteen of the above "secondary indicia" are helpful in determining a hiree's employment status, it noted that "the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends on particular combinations." *Id.* at 351. Moreover, the Court made it "clear that the label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced." *Alexander,* 765 F.3d at 989 (quoting *Borello*). Thus, as the Ninth Circuit explained in *Narayan*, the fact-finder must "assess and weigh all of the incidents of the relationship with the understanding that no one factor is decisive, and that it is the rare case where the various factors will point with unanimity in one direction or the other." *Narayan,* 616 F.3d at 901 (citation omitted).

….

B. *The Plaintiffs Are Uber's Presumptive Employees Because They Provide a Service to Uber*

If Plaintiffs can establish that they provide a service to Uber, then a rebuttable presumption arises that they are Uber's employees. Uber argues that the presumption of employment does not apply here because Plaintiffs provide it no service. The central premise of this argument is Uber's contention that it is not a "transportation company," but instead is a pure "technology company" that merely generates "leads" for its transportation providers through its software. Using this semantic framing, Uber argues that Plaintiffs are simply its customers who buy dispatches that may or may not result in actual rides. In fact, Uber notes that its terms of service with riders specifically state that Uber is under no obligation to actually provide riders with rides at all. Thus, Uber passes itself off as merely a technological intermediary between potential riders and potential drivers. This argument is fatally flawed in numerous respects.

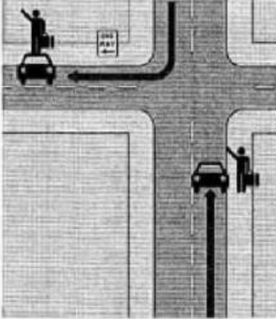
….

D. *Uber is Not Entitled to Summary Judgment Because Material Facts Remain in Dispute and a Reasonable Inference of an Employment Relationship May Be Drawn*

…. As noted above, the "principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." *Ayala* (quoting *Borello*). "Perhaps the strongest evidence of the right to control" is whether Uber can fire its transportation providers at will. *Id.* This critical fact appears to be in dispute. Uber claims that it is only permitted to terminate drivers "with notice or upon the other party's material breach" of the governing contracts. Plaintiffs, however, point out that the actual contracts seem to allow Uber to fire its drivers for any reason and at any time ("Uber will have the right, at all times and at Uber's sole discretion, to reclaim, prohibit, suspend, limit or otherwise restrict the Transportation Company and/or the Driver from accessing or using the Driver App....").

Uber further claims that the right to control element is not met because drivers can work as much or as little as they like, as long as they give at least one ride every 180 days (if on the uberX platform) or every 30 days (if on the UberBlack platform). According to Uber, drivers never have to accept any "leads" generated by Uber (*i.e.,* they can turn down as many rides as they want without penalty), and they can completely control *how* to give any rides they do accept. These contentions are very much in dispute. For instance, while Uber argues that drivers never actually have to accept ride requests when logged in to the Uber application, Plaintiffs provided an Uber Driver Handbook that expressly states: "We expect on-duty drivers to accept all [ride] requests." The Handbook goes on to state that "[w]e consider a dispatch that is not accepted to be a rejection," and we "will follow-up with all drivers that are rejecting trips." The Handbook further notes that Uber considers "[r]ejecting too many trips" to be a performance issue that could lead to possible termination from the Uber platform. *see also* []email from Uber to driver stating that the driver's "dispatch acceptance rate [of 60%] is too low ... Please work towards a dispatch acceptance rate of 80%. If you are unable to significantly improve your dispatch acceptance rate, Uber may suspend your account"[].

It is also hotly disputed whether Uber has the right to significantly control the "manner and means" of Plaintiffs' transportation services. *See Alexander,* 765 F.3d at 988. Plaintiffs cite numerous documents, written in the language of command, that instruct drivers to, amongst other things: "make sure you are dressed professionally;" send the client a text message when 1–2 minutes from the pickup location ("This is VERY IMPORTANT"); "make sure the radio is off or on soft jazz or NPR;" and "make sure to open the door for your client." Onboarding Script at 3–6. As Uber emphasizes, "it is the small details that make for an excellent trip," and Plaintiffs have presented evidence (when viewed in the light most favorable to them) that Uber seeks to control these details right down to whether drivers "have an umbrella in [their] car for clients to be dry until they get in your car or after they get out." *Id.* at 6, 9. Plaintiffs note that drivers are even instructed on such simple tasks as how to pick up a customer with their car:



Uber responds that it merely provides its drivers with "suggestions," but does not actually require its drivers to dress professionally or listen to soft jazz or NPR. But the documents discussed above (and others in the record) are not obviously written as mere suggestions, and Uber's arguments to the contrary cannot be assumed as true on Uber's motion for summary judgment where all reasonable inferences from the record must be drawn in favor of Plaintiffs. Indeed, there is evidence of drivers being admonished (or terminated) by Uber for failing to comply with its "suggestions." (informing driver that "a passenger let us know that your attitude wasn't up to Uber's professional standards," and noting that "[i]f we continue to receive negative feedback ... your account will be reviewed and may be deactivated"); (terminating driver whose "overall driver rating has fallen below the minimum threshold we allow"); (informing driver that a "passenger let us know that they felt you did not take the most efficient/direct route on a trip" and noting that the driver's account may be deactivated).

….

III. *CONCLUSION*

The application of the traditional test of employment—a test which evolved under an economic model very different from the new "sharing economy"—to Uber's business model creates significant challenges. Arguably, many of the factors in that test appear outmoded in this context. Other factors, which might arguably be reflective of the current economic realities (such as the proportion of revenues generated and shared by the respective parties, their relative bargaining power, and the range of alternatives available to each), are not expressly encompassed by the *Borello* test. It may be that the legislature or appellate courts may eventually refine or revise that test in the context of the new economy. It is conceivable that the legislature would enact rules particular to the new so-called "sharing economy." Until then, this Court is tasked with applying the traditional multifactor test of *Borello* and its progeny to the facts at hand. For the reasons stated above, apart from the preliminary finding that Uber drivers are presumptive employees, the *Borello* test does not yield an unambiguous result. The matter cannot on this record be decided as a matter of law. Uber's motion for summary judgment is therefore denied.

IT IS SO ORDERED.

1.2.2.a. Timeline

O'Connor v. Uber

Date	Case Name	Decision	Notes
August 16, 2013	*O'Connor v. Uber Technologies, Inc.* US District Court, Northern District of California, San Francisco Division (2013)	Class action complaint filed	**First filed on this date** ● Link
August 23, 2013	*O'Connor v. Uber Technologies, Inc.* US District Court, Northern District of California (2013)	Plaintiff's motion is denied without prejudice.	Denied to either file a motion setting forth appropriate legal authority for the filing of the emergency motion, or to file it at a more appropriate stage of litigation. ● Link
March 11, 2015	*O'Connor v. Uber* District Court, Northern District of California (2015)	Denied Uber's summary judgment motion.	Applied the Borello test and denied the motion ● Link

October 19, 2018	*O'Connor v. Uber* Ninth Circuit Court (2018)	Reversed the denial of the motions to compel arbitration, class certification orders, and reversed orders in several class actions of Uber drivers alleging violations of federal and state statutes arising from Uber's misclassification.	Considered Uber drivers to be employees and not independent contractors ● Link
May 26, 2020	*Mendel v. Uber Techs., Inc.* (2020)	Petition for writ of certiorari denied.	● Link

1.2.2.1. Notes

i. Where does Section 350 of the Cal. Labor Code fit into the O'Connor case?

Note the curious relationship between Section 350's broad language for defining an employee and the *Borello* tests. Also, note the lack of explicit anchoring of control or the *Borello* subtests in the statutory language. Of note here are two types of legal sources: statutory and court-based. What does that tell us about the relationship between those two legal sources? Will reading the statute help you understand the rule? How can the California public have a say in making the rules? Should they?

ii. Legal Ambiguity as a Shield

Many students are frustrated with the ambiguity of the *Borello* test. It is frustrating, I believe, because it is hard to predict where courts and agencies will end up when considering the *Borello* factors. Ambiguity is bad if we care about legal certainty: the ability of private and public parties to know the law and act accordingly.

But legal ambiguity can be an asset. Consider, for example, how Uber used the legal ambiguity around employment classification to its advantage. Uber used ambiguity as a sword, as the legal tests were vague enough to enter the market and disrupt it with a cloak of legal

uncertainty. Uber used ambiguity as a shield in claims like the one in *O'Connor*. For Uber and its stakeholders, legal ambiguity is an asset not a liability.
Is there something broader that can be said about legal ambiguity aside from its effects on concrete legal parties? Does the public win or lose as a result of legal ambiguity? And if your answer is "lose" how can you explain the use of ambiguous tests by courts?

iii. Borello *is Not Good Law*

Note that, like some other cases in this casebook, *Borello* and *O'Connor* are not "good law." These cases do not represent California's contemporary employment classification law. After *O'Connor*, the California legislature passed AB5, a state legislation which includes a classification test known as the ABC test. The ABC test aims to distinguish between independent contractors and employees by creating a broad set of assumptions and criterions. As of 2024, whether or not AB5 or the *Borello* test covers Uber-like entities is still an open legal and political question.

While *Borello* might not be "good law" with regard to Uber-like entities in California, *Borello* is a good example of how classification is done throughout most of the US - with a fuzzy connection to statutory language, a strong emphasis on control, and a common law-like case-by-case development of criteria and subtests as an aid to determining employment classification.
Can classification be done any other way?

iv. The Common Law(?)

Here is Professor John F. Witt's explanation of why torts (the law that governs compensation for harms done to people and property) is a "common law." Many parallels can be drawn between torts as common law and the common law aspects of work law:

> We call tort law a common law field because it arises out of the body of legal norms and institutions inherited by the United States from England more than two centuries ago, when the United States won independence from the British Empire. In England, the common law was the law of the King's courts in the centuries after the Norman Conquest in 1066. (The common law was the law common to those courts, as opposed to the church courts, borough courts, and the courts of the local nobility, each of which had its own law through the medieval and early modern periods.)
>
> Today, to say that a body of law is made up of common law principles is to say that it is mostly judge-made law, though tort doctrine is not necessarily exclusively so. State legislatures and the U.S. Congress increasingly alter the common law of torts. The

> Federal Constitution and its state-level counterparts largely (but not entirely) give the Congress and state legislatures power to make such alterations, though as we shall see constitutional constraints touch tort law in several different ways. Nonetheless, it is still fair to call torts a common law field. And as a common law field, torts is made up predominantly of state law, rather than federal law, though federal law has always played a role, especially in the past century, and even more so in the last two decades. To the extent that torts remains a subject of state law, its basic norms will vary from state to state, though usually with a wide area of consensus at its core.

John F. Witt, Torts and Regulation, 17-18 (3rd ed., 2022)

Further reading:

- Lawrence B. Solum, Legal Theory Lexicon: Common Law, Legal Theory Blog (Sep. 2024), https://lsolum.typepad.com/legaltheory/2024/09/legal-theory-lexicon-common-law.html

v. Consider the Mismatch between the Stakes and Decision Rules

What are the stakes in cases like *O'Connor*?

Sure, for both the drivers and to Uber, it is ultimately about money. Though, the significance of money for the two sides is different. Also, it is not *just* about money; dignitary interests on the side of the drivers, their ability to control their time, and more are involved. For Uber, the bearer of the future of work, it is about a business model, a form of existence in the world that is under attack in *O'Connor* and similar cases. For the public, cases like *O'Connor* raised issues of public transportation, the future of work, accessibility to jobs and services, equity in the job market, and more.

Consider the relations between the legal tests in *Borello* and the stakes involved. For example, how can the *Borello* minutia about control reflect any serious consideration of access to jobs? Price of rides? Future of work? Why does allowing courts to decide the distribution of those stakes make sense? Does it?

vi. What happened after the O'Connor decision?

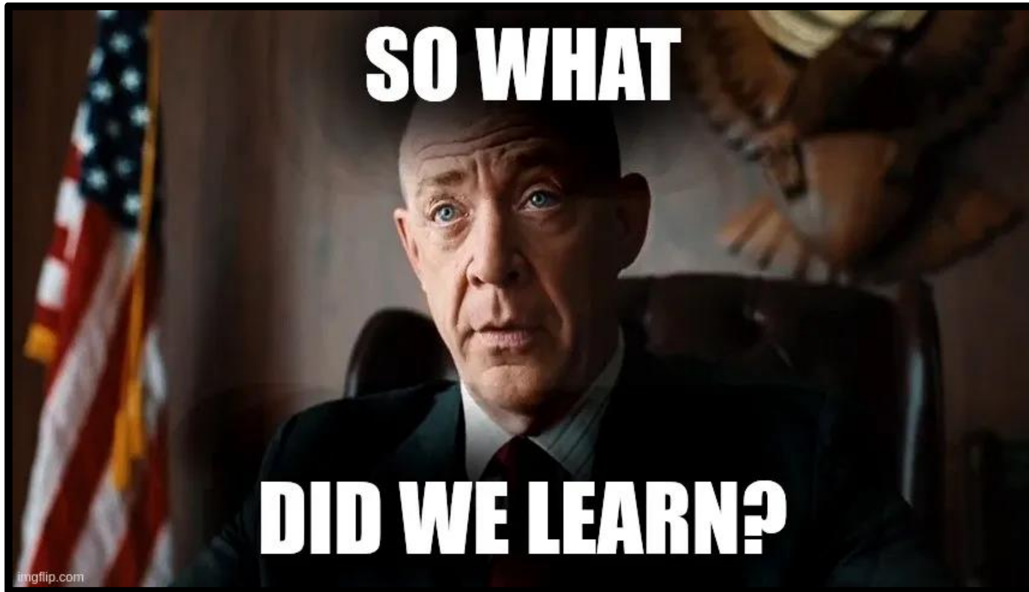
All cases are part of history. Some stuff happened before the cases we read. Some stuff happened after. Those events can have a great explanatory power on why the cases turned out the way they did. Note that in our course we are reading opinions written by (very particular) humans in a (very) particular point in time.

Uber's legal and political struggles over the employment status of its drivers are a complex, ongoing legal-political issue. The specific *O'Connor* litigation thread faced issues regarding arbitration agreements and, as far as I can tell, ended with the Supreme Court denying a request to review (also known as "writ of certiorari") a 9th Circuit decision in related proceedings. The citation for the cert denial is *Mendel v. UBER Techs., Inc.*, 207 L. Ed. 2d 147, 140 S. Ct. 2812 (2020) (link).

Outside of the specific litigation effort in *O'Connor*, in 2018 the Califonia Supreme Court decided *Dynamex*, adopting a stringent classification test called the ABC rule under some of its workplace-related code provisions. The California legislature then expanded the ABC rule to all labor code provisions, excluding significant numbers of sectores, occupations and types of workers, but including Uber in a statute commonly called A.B. 5. Uber responded to AB5 by pushing for a ballot initiative (state-wide referendum) which under the California Constitution can amend statutory provisions. The ballot initiative, Proposition 22, offered to exempt Uber and similar ride-share companies from most of the California Labor Code and enact specific rights and enforcement mechanisms to ride-share drivers. The California constituency voted for Prop. 22 exempting Uber drivers from AB5 and the California Labor Code. Litigation over A.B.5 (from Uber's and other employers' side) and over Prop. 22 (from workers groups) ensued but (at least so far) failed to change the validity of AB5 and Prop. 22.

Various litigation efforts are still underway. Some with regard to workers who worked for Uber prior to the statutory changes. Some still try to challenge Uber's practices within the contemporary classification scheme; others try different legal regime like antitrust or consumer protections. But, workplace reality for Uber drivers in the US was and is one of independent contractors, across the nation and for almost all traditional workplace rights.

Uber is a great case study of economic, legal, and political contestation over the fate of work and technology. But, what did we learn from it?



A fair question, an illustration.

vii. Uber and the NLRA & Board

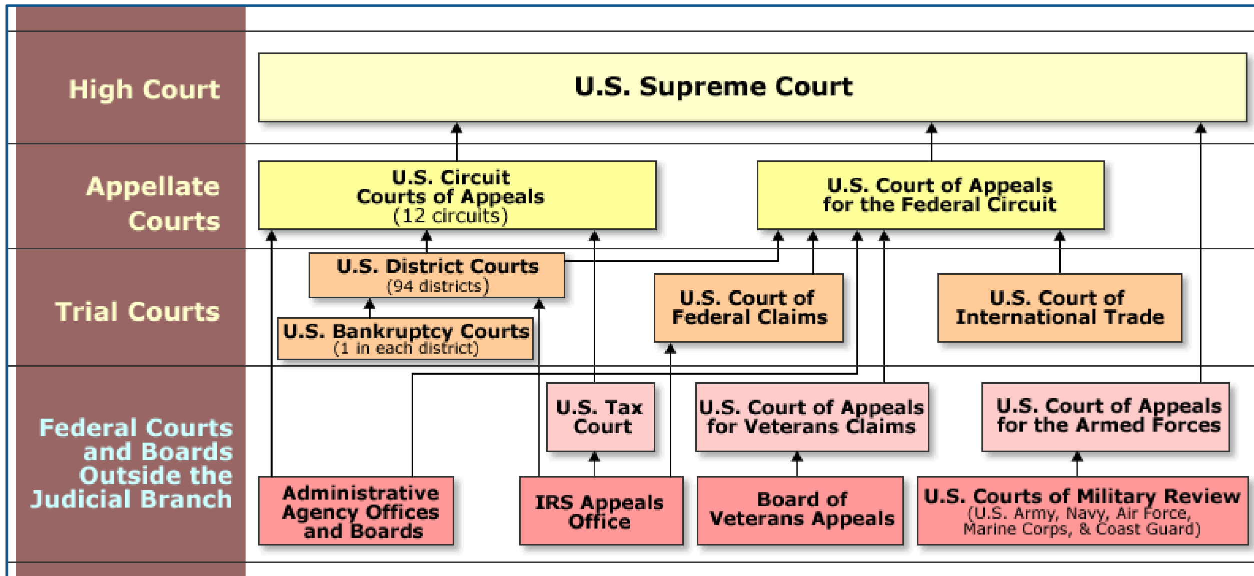
Uber had a relatively narrow, but interesting, interaction with the National Labor Relations Act (NLRA) and the National Labor Relations Board (NLRB or Board). Only a handful reached a more-or-less formal decision.

In 2019 the Board's General Counsel issued a memo collecting and responding to three charges that built on the assertion that Uber drivers are covered employees under the NLRA. The most interesting of those charges came from New York.

Between 2015-16 multiple unions were trying to do something with Uber drivers in NYC. After some struggle, which I describe here and here, a quasi-union was created by agreement between Uber and the Machinists union – the Independent Drivers' Guild (IDG). The IDG was founded on the legal premise that Uber drivers are classified as independent contractors and thereby excluded from the National Labor Relations Act. Because of that exclusions various forms of managerial control of workers' organizations are permitted. A second workers' group, working with the Taxi Workers Alliance filed a charge with the Board claiming Uber drivers were NLRA-covered employees (not excluded independent contractors) and that this quasi-union was prohibited under the NLRA.

The Republican-appointed General Counsel of the Board rejected those claims in the 2019 memorandum.

1.2.2.2. The Structure of the Federal Courts System



Source

1.2.2.3. What does a physical copy of a court opinion look like?

O'CONNOR v. UBER TECHNOLOGIES, INC. 1133
Cite as 82 F.Supp.3d 1133 (N.D.Cal. 2015)

unlawful, an injunction requiring Facebook to change its practices regarding transactions with minors, and restitution. *See* TAC at p. 20. Like in *Ries*, this Court denies certification of Plaintiffs' restitution claims, but that denial does not preclude it from granting certification of Plaintiffs' injunctive and declaratory relief claims.

IV. ORDER

For the foregoing reasons, the Court GRANTS Plaintiffs motion to certify the following class and subclass for claims for declaratory and injunctive relief under Rule 23(b)(2):

> All Facebook users who are or were minor children according to Facebook's own records for the four years preceding the date on which the original complaint was filed through the date on which a class is certified ("the Minor Class"). Within the Minor Class is a subclass of Minors from whose Facebook accounts Facebook Credits were

Douglas O'CONNOR, et al., Plaintiffs,

v.

UBER TECHNOLOGIES, INC., et al., Defendants.

No. C–13–3826 EMC

United States District Court, N.D. California.

Signed March 11, 2015

Background: Drivers who provided passenger car services for customers hailing them through mobile phone application brought putative class action against application's developer, alleging they were misclassified as independent contractors and were entitled to protections of California Labor Code. Developer moved for summary judgment.

Holdings: The District Court, Edward M. Chen, J., held that:

(1) under California law, drivers were presumptively developer's employees;

And here is a PDF copy of the *O'Connor* decision. You can also look it up in the library when you have some free time.

1.2.3. Dynamex Operations W. v. Superior Court (2018)
4 Cal. 5th 903, 232 Cal. Rptr. 3d 1, 416 P.3d 1.
Full decision: (link); **Docket**: (link); **Oral argument**: (link)

Judges: Opinion by Cantil-Sakauye, C. J., with Chin, Corrigan, Liu, Cuéllar, Kruger, and Siggins, JJ., concurring.

CANTIL-SAKAUYE, C. J.—Under both California and federal law, the question whether an individual worker should properly be classified as an employee or, instead, as an independent contractor has considerable significance for workers, businesses, and the public generally.[1] On the one hand, if a worker should properly be classified as an employee, the hiring business bears the responsibility of paying federal Social Security and payroll taxes, unemployment insurance taxes and state employment taxes, providing workers' compensation insurance, and, most relevant for the present case, complying with numerous state and federal statutes and regulations governing

the wages, hours, and working conditions of employees. The worker then obtains the protection of the applicable labor laws and regulations. On the other hand, if a worker should properly be classified as an independent contractor, the business does not bear any of those costs or responsibilities, the worker obtains none of the numerous labor law benefits, and the public may be required under applicable laws to assume additional financial burdens with respect to such workers and their families.

Although in some circumstances classification as an independent contractor may be advantageous to workers as well as to businesses, the risk that workers who should be treated as employees may be improperly misclassified as independent contractors is significant in light of the potentially substantial economic incentives that a business may have in mischaracterizing some workers as independent contractors. Such incentives include the unfair competitive advantage the business may obtain over competitors that properly classify similar workers as employees and that thereby assume the fiscal and other responsibilities and burdens that an employer owes to its employees. In recent years, the relevant regulatory agencies of both the federal and state governments have declared that the misclassification of workers as independent contractors rather than employees is a very serious problem, depriving federal and state governments of billions of dollars in tax revenue and millions of workers of the labor law protections to which they are entitled.

The issue in this case relates to the resolution of the employee or independent contractor question in one specific context. Here we must decide what standard applies, under California law, in determining whether workers should be classified as employees or as independent contractors *for purposes of California wage orders*, which impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks) of California employees.

In the underlying lawsuit in this matter, two individual delivery drivers, suing on their own behalf and on behalf of a class of allegedly similarly situated drivers, filed a complaint against Dynamex Operations West, Inc. (Dynamex), a nationwide package and document delivery company, alleging that Dynamex had misclassified its delivery drivers as independent contractors rather than employees. The drivers claimed that Dynamex's alleged misclassification of its drivers as independent contractors led to Dynamex's violation of the provisions of Industrial Welfare Commission wage order No. 9, the applicable state wage order governing the transportation industry, as well as various sections of the Labor Code, and, as a result, that Dynamex had engaged in unfair and unlawful business practices under Business and Professions Code section 17200.

Prior to 2004, Dynamex classified as employees drivers who allegedly performed similar pickup and delivery work as the current drivers perform. In 2004, however, Dynamex adopted a new policy and contractual arrangement under which all drivers are considered independent contractors rather than employees. Dynamex maintains that, in light of the current contractual arrangement, the drivers are properly classified as independent contractors.

After an earlier round of litigation, the trial court ultimately certified a class action embodying a class of Dynamex drivers who, during a pay period, did not themselves employ other drivers and did not do delivery work for other delivery businesses or for the drivers' own personal customers. In finding that the relevant common legal and factual issues relating to the proper classification of the drivers as employees or as independent contractors predominated over potential individual issues, the trial court's certification order relied upon the three alternative definitions of "employ" and "employer" set forth in the applicable wage order as discussed in this court's then-recently decided opinion in *Martinez v. Combs* (2010) 49 Cal.4th 35, 64 (*Martinez*). As described more fully below, *Martinez* held that "[t]o employ … under the [wage order], has three alternative definitions. It means: (a) to exercise control over the wages, hours or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship." The trial court rejected Dynamex's contention that in the wage order context, as in most other contexts, the multifactor standard set forth in this court's seminal decision in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*) is the only appropriate standard under California law for distinguishing employees and independent contractors.

In response to the trial court's denial of Dynamex's subsequent motion to decertify the class, Dynamex filed the current writ proceeding in the Court of Appeal, maintaining that two of the alternative wage order definitions of "employ" relied upon by the trial court do not apply to the employee or independent contractor issue. Dynamex contended, instead, that those wage order definitions are relevant only to the distinct joint employer question that was directly presented in this court's decision in *Martinez*—namely whether, when a worker is an admitted employee of a primary employer, another business or entity that has some relationship with the primary employer should properly be considered a joint employer of the worker and therefore also responsible, along with the primary employer, for the obligations imposed by the wage order.

The Court of Appeal rejected Dynamex's contention, concluding that neither the provisions of the wage order itself nor this court's decision in *Martinez* supported the argument that the wage order's definitions of "employ" and "employer" are limited to the joint employer context and are not applicable in determining whether a worker is a covered employee, rather than an excluded independent contractor, for purposes of the obligations imposed by the wage order. The Court of Appeal concluded that the wage order definitions discussed in *Martinez* are applicable to the employee or independent contractor question with respect to obligations arising out of the wage order. The Court of Appeal upheld the trial court's class certification order with respect to all of plaintiffs' claims that are based on alleged violations of the wage order.

At the same time, the Court of Appeal concluded that insofar as the causes of action in the complaint seek reimbursement for business expenses such as fuel and tolls that are not governed by the wage order and are obtainable only under section 2802 of the Labor Code, the *Borello*

standard is the applicable standard for determining whether a worker is properly considered an employee or an independent contractor. With respect to plaintiffs' non-wage-order claim under section 2802, the Court of Appeal remanded the matter to the trial court to reconsider its class certification of that claim pursuant to a proper application of the *Borello* standard as further explicated in this court's decision in *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522 (*Ayala*).

Dynamex filed a petition for review in this court, challenging only the Court of Appeal's conclusion that the wage order definitions of "employ" and "employer" discussed in *Martinez* are applicable to the question whether a worker is properly considered an employee or an independent contractor for purposes of the obligations imposed by an applicable wage order. We granted review to consider that issue.

For the reasons discussed below, we agree with the Court of Appeal that the trial court did not err in concluding that the "suffer or permit to work" definition of "employ" contained in the wage order may be relied upon in evaluating whether a worker is an employee or, instead, an independent contractor for purposes of the obligations imposed by the wage order. As explained, in light of its history and purpose, we conclude that the wage order's suffer or permit to work definition must be interpreted broadly to treat as "employees," and thereby provide the wage order's protection to, *all* workers who would ordinarily be viewed as *working in the hiring business*. At the same time, we conclude that the suffer or permit to work definition is a term of art that cannot be interpreted literally in a manner that would encompass within the employee category the type of individual workers, like independent plumbers or electricians, who have traditionally been viewed as *genuine* independent contractors who are working only in their own independent business.

For the reasons explained hereafter, we conclude that in determining whether, under the suffer or permit to work definition, a worker is properly considered the type of independent contractor to whom the wage order does not apply, it is appropriate to look to a standard, commonly referred to as the "ABC" test, that is utilized in other jurisdictions in a variety of contexts to distinguish employees from independent contractors. Under this test, a worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Although, as we shall see, it appears from the class certification order that the trial court may have interpreted the wage order's suffer or permit to work standard too literally, we conclude that on the facts disclosed by the record, the trial court's certification order is nonetheless correct as a matter of law under a proper understanding of the suffer or permit to work standard and should be upheld.

Accordingly, we conclude that the judgment of the Court of Appeal should be affirmed.

I. Facts and Proceedings Below

We summarize the facts as set forth in the prior Court of Appeal opinions in this matter, supplemented by additional facts set forth in the record.

Dynamex is a nationwide same-day courier and delivery service that operates a number of business centers in California. Dynamex offers on-demand, same-day pickup and delivery services to the public generally and also has a number of large business customers—including Office Depot and Home Depot—for whom it delivers purchased goods and picks up returns on a regular basis. Prior to 2004, Dynamex classified its California drivers as employees and compensated them pursuant to this state's wage and hour laws. In 2004, Dynamex converted all of its drivers to independent contractors after management concluded that such a conversion would generate economic savings for the company. Under the current policy, all drivers are treated as independent contractors and are required to provide their own vehicles and pay for all of their transportation expenses, including fuel, tolls, vehicle maintenance, and vehicle liability insurance, as well as all taxes and workers' compensation insurance.

Dynamex obtains its own customers and sets the rates to be charged to those customers for its delivery services. It also negotiates the amount to be paid to drivers on an individual basis. For drivers who are assigned to a dedicated fleet or scheduled route by Dynamex, drivers are paid either a flat fee or an amount based on a percentage of the delivery fee Dynamex receives from the customer. For those who deliver on-demand, drivers are generally paid either a percentage of the delivery fee paid by the customer on a per delivery basis or a flat fee basis per item delivered.

Drivers are generally free to set their own schedule but must notify Dynamex of the days they intend to work for Dynamex. Drivers performing on-demand work are required to obtain and pay for a Nextel cellular telephone through which the drivers maintain contact with Dynamex. On-demand drivers are assigned deliveries by Dynamex dispatchers at Dynamex's sole discretion; drivers have no guarantee of the number or type of deliveries they will be offered. Although drivers are not required to make all of the deliveries they are assigned, they must promptly notify Dynamex if they intend to reject an offered delivery so that Dynamex can quickly contact another driver; drivers are liable for any loss Dynamex incurs if they fail to do so. Drivers make pickups and deliveries using their own vehicles, but are generally expected to wear Dynamex shirts and badges when making deliveries for Dynamex, and, pursuant to Dynamex's agreement with some customers, drivers are sometimes required to attach Dynamex and/or the customer's decals to their vehicles when making deliveries for the customer. Drivers purchase Dynamex shirts and other Dynamex items with their own funds.[6]

In the absence of any special arrangement between Dynamex and a customer, drivers are generally free to choose the sequence in which they will make deliveries and the routes they will take, but are required to complete all assigned deliveries on the day of assignment. If a customer requests, however, drivers must comply with a customer's requirements regarding delivery times and sequence of stops.

Drivers hired by Dynamex are permitted to hire other persons to make deliveries assigned by Dynamex. Further, when they are not making pickups or deliveries for Dynamex, drivers are permitted to make deliveries for another delivery company, including the driver's own personal delivery business. Drivers are prohibited, however, from diverting any delivery order received through or on behalf of Dynamex to a competitive delivery service.

Drivers are ordinarily hired for an indefinite period of time but Dynamex retains the authority to terminate its agreement with any driver without cause, on three days' notice. And, as noted, Dynamex reserves the right, throughout the contract period, to control the number and nature of deliveries that it offers to its on-demand drivers.

In January 2005, Charles Lee—the sole named plaintiff in the original complaint in the underlying action—entered into a written independent contractor agreement with Dynamex to provide delivery services for Dynamex. According to Dynamex, Lee performed on-demand delivery services for Dynamex for a total of 15 days and never performed delivery service for any company other than Dynamex. On April 15, 2005, three months after leaving his work at Dynamex, Lee filed this lawsuit on his own behalf and on behalf of similarly situated Dynamex drivers.

In essence, the underlying action rests on the claim that, since December 2004, Dynamex drivers have performed essentially the same tasks in the same manner as when its drivers were classified as employees, but Dynamex has improperly failed to comply with the requirements imposed by the Labor Code and wage orders for employees with respect to such drivers. The complaint alleges five causes of action arising from Dynamex's alleged misclassification of employees as independent contractors: two counts of unfair and unlawful business practices in violation of Business and Professions Code section 17200, and three counts of Labor Code violations based on Dynamex's failure to pay overtime compensation, to properly provide itemized wage statements, and to compensate the drivers for business expenses.

[procedural background and posture omitted.]

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II. Relevant Wage Order Provisions

We begin with a brief review of the relevant provisions of the wage order that applies to the transportation industry. (See Cal. Code Regs., tit. 8, § 11090.)

In describing its scope, the transportation wage order initially provides in subdivision 1: "This order shall apply to all persons employed in the transportation industry whether paid on a time, piece rate, commission, or other basis," except for persons employed in administrative, executive, or professional capacities, who are exempt from most of the wage order's provisions. (Cal. Code Regs., tit. 8, § 11090, subd. 1.)[8]

Subdivision 2 of the order, which sets forth the definitions of terms as used in the order, contains the following relevant definitions:

> (D) 'Employ' means to engage, suffer, or permit to work.
>
> (E) 'Employee' means any person employed by an employer.
>
> (F) 'Employer' means any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person." (Cal. Code Regs., tit. 8, § 11090, subd. 2(D)–(F).)[9]

Thereafter, the additional substantive provisions of the wage order that establish protections for workers or impose obligations on hiring entities relating to minimum wages, maximum hours, and specified basic working conditions (such as meal and rest breaks) are, by their terms, made applicable to "employees" or "employers." (See, e.g., Cal. Code Regs., tit. 8, § 11090, subds. 3 [hours and days of work], 4 [minimum wages], 7 [records], 11 [meal periods], 12 [rest periods].)

Subdivision 2 of the wage order does not contain a definition of the term "independent contractor," and the wage order contains no other provision that otherwise specifically addresses the potential distinction between workers who are employees covered by the terms of the wage order and workers who are independent contractors who are not entitled to the protections afforded by the wage order.

III. Background of Relevant California Judicial Decisions

We next summarize the most relevant California judicial decisions, providing a historical review of the treatment of the employee or independent contractor distinction under California law.

The difficulty that courts in all jurisdictions have experienced in devising an acceptable general test or standard that properly distinguishes employees from independent contractors is well documented. As the United States Supreme Court observed in *Board v. Hearst Publications* (1944) 322 U.S. 111, 121: "Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing. This is true within the

limited field of determining vicarious liability in tort. It becomes more so when the field is expanded to include all of the possible applications of the distinction."

As the above quotation suggests, at common law the problem of determining whether a worker should be classified as an employee or an independent contractor initially arose in the tort context—in deciding whether the hirer of the worker should be held vicariously liable for an injury that resulted from the worker's actions. In the vicarious liability context, the hirer's right to supervise and control the details of the worker's actions was reasonably viewed as crucial, because "'[t]he extent to which the employer had a right to control [the details of the service] activities was … highly relevant to the question whether the employer ought to be legally liable for them … .'" (*Borello*, *supra*, 48 Cal.3d 341, 350.) For this reason, the question whether the hirer controlled the details of the worker's activities became the primary common law standard for determining whether a worker was considered to be an employee or an independent contractor.

A. *Pre-*Borello *Decisions*

Prior to this court's 1989 decision in *Borello*, *supra*, 48 Cal.3d 341, California decisions generally invoked this common law "control of details" standard beyond the tort context, even when deciding whether workers should be considered employees or independent contractors for purposes of the variety of 20th century social welfare legislation that had been enacted for the protection of employees. Thus, for example, in *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 946 (*Tieberg*), in determining whether a worker was an employee or independent contractor for purposes of California's unemployment insurance legislation, the court stated that "[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired."

In addition to relying upon the control of details test, however, the pre-*Borello* decisions listed a number of "secondary" factors that could properly be considered in determining whether a worker was an employee or an independent contractor. The decisions declared that a hirer's right to discharge a worker "'at will, without cause'" constitutes "'[s]trong evidence in support of an employment relationship.'" (*Tieberg*, *supra*, 2 Cal.3d at p. 949, quoting *Empire Star Mines*, *supra*, 28 Cal.2d at p. 43.) The decisions also pointed to the following additional factors, derived principally from section 220 of the Restatement Second of Agency: "(a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee."

. . . .

B. Borello

In 1989, in *Borello*, *supra*, 48 Cal.3d 341, this court addressed the employee or independent contractor question in an opinion that has come to be viewed as the seminal California decision on this subject. Because of the significance of this decision, we review the majority opinion in *Borello* at length.

The particular controversy in *Borello*, *supra*, 48 Cal.3d 341, concerned whether farmworkers hired by a grower to harvest cucumbers under a written "sharefarmer" agreement were independent contractors or employees for purposes of the California workers' compensation statutes. The grower contended that the farmworkers were independent contractors under the control of details test because the workers (1) were free to manage their own labor (the grower did not supervise the picking at all but compensated the workers based on the amount of cucumbers that they harvested), (2) shared the profit or loss from the crop, and (3) agreed in writing that they were not employees.

In rejecting the grower's contentions, the court in *Borello* summarized its conclusion in the introduction of the opinion as follows: "The grower controls the agricultural operations on its premises from planting to sale of the crops. It simply chooses to accomplish one integrated step in the production of one such crop by means of worker incentives rather than direct supervision. It thereby retains all necessary control over a job which can be done only one way. Moreover, so far as the record discloses, the harvesters' work, though seasonal by nature, follows the usual line of an employee. In no practical sense are the 'sharefarmers' entrepreneurs, operating independent businesses for their own accounts; they and their families are obvious members of the broad class to which workers' compensation protection is intended to apply." On this basis, the court concluded the workers were employees entitled to workers' compensation as a matter of law.

In reaching these conclusions, the legal analysis employed by the *Borello* court is of particular significance. The court began by recognizing that "[t]he distinction between independent contractors and employees arose at common law to limit one's vicarious liability for the misconduct of a person rendering service to him", and that it was in this context that "the 'control of details' test became the principal measure of the servant's status for common law purposes". . . . .

Crucially, the court in *Borello* then went on to explain further that "the concept of 'employment' embodied in the [Workers' Compensation Act] *is not inherently limited by common law principles*. We have acknowledged that the Act's definition of the employment relationship must be construed *with particular reference to the 'history and fundamental purposes' of the statute*." The court observed that "[t]he common law and statutory purposes of the distinction between 'employees'

and 'independent contractors' are substantially different", that "[f]ederal courts have long recognized that the distinction between tort policy and social-legislation policy justifies departures from common law principles when claims arise that one is excluded as an independent contractor from a statute protecting 'employees'", and that "[a] number of state courts have agreed that in worker's compensation cases, the employee-independent contractor issue cannot be decided absent consideration of the remedial statutory purpose". The court in *Borello* agreed with this focus on statutory purpose: "[U]nder the Act, the 'control-of-work-details' test for determining whether a person rendering service to another is an 'employee' or an excluded 'independent contractor' *must be applied with deference to the purposes of the protective legislation. The nature of the work, and the overall arrangement between the parties, must be examined to determine whether they come within the 'history and fundamental purposes' of the statute*."

After identifying the various purposes of the Workers' Compensation Act,[10] the court concluded: "The Act intends comprehensive coverage of injuries in employment. It accomplishes this goal by defining 'employment' broadly in terms of 'service to an employer' and by including a general presumption that any person 'in service to another' is a covered 'employee.'" At the same time, the court acknowledged that "[t]he express exclusion of 'independent contractors' [from the workers' compensation act (see §§ 3353, 3357)] is purposeful … and has a limited but important function. It recognizes those situations where the Act's goals are best served by imposing the risk of 'no-fault' work injuries directly on the provider, rather than the recipient, of a compensated service. This is obviously the case, for example, when the provider of service has the primary power over work safety, is best situated to distribute the risk and cost of injury as an expense of his own business, and has independently chosen the burdens and benefits of self-employment." The court concluded: "This is the balance to be struck when deciding whether a worker is an employee or an independent contractor for purposes of the Act."

Although the *Borello* opinion emphasized that resolution of the employee or independent contractor question must properly proceed in a manner that accords deference to the history and fundamental purposes of the remedial statute in question, the court at the same time made clear that it was *not* adopting "detailed new standards for examination of the issue". The court explained in this regard that "the Restatement guidelines heretofore approved in our state remain a useful reference. The standards set forth for contractor's licensees in [Labor Code] section 2750.5 are also a helpful means of identifying the employee/contractor distinction.[11] The relevant considerations may often overlap those pertinent under the common law. . . .

The *Borello* court also took note of "the six-factor test developed by other jurisdictions which determine independent contractorship in light of the remedial purposes of the legislation."[12] . . . .

In sum, the *Borello* court concluded that in determining whether a worker should properly be classified as a covered employee or an excluded independent contractor with deference to the purposes and intended reach of the remedial statute at issue, it is permissible to consider all of the

various factors set forth in prior California cases, in section 2750.5, and in the out-of-state cases adopting the six-factor test.

The *Borello* court then turned to the question whether, applying the appropriate legal analysis, the cucumber harvesters at issue in that case were properly considered employees or independent contractors. The court concluded that "[b]y any applicable test" the farmworkers were employees *as a matter of law*.

. . . . [detailing *Borello*'s analysis omitted]

As this lengthy review of the *Borello* decision demonstrates, although we have sometimes characterized *Borello* as embodying the common law test or standard for distinguishing employees and independent contractors, it appears more precise to describe *Borello* as calling for resolution of the employee or independent contractor question by focusing on the intended scope and purposes of the particular statutory provision or provisions at issue. In other words, *Borello* calls for application of a *statutory purpose* standard that considers the control of details and other potentially relevant factors identified in prior California and out-of-state cases in order to determine which classification (employee or independent contractor) best effectuates the underlying legislative intent and objective of the statutory scheme at issue.

The *Borello* decision repeatedly emphasizes statutory purpose as the touchstone for deciding whether a particular category of workers should be considered employees rather than independent contractors for purposes of social welfare legislation. This emphasis sets apart the *Borello* test for distinguishing employees from independent contractors from the standard embraced in more recent federal cases, which apply a more traditional common law test for distinguishing between employees and independent contractors for purposes of most federal statutes. Early federal cases interpreting a variety of New Deal social welfare enactments relied heavily on a statutory purpose interpretation in determining who should be considered an employee for purposes of those enactments. (See, e.g., *Labor Board v. Hearst Publications*, *supra*, 322 U.S. at pp. 124–129; *United States v. Silk* (1947) 331 U.S. 704, 711–714) However, subsequent congressional legislation in reaction to such decisions has been interpreted to require that federal legislation generally be construed, in the absence of a more specific statutory standard or definition of employment, to embody a more traditional common law test for distinguishing between employees and independent contractors, in which the control of details factor is given considerable weight. (See, e.g., *Nationwide Mut. Ins. Co. v. Darden* (1992) 503 U.S. 318, 324–325 (*Darden*).) Unlike the federal experience, however, in the almost 30 years since the *Borello* decision, the California Legislature has not exhibited or registered any disagreement with either the statutory purpose standard adopted by the *Borello* decision or the application of that standard in *Borello* regarding the proper classification of the workers involved in that case. Instead, in response to the continuing serious problem of worker misclassification as independent contractors, the California Legislature

has acted to impose substantial civil penalties on those that willfully misclassify, or willfully aid in misclassifying, workers as independent contractors. (See §§ 226.8, added by Stats. 2011, ch. 706, § 1, 2753, added by Stats. 2011, ch. 706, § 2.)

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IV.

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A. *Does the Suffer or Permit To Work Definition Apply to the Employee/Independent Contractor Distinction?*

. . . . [T]he suffer or permit language is one of the wage order's alternative definitions of the term "employ." On its face, the standard would appear relevant to a determination whether, for purposes of the wage order, a worker should be considered an individual who is "employ[ed]" by an "employer" (and therefore an employee covered by the wage order) or, instead, an independent contractor who has been hired, but not "employed," by the hiring business (and thus not covered by the wage order).

Moreover, the discussion of the origin and history of the suffer or permit to work language in *Martinez* itself makes it quite clear that this standard was intended to apply beyond the joint employer context. As *Martinez* explains, at the time the suffer or permit language was initially adopted as part of a wage order in 1916, such language "was already in use throughout the country in statutes regulating and prohibiting child labor (and occasionally that of women), having been recommended for that purpose in several model child labor laws published between 1904 and 1912." (*Martinez*, *supra*, 49 Cal.4th at pp. 57–58.)

. . . .

It is true that, when applied literally and without consideration of its history and purposes in the context of California's wage orders, the suffer or permit to work language, standing alone, does not distinguish between, on the one hand, those individual workers who are properly considered employees for purposes of the wage order and, on the other hand, the type of traditional independent contractors described above, like independent plumbers and electricians, who could not reasonably have been intended by the wage order to be treated as employees of the hiring business. As other jurisdictions have recognized, however, that the literal language of the suffer or permit to work standard does not itself resolve the question whether a worker is properly considered a covered employee rather than an excluded independent contractor does not mean that the suffer or permit to work standard has no substantial bearing on the determination whether an individual worker is properly considered an employee or independent contractor for purposes of a wage and hour statute or regulation. (See, e.g., *Rutherford Food Corp. v. McComb* (1947) 331 U.S. 722, 729 (*Rutherford Food*)).

As we explain, for a variety of reasons we agree with these authorities that the suffer or permit to work standard is relevant and significant in assessing the scope of the category of workers that the wage order was intended to protect. The standard is useful in determining who should properly be treated as covered employees, rather than excluded independent contractors, for purposes of the obligations imposed by the wage order.

At the outset, it is important to recognize that over the years and throughout the country, a number of standards or tests have been adopted in legislative enactments, administrative regulations, and court decisions as the means for distinguishing between those workers who should be considered employees and those who should be considered independent contractors.[20] The suffer or permit to work standard was proposed and adopted in 1937 as part of the FLSA, the principal federal wage and hour legislation. One of the authors of the legislation, then-Senator (later United States Supreme Court Justice) Hugo L. Black, described this standard as "the broadest definition" that has been devised for extending the coverage of a statute or regulation to the widest class of workers that reasonably fall within the reach of a social welfare statute. More recent cases, in referring to the suffer or permit to work standard, continue to describe the standard in just such broad, inclusive terms. (See, e.g., *Darden*, *supra*, 503 U.S. at p. 326 [noting the "striking breadth" of the suffer or permit to work standard]).

The adoption of the exceptionally broad suffer or permit to work standard in California wage orders finds its justification in the fundamental purposes and necessity of the minimum wage and maximum hour legislation in which the standard has traditionally been embodied. Wage and hour statutes and wage orders were adopted in recognition of the fact that individual workers generally possess less bargaining power than a hiring business and that workers' fundamental need to earn income for their families' survival may lead them to accept work for substandard wages or working conditions. The basic objective of wage and hour legislation and wage orders is to ensure that such workers are provided at least the minimal wages and working conditions that are necessary to enable them to obtain a subsistence standard of living and to protect the workers' health and welfare. (See, e.g., *Rosenwasser*, *supra*, 323 U.S. at p. 361 [wage and hour laws are intended to protect workers against "'the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health'"]; *Industrial Welfare Com.*, *supra*, 27 Cal.3d at p. 700 [purpose of California wage orders is "to protect the health and welfare" of workers].) These critically important objectives support a very broad definition of the workers who fall within the reach of the wage orders.

These fundamental obligations of the IWC's wage orders are, of course, primarily for the benefit of the workers themselves, intended to enable them to provide at least minimally for themselves and their families and to accord them a modicum of dignity and self-respect. At the same time, California's *industry-wide* wage orders are also clearly intended for the benefit of those law-abiding businesses that comply with the obligations imposed by the wage orders, ensuring that

such responsible companies are not hurt by unfair competition from competitor businesses that utilize substandard employment practices. (See § 90.5, subd. (a);[21] accord, *Citicorp Industrial Credit, Inc. v. Brock* (1987) 483 U.S. 27, 36 ["While improving working conditions was undoubtedly *one* of Congress' concerns, it was certainly not the *only* aim of the FLSA. In addition to the goal [of establishing decent wages], the Act's declaration of policy … reflects Congress' desire to eliminate the competitive advantage enjoyed by goods produced under substandard conditions"]; *Roland Co. v. Walling* (1946) 326 U.S. 657, 669–670 ["[The FLSA] seeks to eliminate substandard labor conditions … on a wide scale throughout the nation. The purpose is to raise living standards. This purpose will fail of realization unless the Act has sufficiently broad coverage to eliminate in large measure … the competitive advantage accruing from savings in costs based upon substandard labor conditions. Otherwise the Act will be ineffective, and will penalize those who practice fair labor standards as against those who do not"].) Finally, the minimum employment standards imposed by wage orders are also for the benefit of the public at large, because if the wage orders' obligations are not fulfilled the public will often be left to assume responsibility for the ill effects to workers and their families resulting from substandard wages or unhealthy and unsafe working conditions.

Given the intended expansive reach of the suffer or permit to work standard as reflected by its history, along with the more general principle that wage orders are the type of remedial legislation that must be liberally construed in a manner that serves its remedial purposes (see, e.g., *Industrial Welfare Com.*, *supra*, 27 Cal.3d at p. 702), as our decision in *Martinez* recognized, the suffer or permit to work standard must be interpreted and applied broadly to include within the covered "employee" category *all* individual workers who can reasonably be viewed as "*working in* [*the hiring entity's*] *business*" (*Martinez, supra*, 49 Cal.4th at p. 69, italics added; see *ibid.* ["A proprietor who knows that persons are *working in his or her business* without having been formally hired, or while being paid less than the minimum wage, clearly suffers or permits that work by failing to prevent it, while having the power to do so" (italics added)]). Under the suffer or permit to work standard, an individual worker who has been hired by a company can properly be viewed as the type of independent contractor to which the wage order was not intended to apply only if the worker is the type of traditional independent contractor—such as an independent plumber or electrician—who would *not* reasonably have been viewed as working *in the hiring business*. Such an individual would have been realistically understood, instead, as *working only in his or her own independent business*. (See, e.g., *Allen v. Hayward* (Q.B. 1845) 115 Eng.Rep. 749, 755 [describing independent contractor as "a person carrying on an independent business … to perform works which [the hiring local officials] could not execute for themselves, and who was known to all the world as performing them"]).

The federal courts, in applying the suffer or permit to work standard set forth in the FLSA, have recognized that the standard was intended to be broader and more inclusive than the preexisting common law test for distinguishing employees from independent contractors, but at the same time, does not purport to render every individual worker an employee rather than an independent

contractor. [T]he federal courts have developed what is generally described as the "economic reality" test for determining whether a worker should be considered an employee or independent contractor for purposes of the FLSA—namely, whether, as a matter of economic reality, the worker is economically dependent upon and makes a living in another's business (in which case he or she is considered to be a covered employee) or, instead is in business for himself or herself (and may properly be considered an excluded independent contractor). (See, e.g., *Whitaker House Coop*, *supra*, 366 U.S. 28, 33; *Alamo Foundation*, *supra*, 471 U.S. 290, 301.) In applying the economic reality test, federal courts have looked to a list of factors that is briefer than, but somewhat comparable to, the list of factors considered in the pre-*Borello* California decisions and in *Borello* itself. Furthermore, like *Borello*, federal FLSA decisions applying the economic reality standard have held that no one factor is determinative and that the ultimate decision whether a worker is to be found to be an employee or independent contractor for purposes of the FLSA should be based on all the circumstances.

A multifactor standard—like the economic reality standard or the *Borello* standard—that calls for consideration of all potentially relevant factual distinctions in different employment arrangements on a case-by-case, totality-of-the-circumstances basis has its advantages. A number of state courts, administrative agencies and academic commentators have observed, however, that such a wide-ranging and flexible test for evaluating whether a worker should be considered an employee or an independent contractor has significant disadvantages, particularly when applied in the wage and hour context.

First, these jurisdictions and commentators have pointed out that a multifactor, "all the circumstances" standard makes it difficult for both hiring businesses and workers to determine in advance how a particular category of workers will be classified, frequently leaving the ultimate employee or independent contractor determination to a subsequent and often considerably delayed judicial decision. In practice, the lack of an easily and consistently applied standard often leaves both businesses and workers in the dark with respect to basic questions relating to wages and working conditions that arise regularly, on a day-to-day basis.

Second, commentators have also pointed out that the use of a multifactor, all the circumstances standard affords a hiring business greater opportunity to evade its fundamental responsibilities under a wage and hour law by dividing its workforce into disparate categories and varying the working conditions of individual workers within such categories with an eye to the many circumstances that may be relevant under the multifactor standard.

As already noted, a number of jurisdictions have adopted a simpler, more structured test for distinguishing between employees and independent contractors—the so-called "ABC" test—that minimizes these disadvantages. The ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring

business demonstrates that the worker in question satisfies *each* of three conditions: (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (b) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.[23]

Unlike a number of our sister states that included the suffer or permit to work standard in their wage and hour laws or regulations *after* the FLSA had been enacted and had been interpreted to incorporate the economic reality test, California's adoption of the suffer or permit to work standard predated the enactment of the FLSA. Thus, as a matter of legislative intent, the IWC's adoption of the suffer or permit to work standard in California wage orders was not intended to embrace the federal economic reality test. Furthermore, prior California cases have declined to interpret California wage orders as governed by the federal economic reality standard and instead have indicated that the California wage orders are intended to provide broader protection than that accorded workers under the federal standard.

We find merit in the concerns noted above regarding the disadvantages, particularly in the wage and hour context, inherent in relying upon a multifactor, all the circumstances standard for distinguishing between employees and independent contractors. As a consequence, we conclude it is appropriate, and most consistent with the history and purpose of the suffer or permit to work standard in California's wage orders, to interpret that standard as: (1) placing the burden on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the wage order's coverage;[24] and (2) requiring the hiring entity, in order to meet this burden, to establish *each* of the three factors embodied in the ABC test—namely (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.[25]

We briefly discuss each part of the ABC test and its relationship to the suffer or permit to work definition.

1. *Part A: Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact?*

First, as our decision in *Martinez* makes clear, the suffer or permit to work definition was intended to be broader and more inclusive than the common law test, under which a worker's freedom from the control of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact, was the principal factor in establishing that a worker was an independent contractor rather than an employee. Accordingly, because a worker who is subject,

either as a matter of contractual right or in actual practice, to the type and degree of control a business typically exercises over employees would be considered an employee under the common law test, such a worker would, a fortiori, also properly be treated as an employee for purposes of the suffer or permit to work standard. Further, as under *Borello*, depending on the nature of the work and overall arrangement between the parties, a business need not control the precise manner or details of the work in order to be found to have maintained the necessary control that an employer ordinarily possesses over its employees, but does not possess over a genuine independent contractor. The hiring entity must establish that the worker is free of such control to satisfy part A of the test.

2. *Part B: Does the worker perform work that is outside the usual course of the hiring entity's business?*

Second, independent of the question of control, the child labor antecedents of the suffer or permit to work language demonstrate that one principal objective of the suffer or permit to work standard is to bring within the "employee" category *all* individuals who can reasonably be viewed as working "*in* [*the hiring entity's*] *business*" (*Martinez*, *supra*, 49 Cal.4th at p. 69), that is, all individuals who are reasonably viewed as providing services to the business in a role comparable to that of an employee, rather than in a role comparable to that of a traditional independent contractor. Workers whose roles are most clearly comparable to those of employees include individuals whose services are provided within the usual course of the business of the entity for which the work is performed and thus who would ordinarily be viewed by others as working in the hiring entity's business and not as working, instead, in the worker's own independent business.

Thus, on the one hand, when a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee. On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company, or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes, the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees. In the latter settings, the workers' role within the hiring entity's usual business operations is more like that of an employee than that of an independent contractor.

Treating all workers whose services are provided within the usual course of the hiring entity's business as employees is important to ensure that those workers who need and want the fundamental protections afforded by the wage order do not lose those protections. If the wage

order's obligations could be avoided for workers who provide services in a role comparable to employees but who are willing to forgo the wage order's protections, other workers who provide similar services and are intended to be protected under the suffer or permit to work standard would frequently find themselves displaced by those willing to decline such coverage. As the United States Supreme Court explained in a somewhat analogous context in *Alamo Foundation*, *supra*, 471 U.S. at page 302, with respect to the federal wage and hour law: "[T]he purposes of the [FLSA] require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act. Such exceptions to coverage would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses." (*Ibid.*)

3. *Part C: Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity?*

Third, as the situations that gave rise to the suffer or permit to work language disclose, the suffer or permit to work standard, by expansively defining who is an employer, is intended to preclude a business from evading the prohibitions or responsibilities embodied in the relevant wage orders directly or indirectly—through indifference, negligence, intentional subterfuge, or misclassification. It is well established, under all of the varied standards that have been utilized for distinguishing employees and independent contractors, that a business cannot unilaterally determine a worker's status simply by assigning the worker the label "independent contractor" or by requiring the worker, as a condition of hiring, to enter into a contract that designates the worker an independent contractor. This restriction on a hiring business's unilateral authority has particular force and effect under the wage orders' broad suffer or permit to work standard.

As a matter of common usage, the term "independent contractor," when applied to an individual worker, ordinarily has been understood to refer to an individual who *independently* has made the decision to go into business for himself or herself. Such an individual generally takes the usual steps to establish and promote his or her independent business—for example, through incorporation, licensure, advertisements, routine offerings to provide the services of the independent business to the public or to a number of potential customers, and the like. When a worker has not independently decided to engage in an independently established business but instead is simply designated an independent contractor by the unilateral action of a hiring entity, there is a substantial risk that the hiring business is attempting to evade the demands of an applicable wage order through misclassification.

A company that labels as independent contractors a class of workers who are not engaged in an independently established business in order to enable the company to obtain the economic advantages that flow from avoiding the financial obligations that a wage order imposes on employers unquestionably violates the fundamental purposes of the wage order. The fact that a

company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself or herself.

Accordingly, in order to satisfy part C of the ABC test, the hiring entity must prove that the worker is customarily engaged in an independently established trade, occupation, or business.

It bears emphasis that in order to establish that a worker is an independent contractor under the ABC standard, the hiring entity is required to establish the existence of each of the three parts of the ABC standard. Furthermore, inasmuch as a hiring entity's failure to satisfy any one of the three parts itself establishes that the worker should be treated as an employee for purposes of the wage order, a court is free to consider the separate parts of the ABC standard in whatever order it chooses. Because in many cases it may be easier and clearer for a court to determine whether or not part B or part C of the ABC standard has been satisfied than for the court to resolve questions regarding the nature or degree of a worker's freedom from the hiring entity's control for purposes of part A of the standard, the significant advantages of the ABC standard—in terms of increased clarity and consistency—will often be best served by first considering one or both of the latter two parts of the standard in resolving the employee or independent contractor question.

4. *Conclusion regarding suffer or permit to work definition*

In sum, we conclude that unless the hiring entity establishes (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact, (B) that the worker performs work that is outside the usual course of the hiring entity's business, and (C) that the worker is customarily engaged in an independently established trade, occupation, or business, the worker should be considered an employee and the hiring business an employer under the suffer or permit to work standard in wage orders. The hiring entity's failure to prove any one of these three prerequisites will be sufficient in itself to establish that the worker is an included employee, rather than an excluded independent contractor, for purposes of the wage order.

In our view, this interpretation of the suffer or permit to work standard is faithful to its history and to the fundamental purpose of the wage orders and will provide greater clarity and consistency, and less opportunity for manipulation, than a test or standard that invariably requires the consideration and weighing of a significant number of disparate factors on a case-by-case basis.

B. *Application of the Suffer or Permit To Work Standard in This Case*

We now turn to application of the suffer or permit to work standard in this case. As Dynamex points out, the trial court, in applying the suffer or permit to work definition in its class certification order, appears to have adopted a literal interpretation of the suffer or permit to work language that,

if applied generally, could potentially encompass the type of traditional independent contractor—like an independent plumber or electrician—who could not reasonably have been viewed as the hiring business's employee. We agree with Dynamex that the trial court's view of the suffer or permit to work standard was too broad. For the reasons discussed below, however, we nonetheless conclude, for two independently sufficient reasons, that under a proper interpretation of the suffer or permit to work standard, the trial court's ultimate determination that there is a sufficient commonality of interest to support certification of the proposed class is correct and should be upheld.

First, with respect to part B of the ABC test, it is quite clear that there is a sufficient commonality of interest with regard to the question whether the work provided by the delivery drivers within the certified class is outside the usual course of the hiring entity's business to permit plaintiffs' claim of misclassification to be resolved on a class basis. In the present case, Dynamex's entire business is that of a delivery service. Unlike other types of businesses in which the delivery of a product may or may not be viewed as within the usual course of the hiring company's business, here the hiring entity is a delivery company and the question whether the work performed by the delivery drivers within the certified class is outside the usual course of its business is clearly amenable to determination on a class basis. As a general matter, Dynamex obtains the customers for its deliveries, sets the rate that the customers will be charged, notifies the drivers where to pick up and deliver the packages, tracks the packages, and requires the drivers to utilize its tracking and recordkeeping system. As such, there is a sufficient commonality of interest regarding whether the work performed by the certified class of drivers who pick up and deliver packages and documents from and to Dynamex customers on an ongoing basis is outside the usual course of Dynamex's business to permit that question to be resolved on a class basis.

Because each part of the ABC test may be independently determinative of the employee or independent contractor question, our conclusion that there is a sufficient commonality of interest under part B of the ABC test is sufficient in itself to support the trial court's class certification order. Nonetheless, for guidance we go on to discuss whether there is a sufficient commonality of interest under part C of the ABC test to support class treatment of the relevant question under that part of the ABC test as well.

Second, with regard to part C of the ABC test, it is equally clear from the record that there is a sufficient commonality of interest as to whether the drivers in the certified class are customarily engaged in an independently established trade, occupation, or business to permit resolution of that issue on a class basis As discussed above, prior to 2004 Dynamex classified the drivers who picked up and delivered the packages and documents from Dynamex customers as employees rather than independent contractors. In 2004, Dynamex adopted a new business structure under which it required all of its drivers to enter into a contractual agreement that specified the driver's status as an independent contractor. Here the class of drivers certified by the trial court is limited to drivers who, during the relevant time periods, performed delivery services only for Dynamex. The class excludes drivers who performed delivery services for another delivery service or for the driver's

own personal customers; the class also excludes drivers who had employees of their own. With respect to the class of included drivers, there is no indication in the record that there is a lack of commonality of interest regarding the question whether these drivers are customarily engaged in an independently established trade, occupation, or business. For this class of drivers, the pertinent question under part C of the ABC test is amenable to resolution on a class basis.

For the foregoing reasons, we conclude that under a proper understanding of the suffer or permit to work standard there is, as a matter of law, a sufficient commonality of interest within the certified class to permit the question whether such drivers are employees or independent contractors for purposes of the wage order to be litigated on a class basis. Accordingly, we conclude that with respect to the causes of action that are based on alleged violations of the obligations imposed by the wage order, the trial court did not abuse its discretion in certifying the class and in denying Dynamex's motion to decertify the class.

V. CONCLUSION

For the reasons discussed above, the judgment of the Court of Appeal is affirmed.

[1] See United States Department of Labor, Dunlop Commission on the Future of Worker-Management Relations, Final Report (1994) page 64 ("The single most important factor in determining which workers are covered by employment and labor statutes is the way the line is drawn between employees and independent contractors") <https://digitalcommons.ilr.cornell.edu/key_workplace/2/> (as of Apr. 30, 2018).

[6] Although several drivers indicated in depositions that they did not wear Dynamex shirts when making deliveries for Dynamex, it is undisputed that Dynamex retains the authority to require drivers to wear such shirts by agreeing to such a condition with the customer to whom a pickup or delivery is to be made.

[8] The order contains extensive provisions setting forth the requirements that apply "in determining whether an employee's duties meet the test to qualify for an exemption" under the executive, administrative, or professional category. (Cal. Code Regs., tit. 8, § 11090, subd. 1(A)(1)–(3).) The professional category includes persons who are licensed and primarily engaged in the practice of law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting, or another learned or artistic profession. (*Id.*, § 11090, subd. 1(A)(3)(a)–(g).)

The wage order also specifically exempts from its provisions, in whole or in part, (1) employees directly employed by the state or any political subdivision, (2) outside salespersons, (3) any person who is the parent, spouse, or child of the employer, (4) employees who have entered into a collective bargaining agreement under the federal Railway Labor Act (45 U.S.C. § 151 et seq.),

and (5) any individual participating in a national service program such as AmeriCorps. (Cal. Code Regs., tit. 8, § 11090, subd. 1(B)–(F).)

[9] The definitions of "employ," "employee," and "employer" that appear in subdivision 2 of the transportation industry wage order are also included in the definitions set forth in each of the other 15 wage orders governing other industries in California, although several of the other industry wage orders include additional definitions of the term "employee." (See Cal. Code Regs., tit. 8, §§ 11010, subd. 2(D)–(F) [manufacturing industry], 11020, subd. 2(D)–(F) [personal service industry], 11030, subd. 2(E)–(G) [canning, freezing, and preserving industry], 11040, subd. 2(E)–(H) [professional, technical, clerical, mechanical, and similar occupations], 11050, subd. 2(E)–(H) [public housekeeping industry], 11060, subd. 2(D)–(F) [laundry, linen supply, dry cleaning, and dyeing industry], 11070, subd. 2(D)–(F) [mercantile industry], 11080, subd. 2(D)–(F) [industries handling products after harvest], 11100, subd. 2(E)–(G) [amusement and recreation industry], 11110, subd. 2(E)–(G) [broadcasting industry], 11120, subd. 2(D)–(F) [motion picture industry], 11130, subd. 2(D)–(F) [industries preparing agricultural products for market, on the farm], 11140, subd. 2(C)–(G) [agricultural occupations], 11150, subd. 2(E)–(G) [household occupations], 11160, subd. 2(G)–(I) [onsite occupations].)

[10] The court stated in this regard that the Workers' Compensation Act "seeks (1) to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society, (2) to guarantee prompt, limited compensation for an employee's work injuries, regardless of fault, as an inevitable cost of production, (3) to spur increased industrial safety, and (4) in return, to insulate the employer from tort liability for his employees' injuries." (*Borello*, *supra*, 48 Cal.3d at p. 354.)

[11] Section 2750.5, which addresses the employee or independent contractor question in the context of workers who perform services for which a contractor's license is required, provides: "There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license[,] is an employee rather than an independent contractor. Proof of independent contractor status includes satisfactory proof of these factors:

"(a) That the individual has the right to control and discretion as to the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor bargained for.

"(b) That the individual is customarily engaged in an independently established business.

"(c) That the individual's independent contractor status is bona fide and not a subterfuge to avoid employee status. A bona fide independent contractor status is further evidenced by the presence of cumulative factors such as substantial investment other than personal services in the business, holding out to be in business for oneself, bargaining for a contract to complete a specific project for compensation by project rather than by time, control over the time and place the work is performed, supplying the tools or instrumentalities used in the work other than tools and instrumentalities normally and customarily provided by employees, hiring employees, performing

work that is not ordinarily in the course of the principal's work, performing work that requires a particular skill, holding a license pursuant to the Business and Professions Code, the intent by the parties that the work relationship is of an independent contractor status, or that the relationship is not severable or terminable at will by the principal but gives rise to an action for breach of contract.

"In addition to the factors contained in subdivisions (a), (b), and (c), any person performing any function or activity for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code shall hold a valid contractors' license as a condition of having independent contractor status.

"For purposes of workers' compensation law, this presumption is a supplement to the existing statutory definitions of employee and independent contractor, and is not intended to lessen the coverage of employees under Division 4 and Division 5."

[12] In addition to the control of details factor, the other five factors included in the six-factor test are: "(1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business." (*Borello*, *supra*, 48 Cal.3d at pp. 354–355.)

[20] The various standards are frequently described as falling within three broad categories. (See, e.g., Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities* (2017) 105 Cal. L.Rev. 65, 72.)

The first category is commonly characterized as embodying the common law standard, because the standards within this category give significant weight to evidence of the hirer's right to control the details of the work, which had its origin in the common law tort and respondeat superior context. These standards supplement the control of details factor with a variety of additional circumstances, often described as secondary factors. The United States Supreme Court's decision in *Darden*, *supra*, 503 U.S. 318, in holding that this standard applies in interpreting the meaning of the term "employee" in federal statutes that do not otherwise provide a meaningful definition of that term, lists 12 secondary factors to be considered in addition to the right to control factor. (503 U.S. at p. 323, quoting *Community for Creative Non-Violence v. Reid* (1989) 490 U.S. 730, 751–752 [104 L. Ed. 2d 811, 109 S. Ct. 2166].) The IRS has adopted a variation of this standard which lists 20 secondary factors (IRS, Revenue Ruling 87-41, 1987-1 C.B. 296, 298–299); the state of Kansas also has adopted a variation which lists 20 secondary factors, some but not all of which are similar to those applied in other jurisdictions. (See, e.g., *Craig v. FedEx Ground Package System* (2014) 300 Kan. 788 [335 P.3d 66, 75–76].) Although this court's decision in *Borello, supra*, 48 Cal.3d 341, has sometimes been described as adopting the common law standard, as discussed above (*ante*, pp. 929–935), in *Borello* we explained that under California law the control factor is not as concerned with the hiring entity's control over the details of a worker's work as it is with determining whether the hiring entity has retained "*necessary* control"

over the work (*id.* at p. 357), and *Borello* further made clear that consideration of all of the relevant factors is directed at determining whether treatment of the worker as an employee or an independent contractor would best effectuate the purpose of the statute at issue (*id.* at pp. 356–359).

The second category is the "economic reality" (or "economic realities") standard that has been adopted in federal decisions as the standard applicable in cases arising under the FLSA. (See, e.g., *Goldberg v. Whitaker House Coop* (1961) 366 U.S. 28, 33 (*Whitaker House Coop*); *Tony & Susan Alamo Foundation v. Sec'y of Labor* (1985) 471 U.S. 290, 301 (*Alamo Foundation*).) These cases interpret the "suffer or permit to work" definition of "employ" in the FLSA (29 U.S.C. § 203(g)) as intended to treat as employees those workers who, as a matter of economic reality, are economically dependent upon the hiring business, rather than realistically being in business for themselves. In making this determination, lower federal court decisions generally refer to a list of factors, many that are considered under the common law standards, including "'(1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business.'" (*Zheng v. Liberty Apparel Co.* (2d Cir. 2003) 355 F.3d 61, 67; see *Superior Care, supra*, 840 F.2d at pp. 1058–1059; see generally Annot., Determination of "Independent Contractor" and "Employee" Status for Purposes of § 3(e)(1) of the Fair Labor Standards Act (29 USCS § 203(e)(1)) (1981) 51 A.L.R.Fed. 702 (Annotation).)

The third category of standards is described as embodying the "ABC standard." This standard, whose objective is to create a simpler, clearer test for determining whether the worker is an employee or an independent contractor, presumes a worker hired by an entity is an employee and places the burden on the hirer to establish that the worker is an independent contractor. Under the ABC standard, the worker is an employee unless the hiring entity establishes *each* of three designated factors: (a) that the worker is free from control and direction over performance of the work, both under the contract and in fact; (b) that the work provided is outside the usual course of the business for which the work is performed; *and* (c) that the worker is customarily engaged in an independently established trade, occupation or business (hence the ABC standard). If the hirer fails to show that the worker satisfies each of the three criteria, the worker is treated as an employee, not an independent contractor. (See generally Deknatel & Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes* (2015) 18 U.Pa. J.L. & Soc. Change 53).

In addition to these three categories, the recent Restatement of Employment Law, adopted by the American Law Institute in 2015, sets forth a standard which focuses, in addition to the control of details factor, on the entrepreneurial opportunity that the worker is afforded. (See Rest., Employment, § 1.01, subds. (a), (b); see also *FedEx Home Delivery v. NLRB* (D.C. Cir. 2009) 563 F.3d 492, 497.)

[21] Section 90.5, subdivision (a) provides: "It is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under

substandard unlawful conditions or for employers that have not secured the payment of compensation, and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards."

[23] The wording of the ABC test varies in some respects from jurisdiction to jurisdiction. (See *ABC on the Books*, *supra*, 18 U.Pa. J.L. & Soc. Change at pp. 67–71.) The version we have set forth in text (and which we adopt hereafter (*post*, pp. 956–7964)) tracks the Massachusetts version of the ABC test. (See Mass. Gen. Laws ch. 149, § 148B; see also Del. Code Ann. tit. 19, §§ 3501(a)(7), 3503(c).) Unlike some other versions, which provide that a hiring entity may satisfy part B by establishing *either* (1) that the work provided is outside the usual course of the business for which the work is performed, *or* (2) that the work performed is outside all the places of business of the hiring entity (see, e.g., N.J. Stat. Ann. § 43:21-19(i)(6)(A)–(C)), the Massachusetts version permits the hiring entity to satisfy part B only if it establishes that the work is outside the usual course of the business of the hiring entity. In light of contemporary work practices, in which many employees telecommute or work from their homes, we conclude the Massachusetts version of part B provides the alternative that is more consistent with the intended broad reach of the suffer or permit to work definition in California wage orders.

Many jurisdictions that have adopted the ABC test use the standard only in the unemployment insurance context, but other jurisdictions use the ABC test more generally in determining the employee or independent contractor question with respect to a variety of employee-protective labor statutes. (See, e.g., Mass. Gen. Laws ch. 149, § 148B; Del. Code Ann. tit. 19, §§ 3501(a)(7), 3503(c); *Hargrove*, *supra*, 106 A.3d at pp. 462–465; see generally *ABC on the Books*, *supra*, 18 U.Pa. J.L. & Soc. Change at pp. 65–72 [discussing numerous state statutes and judicial decisions].)

[24] Even in the workers' compensation context in which the applicable California statutes contain a definition of "employee" that is less expansive than that provided by the suffer or permit to work standard (see §§ 3351, 3353), the accompanying statutes establish that "[a hiring business] seeking to avoid liability has the burden of proving that persons whose services [the business] has retained are independent contractors rather than employees" (*Borello*, *supra*, 48 Cal.3d at p. 349, citing §§ 3357, 5705, subd. (a)). Moreover, the rule that a hiring entity has the burden of establishing that a worker is an independent contractor rather than an employee has long been applied in California decisions outside the workers' compensation context. (See, e.g., *Robinson v. George* (1940) 16 Cal.2d 238, 242; *Linton v. DeSoto Cab Co., Inc.* (2017) 15 Cal.App.5th 1208, 1220–1221.) Accordingly, the expansive suffer or permit to work standard is reasonably interpreted as placing the burden on a hiring business to prove that a worker the business has retained is not an employee who is covered by an applicable wage order but rather an independent contractor to whom the wage order was not intended to apply.

[25] In *Hargrove*, *supra*, 106 A.3d 449, the New Jersey Supreme Court was faced with the question of the proper standard to be applied in determining whether a worker should be considered a covered employee or an excluded independent contractor for purposes of two distinct New Jersey

labor statutes, the New Jersey wage payment law and the New Jersey wage and hour law. Both statutes defined the term “employ” or “employee” to include “to suffer or to permit to work” (see N.J. Stat. Ann. §§ 34:11-4.1.b, 34:11-56a1(f)), and the New Jersey Department of Labor, in applying the wage and hour law, had utilized the ABC standard—a standard incorporated in the New Jersey Unemployment Compensation Act (N.J. Stat. Ann. § 43:21-19(i)(6)(A)–(C))—in determining whether a worker was an employee or independent contractor for purposes of the wage and hour law. (See N.J. Admin. Code § 12:56-16.1.) In *Hargrove*, the New Jersey Supreme Court concluded that “any employment'status dispute arising under [either the New Jersey wage payment law or the New Jersey wage and hour law] should be resolved by utilizing the ‘ABC’ test … .” (106 A.3d at p. 463.)

In reaching this conclusion, the court in *Hargrove* recognized that both of the New Jersey statutes in question “use the term ‘suffer or permit’ to define those who are within the protection of each statute” and that such language had been interpreted in federal decisions to support the “‘economic realities’” standard. (*Hargrove*, *supra*, 106 A.3d at p. 463.) Nonetheless, the court in *Hargrove*, in finding that application of the ABC test was appropriate, relied in part on the fact that “the ‘ABC’ test operates to provide more predictability and may cast a wider net than the FLSA ‘economic realities’ standard” and that “[by] requiring each identified factor to be satisfied to permit classification as an independent contractor, the ‘ABC’ test fosters the provision of greater income security for workers, which is the express purpose of both [statutes].” (*Hargrove*, *supra*, 106 A.3d at p. 464.)

1.2.3.1. Timeline

First filed: April 15, 2005 Plaintiff filed lawsuit of his and coworkers behalf

Date	Case Name	Decision	Notes
April 15, 2005	*Lee v. Dynamex, Inc.* Los Angeles County Superior Court	Plaintiff filed putative class action lawsuit on his and his coworkers behalf	Alleged improper reclassification of drivers from employees to independent contractors in violation of CA law
December 12, 2006	*Lee v. Dynamex, Inc.* Trial Court	Denied Plaintiff’s (Lee) motion to certify a class and earlier had denied Lee’s first motion to compel discovery	This ruling conflicts with subsequent Supreme Court and Appeals Court decisions

January 23, 2007	*Lee v. Dynamex, Inc.* Court of Appeal of California, Second District	Plaintiff filed appeal from order denying class certification	Contends that earlier motion to compel discovery that was denied prevented him from gathering adequate information to support class certification motion
August 26, 2008	*Lee v. Dynamex, Inc.* Court of Appeal of California, Second District (2008)	Orders of trial court denying Lee's motion to compel and motion for class certification are reversed. Cause is remanded with directions to the trial court.	Gave directions to trial court to compel the company to provide the requested discovery and then permit the parties to submit additional materials prior to holding a new class certification hearing • Link
May 11, 2011	*Lee v. Dynamex, Inc.* Trial Court (2011)	Granted plaintiff's motion for class certification	Validity of the order is at question in *Dynamex Operations West, Inc. v. Superior Court*
December 2012	*Lee v. Dynamex, Inc.* Trial Court (2012)	Dynamex renewed motion to decertify the class action that the trial court certified in 2011. Trial court denied the renewed motion.	
June 24, 2013	*Lee v. Dynamex, Inc.* Court of Appeal (2013)	Dynamex filed petition for writ of mandate in the Court of Appeal.	Challenging trial court's denial of motion to decertify the class

October 15, 2014	*Dynamex Operations W., Inc. v. Superior Court* Court of Appeal of California, Second Appellate District, Division Seven (2014)	Denied petition in part, and granted petition in part to permit trial court to reevaluate its class certification order.	With respect to claims outside of the scope of the applicable wage order, the *Borello* standard should be applied. • Link
December 21, 2016	*Dynamex Operations W., Inc. v. Superior Court* Supreme Court of California (2016)	Parties to file supplemental briefs.	• Link
April 30, 2018	*Dynamex Operations W., Inc. v. Superior Court* Supreme Court of California (2018)	Judgment of the Court of Appeal is affirmed.	Trial court class certification order at issue should be upheld. Using the suffer or permit to work standard. • Link

1.2.4. Cal. Lab. Code § 2775 Employee versus independent contractor
(link)

(a) As used in this article:

(1) "Dynamex" means Dynamex Operations W. Inc. v. Superior Court (2018) 4 Cal.5th 903.

(2) "Borello" means the California Supreme Court's decision in S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341.

(b)

(1) For purposes of this code and the Unemployment Insurance Code, and for the purposes of wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:

(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(B) The person performs work that is outside the usual course of the hiring entity's business.
(C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

(2) Notwithstanding paragraph (1), any exceptions to the terms "employee," "employer," "employ," or "independent contractor," and any extensions of employer status or liability, that are expressly made by a provision of this code, the Unemployment Insurance Code, or in an applicable order of the Industrial Welfare Commission, including, but not limited to, the definition of "employee" in subdivision 2(E) of Wage Order No. 2, shall remain in effect for the purposes set forth therein.

(3) If a court of law rules that the three-part test in paragraph (1) cannot be applied to a particular context based on grounds other than an express exception to employment status as provided under paragraph (2), then the determination of employee or independent contractor status in that context shall instead be governed by the California Supreme Court's decision in S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341 (Borello).

1.2.5. Proposition 22 - Protecting App-Based Drivers in California Ballot Measure

(link)

ARTICLE 2. App-Based Driver Independence.

7451. Protecting Independence.

Notwithstanding any other provision of law, including but not limited to the Labor Code, the Unemployment Insurance Code, and any orders, regulations, or opinions of the Department of Industrial Relations or any board, division, or commission within the Department of Industrial Relations, an app-based driver is an independent contractor and not an employee or agent with respect to his or her relationship with a network company if the following conditions are met:

(a) The network company does not unilaterally prescribe specific dates, times of day, or a minimum number of hours during which the app-based driver must be logged into the network company's online-enabled application or platform.

(b) The network company does not require the app-based driver to accept any specific rideshare service or delivery service request as a condition of maintaining access to the network company's online-enabled application or platform.

(c) The network company does not restrict the app-based driver from performing rideshare services or delivery services through other network companies except during engaged time.

(d) The network company does not restrict the app-based driver from working in any other lawful occupation or business.

2. Employment At Will

2.1. Restatement of Employment Law § 2.01

(link)

§ 2.01. Default Rule of an At-Will Employment Relationship

Either Party may terminate an employment relationship with or without cause unless the right to do so is limited by a statute, other law or public policy, or an agreement between the parties, a binding employment promise, or a binding employer policy statement….

….

b. Rebuttable presumption of at-will employment. At its core, employment is a contractual relationship. The law of contracts rests on a series of default rules that provide starting points for bargaining between the parties. These default rules control in the event neither the parties' agreement nor the applicable law prescribe different rules. The high courts in 49 states and the District of Columbia recognize as the defaulty rule the principle that employment is presumptively an at-will relationship (The sole exception is Montana, which by statute requires "good cause" for an employer's termination….).

….

d. Statutory Provision. The at-will default rule serves to guide courts in evaluating the rights and obligations of the parties under their agreement; it does not supersede controlling legislation or other law. Virtually all legislation regulating the employment relationship restricts to some extent the kinds of adverse employment decisions employers may make. Many statutes, for example, bar employers from taking adverse employment actions against employees because the employees exercise a right under those laws by filing a claim or participating in investigatory and enforcement proceedings authorized by the law. ….

2.1.1. What is a default rule?

Excerpts From Lawrence Solum, Legal Theory Lexicon: Default Rules and Completeness, Legal Theory Blog (Sep. 30, 2012):

At some point in the introductory class in contract law, students are likely to encounter a very powerful idea--the distinction between "default rules" and "mandatory rules." The basic distinction is easy to grasp. Some rules of contract law supply default terms that are subject to contractual override; other rules of contract law are mandatory--they can't be modified by the

contract… Once you understand the distinction between default rules and mandatory rules, additional questions arise: as a matter of normative contract theory, which rules should be default rules and which rules should be mandatory? And what normative principles should guide the design of default rules?

…

Let's start with the "takeaway" point. In contract law, we can sort the rules into two sorts, "default rules" and "mandatory rules."

Here's an example. The Uniform Commercial Code (or UCC, the codified law of contract that applies to contracts between businesses as a matter of state law in the United States) creates a duty to act in good faith--this is a mandatory rule, because this duty cannot be disclaimed by a contractual provision. The UCC also includes an implied "warranty of merchantability," that attaches to contracts, but can be waived by agreement--this is a default rule.

Grasping this distinction is important for at least two reasons. First, unless you know whether a given rule of contract law is a default rule or a mandatory rule, you don't really know the law. And it isn't always clear whether a given rule is one or the other: the usual tipoff is language like, "unless the contract provides otherwise" or "absent an agreement to the contrary." Second, the distinction between default rules and mandatory rules is fundamental to the normative structure of contract law. Learning contract is more than a matter of mastering the rules; mastering the arguments of principle and policy that can be used to argue for and against the rules is equally important. But the arguments for default rules and the arguments for mandatory rules must be different--because these two kinds of rules have different functions.

Generalizing the Idea of a "Default Rule"

Although the notion of a "default rule" is usually introduced to law students in the context of contract law, the idea is more general. For example, we could think of the law of wills and intestate succession through this theoretical lens. Rules of intestate succession are "default rules" that can be overridden by a will. Much of the law of wills consists of default rules, and we can imagine a "complete will" that covered every possible contingency.

Similarly, we can imagine a "complete code" that covers every possible action or inaction and specifies what legal consequences follow. Given that actual codes are incomplete, we can look at the law of statutory interpretation as including a collection of "default rules" that allow courts to fill in the gaps. Another example is provided by corporations law--once again, some of the rules are mandatory and others are merely defaults.

You get the idea--default rules can be applied to any authoritative legal text that is "incomplete."

Normative Theories of Default Rules

Once we understand the distinction between default rules and mandatory rules, we can then ask the question, "What normative principles should guide the design of default rules?" For example, we might decide that lawmakers (legislators or common-law judges) should attempt to devise the default rules that are most likely to be the rules that the parties would have adopted had they contracted on the issue. Or we might want "efficient" default rules. Or default rules that maximize utility. All of these approaches are associated with normative law and economics. But there are other approaches as well. For example, we might try to design default rules so that they maximize the autonomy or liberty of the parties to the contract--imposing the fewest possible restrictions that have not actually be agreed to by the parties. Or we might impose default rules that will serve some other goal such as distributive justice or economic equality.

2.1.2. Notes

i. The Historical and Legal Origins of the At-Will Rule

It is canonical to trace the prevalence of the at-will rule in the US to a specific treatise: *Horace Gray Wood, Master and Servant, Sec. 134 (1877)* states that

> With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. . . . .

In most states, the authority of the at-will rule stems from state common law, as the legal cases in this Part illustrate. In some jurisdictions, however, the at-will rule's binding authority stems, at least in part, from statutes. See, for example, Section 2922 of the California Labor Code:

> An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month.

Other than statutes and common law, one aspect of the at-will rule is directly derived from the Constitution. The 13th Amendment prohibits slavery, and provides workers with the basis for basic right to quit and leave working relations. It is always nice to see this link recognized.[1] But the at-will rule has had a far more successful (and notorious) constitutional career in protecting employers' interests and rights. *See*, *e.g.*, *Lochner* and *Engquist*.

ii. How Do Default Rules Matter 1: Information

One way to think about the effects of default rules is with an information lens. Through this prism, we will ask questions about different parties' information accumulation and exchange

[1] *Southwest Chevrolet Corp*., 194 NLRB 975, 985 n.40 (Jan. 13, 1972).

processes. For example, we might be worried about employers fearing just-cause termination because of the risk of attracting bad employees. The mirror image of this concern is that employees might be worried about bargaining over contractual "just-cause" provisions out of concern of signaling to the potential employer they would need the protection of such clauses. In this scenario, the optimal behavior of the employer-employee diad is simply not to bargain over termination clauses. Default rules allocate information gathering burdens and risks, making it less or more worthwhile for parties to negotiate and exchange information.

Another way in which default rules operate in the context of information is as *1)* misinformation or *2)* as threats.

For example of misinformation, in multiple union organizing scenarios, employers respond by stating that "[state] is an at will state" implying that the termination of organizing workers is legal under the National Labor Relations Act. This is a legal mistake, under current law, but employers (and their lawyers) are still making such claims in 2024. Now aside from the legal error, such claims may have information effects - workers might adjust their behavior (e.g., stop organizing) once they learn that at-will fact.

> See also: *T-Mobile USA*, Inc. 365 NLRB No. 23 (2017) (noting at will status in employers' handbook is not a violation of Sec. 7 of the NLRA); *Lionbridge Technologies*, 19-CA-115285, NLRB GC Advice Memo (March 31, 2014).

Threats can be thought of as information + power. For example, consider the following summary of a Board case. A supervisor approaches a groups of employees, and

> [After the supervisor] demanded to know the names of coworkers with whom an employee had discussed a holiday scheduling dispute, [he] approached one of the coworkers and screamed at her asking if she knew what an at will employee was, and told her that an at will employee meant that he had the right to fire someone and didn't have to have any reason and that "I want you to know that I have the right—an at will employee means that I have the right to fire you any time I want and I don't have to have a reason. Do you understand that?

From *Belle of Sioux City*, 333 NLRB 98, 106 (2001). *But see S & S Enterprises, LLC d/b/a Appalachian Heating and Sheet Metal, Air, Rail and Transportation Workers, Local Union No. 33*. Cases 09–CA–235304 (2020) (making workers re-sign at-will contracts is not a threat interfering with Section 7 rights under the NLRA).

iii. Two more ways of conceptualizing default rules

Another way to think about default rules is with a power lens. Here the question is how a default of at-will termination of the employment relationship affects the power of the parties. Here, for example, we might look at how the at-will rule affects the ability of workers to utilize other protective legislation like minimum wage, anti-discrimination, and unionization laws.

Yet another way to examine the at-will rule is through a political economy lens. In this analytical frame, we will ask questions about the systemic effect of a default that posits the working relationship as highly precarious and temporary. For example, how does a legally-based lack of stability across the labor market affect the creation of good high-road jobs? How does it affect the distribution of the stakes of work across social groups and sectors, and more?

iv. The limited explanatory power of the at-will rule

In US law, the at-will rule receives a significant explanatory role in the relative weaknesses of US workers. The argument goes that as the employer can condition obedience with the maintenance of the job, the employer holds unparalleled power over the worker. The employment relationship can be explained by its end game, and since employers hold the at-will whip, they control the game.

But the explanatory power of the at-will rule is limited. US employers hold significant levers of control even when there is a just-cause relationship. Employers have the legal prerogative to control the manner and means of workers' work, employers control the organizational structure of the business, and hold sole control over what is made in the business, when, where, and how. As we saw in the *O'Connor* case, employers' control over workers and over work is *the* defining characteristic of the employment relationship. All of those characteristic features of work are true regardless of whether or not the contract's end game is with an at-will provision or a just-cause one.

v. Employment at will is sticky and imperialist

At-will is a mere default rule, but it has a bite. First, it is a very sticky default rule, and second, it has imperialist tendencies of diffusing to other legal doctrines.

Over significant periods, courts were highly resistant to contractual modifications of the at-will rule. Even if and when parties seemed to adopt contractual language that would suggest the employment relationship is not "at will," courts demanded more (and more) explicit language. This court-based insistence made the at-will rule "sticky" it was tough for contractual parties to circumvent.

Another important aspect of at will is how it is diffused into other areas outside termination, other work law legal doctrines. While the Restatement treats the end of work relations, it is common to encompass *all* workplace actions as "at will" in at-will relations. Discipline at will, as in discipline for "bad, good or no reason" is considered an essential component of at will relations. *See* Audio Visual Services Group, NLRB, 19–CA186007 (2019).

Aside from other aspects of the workplace, the at will doctrine is diffused into other areas of work law. For example, in describing early 20th Century litigation about workplace injuries, John Witt states that early workplace injury law assumed that because at-will workers can walk away from the job, any workplace risk they come across they actively take on their own volition. Such a choice of "free laborers" to walk was juxtaposed with the inability of enslaved people to do the same (Witt, Accidental Republic 30-31 (2004)).

Later in this textbook, we will see again and again how courts utilize the at-will status and rule to weaken workers' legal claims on the job. The strength of good faith, contractual modification rights, and constitutional and statutory rights arguments all depend significantly on the at-will as *the* default rule on the job.

Scholars and practitioners who argue for the explanatory strength of the at-will rule in US labor relations point to those two features.

What do you think?

vi. the Rumors of the Death of At Will were exaggerated

Since the enactment of the Civil Rights act in the 1970s, the at will rule was rumored to die every a few years. This belief had three main rationales.

First is that scholars and practitioners believed that Title VII effectively killed the at will rule. Why? Because since termination is now a potential liability under Title VII as all employees can utilize its protections (everyone has sex, race, national origin, etc.), employers will respond by justifying each termination with something. Thus, while 49 states are supposedly "at will" de-facto non are. In all states employers take a legal risk by terminating a person for "no reason or bad reason."

Second, is that scholars and practitioners identified the enactment of Title VII as part of a broader narrowing of the scope of the at will rule. Alongside the passing and litigation of Title VII states were introducing good-faith requirements, public policy exceptions and various torts

into the workplace - where non existed before. The at will rule was fastly narrowing through the 1980s. From the 1990s and into the 2000s states were introducing more and more state-based workplace protection (like whistleblower protections) and state antidiscrimination laws. Further narrowing the scope of the at will rule.

Third, and most anachronistically, is that scholars predicted that the labor market is heading towards more and more rationality and further away from arbitrariness. This belief, somehow surviving post-modernism's disbelief in meta narratives, was anchored in corporate unions and HR practices that included regulated grievance procedures and wage arrangments. Bureaucracy was sorting itself into the workplace - living very little room for "no reason or bad reason" termination.

vii. Employment Relationship as Contractual Relationship?

Section 2.01(b) of the Restatement states that "[a]t its core, employment is a contractual relationship." Is that so?

Perhaps employment is more of a legal status than a contract. The employment relationship can be arranged by contract, but it can also be imposed by courts or legislation. The existence of a contract and the titles the parties chose to call their working relationship is not binding on the decision maker. Instead, courts examine issues like "control" that may or may not arise from contracts per se.

2.1a. Just Cause as the Alternative to At Will

An example for an alternative termination regime is a just-cause one, adopted for example by statutes or by collective bargaining agreements between a union and an employer.

2.1a.1. Legislated Just Cause

Consider for example the New York City regulation of termination in certain fast-food establishments (here) (other example is here, at note *v*.).

§ 20-1272 Prohibition on wrongful discharge

a. A fast food employer shall not discharge a fast food employee who has completed such employer's probation period except for just cause or for a bona fide economic reason.

b. In determining whether a fast food employee has been discharged for just cause, the fact-finder shall consider, in addition to any other relevant factors, whether:

1. The fast food employee knew or should have known of the fast food employer's policy, rule or practice that is the basis for progressive discipline or discharge;

2. The fast food employer provided relevant and adequate training to the fast food employee;

3. The fast food employer's policy, rule or practice, including the utilization of progressive discipline, was reasonable and applied consistently;

4. The fast food employer undertook a fair and objective investigation into the job performance or misconduct; and

5. The fast food employee violated the policy, rule or practice or committed the misconduct that is the basis for progressive discipline or discharge.

c. Except where termination is for an egregious failure by the employee to perform their duties, or for egregious misconduct, a termination shall not be considered based on just cause unless (1) the fast food employer has utilized progressive discipline; provided, however, that the fast food employer may not rely on discipline issued more than one year before the purported just cause termination, and (2) the fast food employer had a written policy on progressive discipline in effect at the fast food establishment and that was provided to the fast food employee.

d. Within 5 days of discharging a fast food employee, the fast food employer shall provide a written explanation to the fast food employee of the precise reasons for their discharge. In determining whether a fast food employer had just cause for discharge, the fact-finder may not consider any reasons proffered by the fast food employer but not included in such written explanation provided to the fast food employee.

e. The fast food employer shall bear the burden of proving just cause or a bona fide economic reason by a preponderance of the evidence in any proceeding brought pursuant to this subchapter, subject to the rules of evidence as set forth in the civil practice law and rules or, where applicable, the common law.

f. In any action or proceeding brought pursuant to sections 20-1207, 20-1211, or 20-1273, if a fast food employer is found to have unlawfully discharged a fast food employee in violation of this subchapter the relief shall include an order to reinstate or restore the hours of the fast food employee, unless waived by the fast food employee, and, in any such proceeding brought pursuant to 20-1211 or 20-1273 where a fast food employer is found to have unlawfully discharged a fast food employee in violation of this subchapter, the fast food employer shall be ordered to pay the reasonable attorneys' fees and costs of the fast food employee.

g. A discharge shall not be considered based on a bona fide economic reason unless supported by a fast food employer's business records showing that the closing, or technological or reorganizational changes are in response to a reduction in volume of production, sales, or profit.

h. Discharges of fast food employees based on bona fide economic reason shall be done in reverse order of seniority in the fast food establishment where the discharge is to occur, so that employees with the greatest seniority shall be retained the longest and reinstated or restored hours first. In accordance with section 20-1241, a fast food employer shall make reasonable efforts to offer reinstatement or restoration of hours, as applicable, to any fast food employee discharged based on a bona fide economic reason within the previous twelve months, if any, before the fast food employer may offer or distribute shifts to other employees or hire any new fast food employees.

2.2. Exceptions to the At-Will Rule

2.2.1. Implied Contract

2.2.1.1. Restatement of Employment Law,* § *2.02.

(link)

§ 2.02. Agreements and Binding Employer Promises or Statements Providing for Terms Other Than At-Will Employment

The employment relationship is not terminable at will by an employer if:

(a) an agreement between the employer and the employee provides for
(i) a definite term of employment, or
(ii) an indefinite term of employment and requires cause to terminate the employment;

or

(b) a promise by the employer to limit termination of employment reasonably induces detrimental reliance by the employee; or

(c) a binding policy statement made by the employer limits termination of employment; or

(d) the implied duty of good faith and fair dealing applicable to all employment relationships limits termination of employment; or

(e) other established principles recognized in the general law of contracts limit termination of employment.

2.2.1.2. Ferdinando v. Intrexon Corp.,

No. 16-CV-01826-BTM-JMA, 2016 WL 6947060 (S.D. Cal. Nov. 28, 2016).

Full decision: (link); **Docket**: (link); **Oral argument**: ()

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Barry Ted Moskowitz, Chief Judge

Defendant Intrexon Corporation ("Defendant") has filed a motion to dismiss Plaintiff Dana M. Di Ferdinando's ("Plaintiff") Complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. For the reasons discussed below, Defendant's motion is **GRANTED**.

I. BACKGROUND

On March 22, 2016, Plaintiff commenced this action in state court. Plaintiff asserts the following claims under California law: (1) breach of implied covenant of good faith and fair dealing; (2) common counts; (3) wrongful termination; (4) fraud; and (5) tortious breach of implied covenant of good faith.

According to the Complaint, on October 3, 2013, Defendant offered Plaintiff employment as Chief Information Officer in its Operations Division. Plaintiff accepted the offer and both parties signed an employment agreement which set forth the terms of the employment and compensation. In particular, the employment agreement provides that Plaintiff:

> will be eligible for a stock option grant of 65,000 shares of Intrexon's common stock, which will vest in increments of 25% per year, over a four-year period from the date of grant. Your grant option is subject to the execution of a Stock Option Agreement by and between you and the Company.

It further states that:

> [b]y signing this letter below, you acknowledge and agree that your employment with Intrexon is considered 'at will,' meaning it is for an unspecified period of time and that the employment relationship may be ended by you or by the Company at any time, with or without cause.

Plaintiff began working on November 18, 2013. On December 17, 2013, both parties executed a stock option agreement for 65,000 shares ("option plan"). The stock option agreement detailed several vesting options, including a vesting option in the event that Defendant terminated Plaintiff without cause. It specifically stated that the stock option would "become exercisable in full ... in the event the Participant's employment with the Company and its Affiliates is terminated by the Company or any Affiliate involuntarily and without cause." The stock option agreement also included a provision reiterating that there was no right to continued employment.

On March 28, 2014, Defendant presented Plaintiff with a modified stock option agreement which no longer included the provision that allowed for full vesting upon a termination without cause. Plaintiff initially refused to sign the modified stock option agreement and complained to the CFO

and General Counsel. She was told that she was one of two hold outs and that she had no choice but to sign the modified agreement. Plaintiff signed the agreement on March 28, 2014.

On July 21, 2015, Defendant terminated Plaintiff's employment without cause.

II. DISCUSSION

….

A. Wrongful Termination

Defendant moves to dismiss Plaintiff's third cause of action for wrongful termination on the grounds that her employment was "at-will." To support its argument Defendant points to the employment agreement—which expressly labels the employment at-will—and the stock option agreement—which expressly states that there is no right to continued employment.

Notwithstanding these contractual terms, Plaintiff claims that Defendant wrongfully terminated her employment because it breached both an implied contract and the implied covenant of good faith and fair dealing.

Under California Labor Code § 2922, an employment that has no specified term may be terminated "at the will" of either party. However, an employer does not hold an unfettered right to discharge even an at-will employee. *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 665 (1988). California has developed three distinct theories upon which an employee can rebut the presumption of an at-will relationship: (1) a wrongful discharge in violation of public policy; (2) an employer's breach of an implied-in-fact contract to terminate only for good cause; and (3) an employer's breach of the implied covenant of good faith and fair dealing. *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 467, 475–76 (1984). Here, Plaintiff's wrongful termination claim rests on the second and third theories. The Court addresses each argument below.

1. Implied Contract

First, Plaintiff argues that the modified stock option agreement gave rise to an implied contract that the employment relationship would continue for a minimum of four years—the time it would take for Plaintiff's stock option to fully vest. Plaintiff contends that because the modified stock option agreement eliminated the provision that allowed for full vesting upon a termination without cause, it necessarily created an implied-in-fact contract for continued employment until all of her shares vested.

In *Foley v. Interactive Data Corporation*, the California Supreme Court held that an implied-in-fact contract can overcome a presumption of at-will employment upon a showing of contrary evidence. *See* 47 Cal.3d at 677. Whether the parties' conduct gave rise to an implied contract is a question of fact. *Id.* The court
in *Pugh v. See's Candies, Incorporation,* 116 Cal. App. 3d 311, 327 (1981), identified several factors that may bear on the existence of an implied-in-fact agreement, including **"the personnel**

policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged." However, where there is an express contract that insists on the employee's at will status, the *Pugh* factors have no relevance. *See Halvorsen v. Aramark Unif. Servs., Inc.*, 65 Cal. App. 4th 1383, 1388 (1998).

In *Shapiro v. Wells Fargo Realty Advisors*, the court held that a stock option agreement, that defined an employment relationship as at-will, prevailed over a finding of an implied-in-fact contract. The court distinguished the case from *Pugh*, noting that in *Pugh*, there was no contract which expressly defined the employment relationship. In *Shapiro*, however, the plaintiff signed a stock option agreement that expressly reserved the defendant's right to discharge the plaintiff at any time for any reason whatsoever, with or without cause. In light of the agreement, the court held that "[t]here [could not] be a valid express contract and an implied contract, each embracing the same subject, but requiring different results." Therefore, the plaintiff's allegations of an implied-in-fact contract for continued employment could not rebut his status as an at-will employee.

Here, Plaintiff signed an employment agreement that expressly defined the employment status as at-will. After starting employment, she also signed two stock option agreements which reiterated that there was no right to continued employment. If the Court were to find an implied-in-fact contract, its subject matter would be in direct conflict with the written agreements. Given the express contractual provisions, Plaintiff's claim of an implied contract for continued employment cannot rebut her status as an at-will employee.

Moreover, Plaintiff also claims that, prior to signing the modified stock option agreement, she had a reasonable expectation of continued employment based on Defendant's acts and conduct. However, Plaintiff fails to support such conclusory allegations with facts. She makes no reference to any of the *Pugh* factors, and only generally refers to Defendant's "acts and conduct." Notwithstanding the lack of factual support, the Court finds that Plaintiff could not have reasonably relied on any implied promise by Defendant which contradicts the provisions contained in both the employment agreement and original stock option agreement. Consequently, Plaintiff's claim for wrongful termination based on a theory of an implied-in-fact contract fails as a matter of law.

2.2.1.2.1. Timeline

First filed: March 22, 2016 plaintiff commenced this action in California state court

Date	Case Name	Decision	Notes

March 22, 2016	*Di Ferdinando v. Intrexon Corp.*	Plaintiff alleges two causes of action" breach of implied covenant of good faith and fair dealing and fraud.	Wrongful termination
November 28, 2016	*Di Ferdinando v. Intrexon Corp.* United States District Court, Southern District of California (2016)	Defendant's motion to dismiss was granted and Plaintiff's complaint was dismissed.	Motion to dismiss for breach of implied good faith and fair dealing; common counts; wrongful termination; fraud; tortious breach of the implied covenant • Link
August 24, 2017	*Di Ferdinando v. Intrexon Corp.* United States District Court, Southern District of California (2017)	Defendant's motion to dismiss was denied.	No motion to dismiss for a breach of good faith and fair dealing Filed to dismiss because of a lack of a cognizable legal theory or for insufficient facts under a cognizable theory • Link

2.2.2. Wrongful Discharge Cause

2.2.2.1. Restatement of Employment Law, Sections 5.01 and 5.02.

(link)

§ 5.01. Wrongful Discharge in Violation of Public Policy

An employer that discharges an employee because the employee engages in activity protected by a well-established public policy as described in § 5.02 is subject to liability in tort for wrongful discharge in violation of public policy, unless the statute or other law forming the basis of the applicable public policy precludes tort liability or otherwise makes judicial recognition of a tort claim inappropriate.

§ 5.02. Wrongful Discharge in Violation of Public Policy: Protected Activities

An employer is subject to liability in tort under § 5.01 for discharging an employee because the employee, acting in a reasonable manner:

> (a) refuses to commit an act that the employee reasonably and in good faith believes violates a law or other well-established public policy, such as a professional or occupational code of conduct protective of the public interest;
>
> (b) performs a public duty or obligation that the employee reasonably and in good faith believes the law imposes;
>
> (c) files a charge or claims a benefit in good faith under an employment statute or law, whether or not the charge or claim is meritorious;
>
> (d) refuses to waive a nonnegotiable or nonwaivable right when the employer's insistence on the waiver as a condition of employment, or the court's enforcement of the waiver, would violate well-established public policy;
>
> (e) reports or inquires about conduct that the employee reasonably and in good faith believes violates a law or an established principle of a professional or occupational code of conduct protective of the public interest; or
>
> (f) engages in other activity directly furthering a well established public policy.

2.2.2.2 Murphy v. Am. Home Prod. Corp.,

58 N.Y.2d 293, 448 N.E.2d 86 (1983)
Full decision: (link); **Docket**: (); **Oral argument**: ()

OPINION OF THE COURT

JONES, Judge.

This court has not and does not now recognize a cause of action in tort for abusive or wrongful discharge of an employee; such recognition must await action of the Legislature. Nor does the complaint here state a cause of action for intentional infliction of emotional distress, for prima facie tort, or for breach of contract. These causes of action were, therefore, properly dismissed. Appellant's cause of action based on his claim of age discrimination, however, should be reinstated…

Plaintiff, Joseph Murphy, was first employed by defendant, American Home Products Corp., in 1957. He thereafter served in various accounting positions, eventually attaining the office of assistant treasurer, but he never had a formal contract of employment. On April 18, 1980, when he was 59 years old, he was discharged.

Plaintiff claims that he was fired for two reasons: because of his disclosure to top management of alleged accounting improprieties on the part of corporate personnel and because of his age. As to the first ground, plaintiff asserts that his firing was in retaliation for his revelation to officers and directors of defendant corporation that he had uncovered at least $50 million in illegal account manipulations of secret pension reserves which improperly inflated the company's growth in income and allowed high-ranking officers to reap unwarranted bonuses from a management incentive plan, as well as in retaliation for his own refusal to engage in the alleged accounting improprieties. He contends that the company's internal regulations required him to make the disclosure that he did. He also alleges that his termination was carried out in a humiliating manner.

As to the second basis for his termination, plaintiff claims that defendant's top financial officer told him on various occasions that he wished he could fire plaintiff but that, because to do so would be illegal due to plaintiff's age, he would make sure by confining him to routine work that plaintiff did not advance in the company. Plaintiff also asserts that a contributing factor to his dismissal was that he was over 50 years of age.

On April 14, 1981, plaintiff filed a …. suit "to recover damages for defendant's wrongful and malicious termination of plaintiff's employment". [The] plaintiff alleged that his discharge "was wrongful, malicious and in bad faith" and that defendant was bound "not to dismiss its employees for reasons that are contrary to public policy". In his second cause of action, plaintiff claimed that his dismissal "was intended to and did cause plaintiff severe mental and emotional distress thereby damaging plaintiff". His third claim was based on an allegation that the manner of his termination "was deliberately and viciously insulting, was designed to and did embarrass and humiliate plaintiff and was intended to and did cause plaintiff severe mental and emotional distress thereby damaging plaintiff". In his fourth cause of action, plaintiff asserted that, although his employment contract was of indefinite duration, the law imposes in every employment contract "the requirement that an employer shall deal with each employee fairly and in good faith". On that predicate he alleged that defendant's conduct in stalling his advancement and ultimately firing him for his disclosures "breached the terms of its contract requiring good faith and fair dealing toward plaintiff and damaged plaintiff thereby". Plaintiff demanded compensatory and punitive damages.

….

With respect to his first cause of action, plaintiff urges that the time has come when the courts of New York should recognize the tort of abusive or wrongful discharge of an at-will employee. To do so would alter our long-settled rule that where an employment is for an indefinite term it is presumed to be a hiring at will which may be freely terminated by either party at any time for

any reason or even for no reason (see *Martin v. New York Life Ins. Co.,* 148 N.Y. 117, 42 N.E. 416; *Parker v. Borock,* 5 N.Y.2d 156, 182 N.Y.S.2d 577, 156 N.E.2d 297).

Plaintiff argues that a trend has emerged in the courts of other States to temper what is perceived as the unfairness of the traditional rule by allowing a cause of action in tort to redress abusive discharges. He accurately points out that this tort has elsewhere been recognized to hold employers liable for dismissal of employees in retaliation for employee conduct that is protected by public policy. Thus, the abusive discharge doctrine has been applied to impose liability on employers where employees have been discharged for disclosing illegal activities on the part of their employers (*Sheets v. Teddy's Frosted Foods,* 179 Conn. 471, 427 A.2d 385; *Palmateer v. International Harvester Co.,* 85 Ill.2d 124, 52 Ill.Dec. 13, 421 N.E.2d 876; *Harless v. First Nat. Bank in Fairmont,* 246 S.E.2d 270 [W.Va.1978]), where employees have been terminated due to their service on jury duty (*Nees v. Hocks,* 272 Or. 210, 536 P.2d 512), and where employees have been dismissed because they have filed workers' compensation claims (*Kelsay v. Motorola, Inc.,* 74 Ill.2d 172, 23 Ill.Dec. 559, 384 N.E.2d 353; *Frampton v. Central Ind. Gas Co.,* 260 Ind. 249, 297 N.E.2d 425). Plaintiff would have this court adopt this emerging view. We decline his invitation, being of the opinion that such a significant change in our law is best left to the Legislature.

Those jurisdictions that have modified the traditional at-will rule appear to have been motivated by conclusions that the freedom of contract underpinnings of the rule have become outdated, that individual employees in the modern work force do not have the bargaining power to negotiate security for the jobs on which they have grown to rely, and that the rule yields harsh results for those employees who do not enjoy the benefits of express contractual limitations on the power of dismissal. Whether these conclusions are supportable or whether for other compelling reasons employers should, as a matter of policy, be held liable to at-will employees discharged in circumstances for which no liability has existed at common law, are issues better left to resolution at the hands of the Legislature. In addition to the fundamental question whether such liability should be recognized in New York, of no less practical importance is the definition of its configuration if it is to be recognized.

Both of these aspects of the issue, involving perception and declaration of relevant public policy …. best and more appropriately explored and resolved by the legislative branch of our government. The Legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected and in any event critically interested, and to investigate and anticipate the impact of imposition of such liability.

Standards should doubtless be established applicable to the multifarious types of employment and the various circumstances of discharge. If the rule of nonliability for termination of at-

will employment is to be tempered, it should be accomplished through a principled statutory scheme, adopted after opportunity for public ventilation, rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants.

Additionally, if the rights and obligations under a relationship forged, perhaps some time ago, between employer and employee in reliance on existing legal principles are to be significantly altered, a fitting accommodation of the competing interests to be affected may well dictate that any change should be given prospective effect only, or at least so the Legislature might conclude.

For all the reasons stated, we conclude that recognition in New York State of tort liability for what has become known as abusive or wrongful discharge should await legislative action.

Plaintiff's second cause of action is framed in terms of a claim for intentional infliction of emotional distress. …. [But], in light of our holding above that there is now no cause of action in tort in New York for abusive or wrongful discharge of an at-will employee, plaintiff should not be allowed to evade that conclusion or to subvert the traditional at-will contract rule by casting his cause of action in terms of a tort of intentional infliction of emotional distress.

Plaintiff's third cause of action was also properly dismissed. If considered, as plaintiff would have us, as intended to allege a prima facie tort it is deficient inasmuch as there is no allegation that his discharge was without economic or social justification …. Moreover, we held in *James v. Board of Educ.,* 37 N.Y.2d 891, 892, 378 N.Y.S.2d 371, 340 N.E.2d 735, which also involved the exercise of an unrestricted right to discharge an employee, that: “Plaintiff cannot, by the device of an allegation that the sole reason for the termination of his employment by these public officials acting within the ambit of their authority was to harm him without justification (a contention which could be advanced with respect to almost any such termination), bootstrap himself around a motion addressed to the pleadings”. Nor does the conclusory allegation of malice by plaintiff here supply the deficiency. As with the intentional infliction of emotional distress claim, this cause of action cannot be allowed in circumvention of the unavailability of a tort claim for wrongful discharge or the contract rule against liability for discharge of an at-will employee.

Plaintiff's fourth cause of action is for breach of contract. Although he concedes in his complaint that his employment contract was of indefinite duration (inferentially recognizing that, were there no more, under traditional principles his employer might have discharged him at any time), he asserts that in all employment contracts the law implies an obligation on the part of the employer to deal with his employees fairly and in good faith and that a discharge in violation of that implied obligation exposes the employer to liability for breach of contract. Seeking then to apply this proposition to the present case, plaintiff argues in substance that he was required by the terms of his employment to disclose accounting improprieties and that defendant's discharge of him for having done so constituted a failure by the employer to act in good faith and thus a breach of the contract of employment.

No New York case upholding any such broad proposition is cited to us by plaintiff (or identified by our dissenting colleague), and we know of none. New York does recognize that in appropriate circumstances an obligation of good faith and fair dealing on the part of a party to a contract may be implied and, if implied will be enforced (e.g., *Wood v. Duff-Gordon,* 222 N.Y. 88, 118 N.E. 1082; *Pernet v. Peabody Eng. Corp.,* 20 A.D.2d 781, 248 N.Y.S.2d 132). In such instances the implied obligation is in aid and furtherance of other terms of the agreement of the parties. No obligation can be implied, however, which would be inconsistent with other terms of the contractual relationship. Thus, in the case now before us, plaintiff's employment was at will, a relationship in which the law accords the employer an unfettered right to terminate the employment at any time. In the context of such an employment it would be incongruous to say that an inference may be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination. The parties may by express agreement limit or restrict the employer's right of discharge, but to imply such a limitation from the existence of an unrestricted right would be internally inconsistent. In sum, under New York law as it now stands, absent a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment, an employer's right at any time to terminate an employment at will remains unimpaired.

Of course, if there were an express limitation on the employer's right of discharge it would be given effect even though the employment contract was of indefinite duration. Thus, in *Weiner v. McGraw-Hill, Inc.,* 57 N.Y.2d 458, 457 N.Y.S.2d 193, 443 N.E.2d 441, cited by plaintiff, we recently held that, on an appropriate evidentiary showing, a limitation on the employer's right to terminate an employment of indefinite duration might be imported from an express provision therefor found in the employer's handbook on personnel policies and procedures. Plaintiff's attempts on this appeal to bring himself within the beneficial scope of that holding must fail, however. There is here no evidence of any such express limitation. Although general references are to be found in his brief in our court to an employer's “manual”, no citation is furnished to any provision therein pertinent to the employer's right to terminate his employment, and the alleged manual was not submitted with his affidavit in opposition to the motion to dismiss his complaint.

….

MEYER, Judge (dissenting in part).

The harshness of a rule which permits an employer to discharge with impunity a 30-year employee one day before his pension vests (see *United Steelworkers of Amer., Local No. 1617 v. General Fireproofing Co.,* 464 F.2d 726 (6th Cir.1972); and *Savodnick v. Korvettes, Inc.,* 488 F.Supp. 822) or for no other reason than that he filed a compensation claim (2A Larson, Workmen's Compensation Law, § 68.36), the bizarre origin of the termination-at-will rule, the

change of economic and constitutional philosophy that has occurred since its adoption, the exclusion of a substantial segment of the working community from its effects through "just cause" limitations upon the right to fire resulting from collective bargaining, and the inconsistency of the rule not only with the common law of England and with earlier New York decisions but also with the law of most industrial countries of the world, have caused an outpouring of judicial and scholarly writings intended to ameliorate, if not abolish, the rule. I agree with the majority that we should not now adopt the tort remedies proposed in those writings, because such remedies are essentially grounded in public policy, the declaration of which is a function of both the Legislature and the courts, because the New York Legislature has not been reticent in the area, and because of the difficulty encountered by the courts adopting such remedies in articulating the exact nature of the public policy which will bring them into play….

…. I cannot, however, accept the majority's refusal to follow precedent decisional law recognizing an implied-in-law obligation on the part of the employer not to discharge an employee for doing that which the employment contract obligated him to do or to differentiate between that existing contract obligation and the public policy laden tort of abusive discharge. Plaintiff's complaint alleges that "defendant's internal regulations …. required that plaintiff report any deviation from proper accounting practice to defendant's top management" and that he was dismissed as a result of his doing just that. Because those allegations sufficiently state a cause of action for breach of contract not only under decisions of other States but as a matter of New York law as well, I dissent from the majority's affirmance of the dismissal of the fourth cause of action.

I do not gainsay that *Martin v. New York Life Ins. Co.,* 148 N.Y. 117, 42 N.E. 416, however questionable its origin and continued existence, is the New York rule concerning employment contracts of unspecified duration. So in *Haines v. City of New York,* 41 N.Y.2d 769, 772, 396 N.Y.S.2d 155, 364 N.E.2d 820 we took pains to point out that unlike other contracts of unspecified duration, as to which the law will imply that the parties "intended performance to continue for a reasonable time", that rule "[f]or compelling policy reasons * * * has not been, and should not be, applied to contracts of employment". But the policy reasons behind refusing to read a durational term into employment contracts do not require reading out of such contracts the "implied covenant of fair dealing and good faith" which "is implicit in all contracts" (*Van Valkenburgh, Nooger & Neville v. Hayden Pub. Co.,* 30 N.Y.2d 34, 45, 330 N.Y.S.2d 329, 281 N.E.2d 142; accord *Kirke La Shelle Co. v. Armstrong Co.,* 263 N.Y. 79, 87, 188 N.E. 163) and is "a contractual obligation of universal force which underlies all written agreements" (*Brassil v. Maryland Cas. Co.,* 210 N.Y. 235, 241, 104 N.E. 662).

….

There is [] no compelling policy reason to read the implied obligation of good faith out of contracts impliedly terminable at will. To do so belies the "universal force" of the good faith obligation which, as we have seen, the law reads into "all contracts." Nor can credence be given the *in terrorem* suggestion that to limit terminable-at-will contracts by good faith will drive

industry from New York (see *Weiner v. McGraw-Hill, Inc.,* 57 N.Y.2d 458, 469, 457 N.Y.S.2d 193, 443 N.E.2d 441 [dissenting opn]). That is no more than speculation and hardly appears acceptable in the face of (1) the recognition without apparent industrial exodus of the even more burdensome tort remedy for discharge of at-will employees by such industrial States as California, Connecticut, Illinois, Indiana, Maryland, Massachusetts, Michigan, New Jersey, Pennsylvania and Wisconsin …

The more particularly is this so because collective bargaining "just cause" provisions, which impose a greater burden on employers than does a good faith limitation (see *Toussaint v. Blue Cross & Blue Shield of Mich.,* 408 Mich. 579, 292 N.W.2d 880) have not done so, and because employers can obtain a large measure of protection by expressly reserving in the employment contract the right to terminate without cause.

The fact that the Legislature has limited at-will discharge in [] several ways …. but has not expressly established a breach of contract action for termination of at-will employment which violates the implied-in-law obligation of good faith provides no reason to await action by the Legislature.

The at-will rule was created by the courts and can properly be changed by the courts but, more importantly, as demonstrated above, the rule has for at least a century been subject to the "universal force" of the good faith rule. The Legislature, therefore, had no reason before the present decision to believe that action on its part was required.

Nor ought we succumb to any "floodgates" argument. "This court has rejected as a ground for denying a cause of action that there will be a proliferation of claims. It suffices that if a cognizable wrong has been committed that there must be a remedy, whatever the burden on the courts" (*Tobin v. Grossman,* 24 N.Y.2d 609, 615, 301 N.Y.S.2d 554, 249 N.E.2d 419 ; accord Prosser, Torts [4th ed.], p. 51)...
....

2.2.2.2.a. Timeline

Date	Case Name	Decision	Notes
April 14, 1981	*Murphy v. American Home Products Corp*	Filed a summons in the present action with NY County	**First filed on April 14, 1981, plaintiff filed lawsuit against**

June 5, 1981		Clerk, a "suit to recover damages for defendant's wrongful and malicious termination of plaintiff's employment".	**defendant**
July 21, 1981	*Murphy v. American Home Products Corp*	Defendant moved to dismiss complaint on grounds	On grounds that it failed to state cause of action and that the fourth cause of action was barred by the Statute of Frauds Contended that employee was at-will
October 16, 1981	*Murphy v. American Home Products Corp*	Plaintiff served amended complaint, adding a fifth cause of action	Alleged age discrimination in violation of NY Executive Law Section 296
January 29, 1982	*Murphy v. American Home* New York County Supreme Court (1982)	Granted defendant's motion to dismiss the second, third, fourth, and fifth causes of action of the amended complaint. Denied the motion to dismiss the first cause of action is modified to the extent that the motion to dismiss it is granted, the order is otherwise affirmed.	• Link
1982	*Murphy v. American Home* Supreme Court, Special Term, New York State (1982)	Court found in favor of American Home Products Corp., dismissing all causes except for that regarding age discrimination.	Murphy sued to recover damages for wrongful termination: in bad faith, violated public policy, and was designed to humiliate him; also sued for age discrimination
June 24,	*Murphy v. American Home*	Court found in favor	Court found that there

1982	*Products Corp.* Appellate Division of the Supreme Court of New York, First Department (1982)	of American Home Products Corp., dismissing all causes.	was nothing to interfere with an employer's right to terminate employmentent • Link
Argued January 10, 1983 **Decided March 29, 1983**	*Murphy v. American Home Products Corp.* Court of Appeals of New York (1983)	The court adjusted the lower court's order to reinstate the former employee's cause of action for age discrimination.	• Link
December 15, 1986	*Murphy v. American Home Products Corp.* Supreme Court of NY, New York County	Jury demand stricken.	• Link
April 7, 1988	*Murphy v. American Home Products Corp.* Supreme Court of New York Appellate Division, First Department	Court reversed trial court's grant of employer's motion to strike employee's demand for jury trial. Motion Denied.	• Link
July 10, 1990	*Murphy v. American Home Products Corp.* Supreme Court of New York, Appellate Division, First Department	Judgment of trial court in favor of employer was reversed, matter remanded for new trial.	• Link
February 26, 1991	*Murphy v. American Home Products Corp.* Supreme Court of New York	Settled during trial.	

2.2.2.2.1. Notes

I. Institutional Capacities / Roles are Integral to the Doctrine

Note how the majority opinion utilizes institutional constraints to justify its position about the exception to the at-will doctrine. It does so when pushing the issue of public policy exceptions

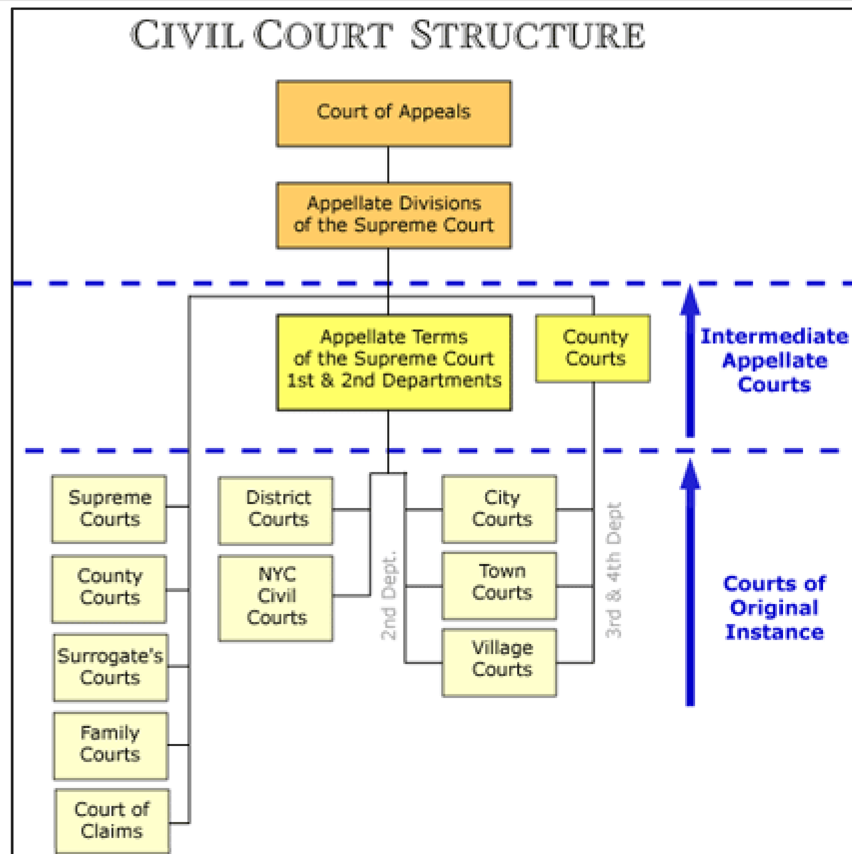
to the state legislature. It is interesting to note how discussions of “who should do what” enters the doctrine itself as both a constraint and an affordance. The court here is convinced by its own kind of institutional analysis that the court system is not the right actor to create exceptions to the at-will rule. The dissent disagrees. How can we evaluate who is right?

In thinking about this issue, we can come up with multiple factors to consider: the judicial origins of the at-will doctrine, the always-risky floodgate argument, and actual capacities of legislators to intervene in concrete cases. But again, the point here is the bite of the argument- it is this institutional rhetoric that made the public policy exception unachievable in this case.

II. Another Push on At-Will Institutions

One particular point where the rejection of adding a public policy exception to the at-will rule seems arbitrary is this exact institutional argument. In most states, it is courts, not legislatures, that placed the at-will rule in its place. It is courts, not Congress, that enforce the at-will rule on the myriad of plaintiffs arguing their cases and seeking remedies for their harms. And it is courts that took it upon themselves to interpret most, if not all, work law in accordance with the at-will rule. Given this demonstrated capacity in administering the at-will rule, a hands-off approach seems, well, questioned, in this case. Maybe it is a matter of *will* not of *capacity*?

2.2.2.3. The Structure of New York State Civil Court Judiciary



Source: Link

2.2.2.4. Novosel v. Nationwide (1983)

721 F.2d 894 (3d Cir. 1983)

Full decision: (link); **Docket**: (link); **Oral argument**: ()

ADAMS, Circuit Judge

This appeal presents us with the task of determining under what circumstances a federal court …. may intercede in a non-union employment relationship and limit the employer's ability to discharge employees. In his suit against Nationwide Insurance Company, John Novosel's …. tort claim turns on whether a cause of action is created by a discharge that contravenes either important public policies or rights conferred on employees as members of the citizenry at large. …. The district court, finding no cause of action to be stated, granted the employer's motion to dismiss both claims. … [W]e vacate the district court's judgment and remand for further proceedings.

I

Novosel was an employee of Nationwide from December 1966 until November 18, 1981. He had steadily advanced through the company's ranks in a career unmarred by reprimands or

disciplinary action. At the time his employment was terminated, he was a district claims manager and one of three candidates for the position of division claims manager.

In late October 1981, a memorandum was circulated through Nationwide's offices soliciting the participation of all employees in an effort to lobby the Pennsylvania House of Representatives. Specifically, employees were instructed to clip, copy, and obtain signatures on coupons bearing the insignia of the Pennsylvania Committee for No-Fault Reform. This Committee was actively supporting the passage of House Bill 1285, the "No-Fault Reform Act," then before the state legislature.

The allegations of the complaint charge that the sole reason for Novosel's discharge was his refusal to participate in the lobbying effort and his privately stated opposition to the company's political stand. Novosel contends that the discharge for refusing to lobby the state legislature on the employer's behalf constituted the tort of wrongful discharge on the grounds it was willful, arbitrary, malicious and in bad faith, and that it was contrary to public policy. ….

II

Considerable ferment surrounds the doctrine of employment-at-will.[FN2] Once the common-law cornerstone of employment relations not covered by either civil service laws or the National Labor Relations Act, the at-will doctrine has been significantly eroded by both tort and contract theories similar to those propounded by appellant in this case. Already 29 states have granted some form of common law exceptions to the at-will doctrine; in addition, the courts of five other states as well as the District of Columbia have indicated their willingness to do so.

….

III

….

The circumstances of the discharge presented by Novosel fall squarely within the range of activity recognized by the emerging tort case law. As one commentator has written:

> The factual pattern alleged in these cases seldom varies. The employee objects to work that the employee believes is violative of state or federal law or otherwise improper; the employee protests to his employer that the work should not be performed; the employee expresses his intention not to assist the employer in the furtherance of such work and/or engages in "self-help" activity outside the work place to halt the work; and the employer discharges the employee for refusal to work or incompatibility with management.

Olsen, *Wrongful Discharge Claims Raised By At Will Employees: A New Legal Concern for Employers*, 32 Lab. L. J. 265, 276 (1981).

In a landmark opinion, the Pennsylvania Supreme Court recognized that such a situation could give rise to a legal cause of action:

> It may be granted that there are areas of an employee's life in which his employer has no legitimate interest. An intrusion into one of these areas by virtue of the employer's power of discharge might plausibly give rise to a cause of action, particularly where some recognized facet of public policy is threatened. The notion that substantive due process elevates an employer's privilege of hiring and discharging his employees to an absolute constitutional right has long since been discredited.

Geary v. United States Steel Corp., 456 Pa. 171, 184, 319 A.2d 174, 180 (1974). Under the particular facts of Geary, the court held:

> this case does not require us to define in comprehensive fashion the perimeters of this privilege [to employ-at-will], and we decline to do so. We hold only that where the complaint itself discloses a plausible and legitimate reason for terminating an at-will employment relationship and no clear mandate of public policy is violated thereby, an employee at will has no right of action against his employer for wrongful discharge.

….

Two subsequent Pennsylvania Superior Court cases upheld wrongful discharge causes of action under the theory that "where a clear mandate of public policy is violated by the [employee's] termination, the employer's right to discharge may be circumscribed . . ." Reuther v. Fowler & Williams, Inc., 255 Pa. Super. 28, 31, 386 A.2d 119, 120 (1978). The Reuther court held that "the law of this Commonwealth recognizes a cause of action for damages resulting when an employee is discharged for having performed his obligation of jury service." 255 Pa. Super at 32, 386 A.2d at 120. Similarly in Yaindl v. Ingersoll-Rand Co., 281 Pa. Super. 560, 572, 422 A.2d 611, 617 (1980), the Superior Court recognized "an interest of the public in seeing to it that the employer does not act abusively." See also Hunter v. Port Authority of Allegheny County, 277 Pa. Super. 4, 419 A.2d 631 (1980) (non-statutory wrongful discharge claim of public employee). In addition, other state courts have used public policy standards as the benchmark for wrongful discharge cases; see, e.g., Jackson v. Minidoka Irrigation District, 98 Idaho 330, 563 P.2d 54, 57 (1977) ("an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy"); Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976) (discharge in retaliation for filing workers' compensation claim violates public policy).

Thus, on the issue whether such a suit may go forward, it was incorrect as a matter of law to declare that "no cause of action for wrongful discharge is stated under Pennsylvania law. . . ." The district court's assertion that "there occurs an express or implied waiver or relinquishment of otherwise valid constitutional rights when an employee voluntarily engages in employment . . ." must consequently be rejected as a ruling that "simply persists from blind imitation of the past." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).

B

Applying the logic of Geary, we find that Pennsylvania law permits a cause of action for wrongful discharge where the employment termination contravenes a significant and recognized public policy. The district court did not consider the question whether an averment of discharge for refusing to support the employer's lobbying efforts is sufficiently violative of such public policy as to state a cause of action. Nationwide proposes that "the only prohibition on the termination of an employee is that the termination cannot violate a statutorily recognized public policy," Brief of Appellee at 5 (emphasis added).

This Court has recognized that the "only Pennsylvania cases applying public policy exceptions have done so where no statutory remedies were available." Bruffett, supra, 692 F.2d at 919. Moreover, both Reuther and Hunter allowed causes of action to be implied directly from the Pennsylvania Constitution. Hunter further noted that Pennsylvania courts allow direct causes of action under the Constitution regardless of legislative action or inaction. Given that there are no statutory remedies available in the present case and taking into consideration the importance of the political and associational freedoms of the federal and state Constitutions, the absence of a statutory declaration of public policy would appear to be no bar to the existence of a cause of action. Accordingly, a cognizable expression of public policy can be derived in this case from either the First Amendment of the United States Constitution or Article I, Section 7 of the Pennsylvania Constitution.

The key question in considering the tort claim is therefore whether a discharge for disagreement with the employer's legislative agenda or a refusal to lobby the state legislature on the employer's behalf sufficiently implicate a recognized facet of public policy. The definition of a "clearly mandated public policy" as one that "strikes at the heart of a citizen's social right, duties and responsibilities," set forth in Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876, 52 Ill. Dec. 13 (1981), appears to provide a workable standard for the tort action. While no Pennsylvania law directly addresses the public policy question at bar, the protection of an employee's freedom of political expression would appear to involve no less compelling a societal interest than the fulfillment of jury service or the filing of a workers' compensation claim. Although Novosel is not a government employee, [] public employee cases do not confine themselves to the narrow question of state action. Rather, these cases suggest that an important public policy is in fact implicated wherever the power to hire and fire is utilized to dictate the terms of employee political activities. In dealing with public employees, the cause of action arises directly from the Constitution rather than from common law developments. The protection of important political freedoms, however, goes well beyond the question whether the threat comes from state or private bodies. The inquiry before us is whether the concern for the rights of political expression and association which animated the public employee cases is sufficient to state a public policy under Pennsylvania law. While there are no Pennsylvania cases squarely on this point, we believe that the clear direction of the opinions promulgated by the state's courts suggests that this question be answered in the affirmative.

Having concluded thereby that an important public policy is at stake, we now hold that Novosel's allegations state a claim within the ambit of Geary in that Novosel's complaint discloses no plausible and legitimate reason for terminating his employment, and his discharge violates a clear mandate of public policy. The Pennsylvania Supreme Court's rulings in Geary and Sacks are thus interpreted to extend to a non-constitutional claim where a corporation conditions employment upon political subordination. This is not the first judicial recognition of the relationship between economic power and the political process:

> the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process. . . . [The desired end] is not one of equalizing the resources of opposing candidates or opposing positions, but rather of preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process. . . .

First National Bank of Boston v. Bellotti, 435 U.S. 765, 809, 55 L. Ed. 2d 707, 98 S. Ct. 1407 (1978) (White, J., dissenting).

Because this case is to be remanded, and taking into consideration the novelty of wrongful discharge actions, we proceed to a consideration of the factual bases a plaintiff would have to establish in order to prevail. It appears that the same factors to which the Pennsylvania Supreme Court referred in Sacks for evaluating the evidentiary sufficiency of Sacks' claim would be just as applicable to the case at hand.

Thus, on remand the district court should employ the four part inquiry the Sacks court derived from Connick and Pickering:

> 1. Whether, because of the speech, the employer is prevented from efficiently carrying out its responsibilities;
> 2. Whether the speech impairs the employee's ability to carry out his own responsibilities;
> 3. Whether the speech interferes with essential and close working relationships;
> 4. Whether the manner, time and place in which the speech occurs interferes with business operations.

Sacks, supra, 502 Pa. at 216.

….

The judgment and order of the district court will be vacated and the case remanded for discovery and further proceedings consistent with this opinion.

Footnotes

[FN2] An oft quoted statement of this doctrine is found in *Payne v. Western & Atl. R.R. Co.*, 81 Tenn. 507, 518-19 (1884) (link), overruled on other grounds, *Hutton v. Watters*, 132 Tenn. 527, 544, 179 S.W. 134, 138 (1915) (link):

> Men must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se. It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.

2.2.2.4.a. Timeline

Date	Case Name	Decision	Notes
1981-1982	*Novosel v. Nationwide*	Plaintiff files complaint charge of wrongful termination	**First filed in late 1981 or 1982**
1981-1982	*Novosel v. Nationwide*	Defendant filed motion to dismiss	
January 14, 1983	*Novosel v. Nationwide* Federal District Court (1983)	Court granted a motion to dismiss both of Novosel's claims.	Novosel filed a suit claiming wrongful discharge and breach of contract
October 26, 1983, as amended November 2, 1983	*Novosel v. Nationwide* Court of Appeals for the Third Circuit (1983)	Court reversed the district court's decision	Court ruled that Pennsylvania law permitted a cause of action for wrongful discharge when the termination violated a significant and recognized public policy • Link
December 19, 1983	*Novosel v. Nationwide* Court of Appeals for the Third Circuit (1983)	Denied appellant's petition for rehearing.	Link
February 13, 1985	*Novosel v. Nationwide Mutual Insurance Co.* US District Court for the Western District of	Graned employer's motion for summary judgment in part, and denied in part.	• Link

	Pennsylvania		

2.2.2.4.1 Notes

i. *Common Inquiries about the Public Policy Exception*

The traditional "law-school" questions asked about the public policy exception are about recognizing a "clear mandate" of a "significant and recognized" public policy. How can you tell whether or not the First Amendment provides a clear mandate? How can judges say if one public policy is "significant and recognized" and another is not? It is indeed unclear.

ii. *An Aside on Workability*

Despite being objectively unclear, the *Novosel* court seems to hold that this standard is relatively straightforward. We can explain this mismatch between perception of clarity in two ways. First, the court bluffs in implying that this standard is workable and clear, while the court knows it is not. And second, the court does indeed believe this vagueness is much less vague than it seems.

It is possible that perhaps the court imagined a much different historical trajectory for the at-will rule- one of diminishing importance in the US labor market. The court reveals this premise by explicitly telling us that "the at-will doctrine has been significantly eroded by both tort and contract theories." In this counterfactual world of increasing public interventions in the at-will rule, the relative vagueness of the public policy framework loses some of its bite.

In other words, the "workability" of a legal rule depends on the setting in which it sits. The workability of the public policy exception depends on what else is happening around it. And when the court says a rule is workable, or when your law school professor asks you whether a specific rule is workable, remember there is a hidden premise in their question- a particular institutional, legal, and social terrain.

More discussion on the durability, extinction, and effects of the at-will rule is here.

iii. Novosel *as an Exception to the Rule*

Most states do not recognize Constitutional limitations on the at-will doctrine. This is for two main reasons. First, as traditionally understood, the US Constitution does not apply to private actors, only state (public) actors. So, the Constitution applies directly to a public-sector employer doing things in the world (hiring, terminating, promoting, etc.) but not to private-sector employers.

Second, *Novosel* takes doctrines that traditionally apply to relatively minor workplace issues (jury duties, whistleblowing, *etc.*) and applies them to speech, which is perhaps the most abstract and commonplace activity. No clear limitations exist regarding how far and deep *Novosel*'s impact can go. Especially if you take *Novosel* to stand for the proposition that all constitutionally protected conducts are recognized public policies for this exception.

iv. Novosel *remains an island even in Philly*

A worker is accused of stealing on the job and faces criminal charges. The (private-sector) employer terminates the employee because of the allegations. In trial, the employee is found not guilty. The employee then asks to be re-hired. The employer refuses. The employee sues and demands reinstatement due to a Constitutional public policy of "innocent until proven guilty." Is there a public policy exception here?

Philadelphia Superior Court, a year after *Novosel*, said *no*. The public policy exception is narrow, even with *Novosel* in the background– and even if grave injustice is felt. The Superior Court simply could not make the move to apply constitutional principles without state action.

> While the full panoply of rights [of[a criminal defendant were entitlements of [worker] in his trial experience, including the right to be presumed innocent until proven guilty, these rights which are ensured by both the United States and Pennsylvania Constitutions are not necessarily meant to, nor can they, be superimposed into an accused's remaining life experiences. Thus, marriages crumble when one is adjudged guilty without ever being considered innocent and jobs are lost [when an employer decides to act based on beliefs about criminal concerns]
>
> *Cisco v. UPS*, 328 Pa. Super. 300, 308 (1984) (link).

Other than the, hmm, personal-experience-sounding relationship insights here, note the lack of Constitutional concern regarding private power and its effects. This is the canon in US Constitutional thought. *Novosel* is a glaring exception.

v. *State v. Federal Public Policies*

Note the efforts the *Novosel* court is making in framing the issue as a Federal Constitutional First Amendment issue *and* a Pennsylvania Constitutional issue. This is so because the source of the public policy exception must be within the state's jurisdiction, not the federal one. Or so, at least, is how the Pennsylvania courts interpreted the public policy exception. See, for example:

- *McLaughlin v. Gastrointestinal Specialists, Inc.*, 561 Pa. 307, 750 A.2d 283 (2000) (retaliation for reporting safety violations does not involve the *state*'s public policy, perhaps federal) (link).
- *Castro v. Air-Shield, Inc.*, 78 Bucks Co. L. Rep. 94 (Aug. 20, 2004) (employer's federal regulation violations do not necessarily involve the state's public policy).
- *Devore v. Metro Aviation, Inc.*, 2024 PA Super 274 (Nov. 18, 2024) (employers' termination of pilot who followed their understanding of federal guidelines not a violation of public policy).

vi. *Common Law Exceptions to a Common Law Rule*

How wide is the public policy exception to the at-will rule? It seems courts have some leeway in deciding how to apply the tests about significance and about a lack of remedial structure. Should courts apply the exception broadly or narrowly? One common answer is that all exceptions to the at-will rule are extremely narrow. In Pennsylvania, the leading phrase is that the public policy exception must be activated only in "the most limited circumstances" (*Weaver v. Harpster*, 601 Pa. 488, 501 (2009) (link); *see also Devore v. Metro Aviation, Inc.*, 2024 PA Super 274 (2024)). Why is that?

One possible answer is that exceptions to a rule are always narrow. That cannot be true or determinative. Some exceptions, as we'll see in the labor law module, almost swallow the rule whole. Another possible answer is that in applying exceptions to a rule, the court needs to tread carefully because it doesn't want to circumvent the at-will rule. Well, that just states the question in different terms.

Regardless of reasoning (which is lacking), note that the common law public policy exception is, in most cases, an exception to the common law at-will rule. Courts made the rule, courts made the exceptions, and courts implemented and enforced both. Both the rule and exceptions are court-made; different parts of the same actor. Other than the *will* to not encroach on the at-will

rule (perhaps anchored in ideology, policy, or politics), there isn't much law behind how narrow the public policy exception is.

More discussion of the proper institutions for creating exceptions to the at will rule are here.

vii. *Employer Political Mobilization Research*

We know very little about employers' political mobilization of employees. But, what we do know seems to indicate that *Novosel*-like cases, where employers use employees to lobby, are not rare.

Alexander Hertel-Fernandez found that significant numbers of employers encourage employees to register to vote, make their political preferences known to employees, and even utilize supervisors to demand employees participate in political action. Employers also often add implicit or explicit threats about what would happen to the individual employee if they did not participate in the activity or what would happen to the business if their preferred policy/candidate did not win.

- *See* Alexander Hertel-Fernandez, Politics at Work: How Companies Turn Their Workers into Lobbyists (2018).

Before you get mad about evil employers, we should note that we do not know whether or not such political mobilization leads to bad outcomes in the world overall (nor do we agree on what that means). In some contexts, employers can promote policies you may like and use their employees to do good in the world. Save puppies or whales, increase diversity, or reduce emissions, as a few examples. Their employees, on the other hand, may sit out of participating in any political activity or, even worse, support policies that you do not like– annihilating the puppies or whales, decreasing diversity, and increasing emissions.
But does your judgment about the validity of such actions depend on its outcome?

viii. The Constitution and the Private Workplace - Paths for Indirect Application

Traditionally, the Constitution and the First Amendment apply only to the state. This is called the "state action" requirement. So, arguing that Nationwide directly violated the First Amendment is not an option for Novosel under our traditional understanding of what the Constitution does and does not protect.

However, even taking this constrained view of the Constitution, there are at least three ways in which the state *is* involved in Novosel's case.

First, the at-will rule is state-created. Like all rules and doctrines, a state actor put it there: a Court, a legislature, or a regulator. The at-will rule is not a contractual agreement between Novosel and Nationwide; it is a default rule placed there by, you guessed it, the state.

Second, a court is now in charge of enforcing the at-will rule. The at will rule is not self executing, instead, enforcement and repeated legal validation of its scope and contents happen in courts, which are, hmm [check notes] - a state actor!

Third, and most remotely, it is the state that designed and constituted a system where one's welfare is highly dependent on their job. Income, health insurance, retirement funds, education in the US are all extremely work-dependent. The state created this work-centerd world, it gave all that power to employers - and now when employers utilize the powers given to them by the state suddenly it is not state action? (the official answer is a clear *no*).

So a state actor may not be the one to terminate Novosel, but it is the one that 1) created the workplace rule under which Novosel is terminated and 2) enforces that rule on Novosel and 3) created the world where if Novosel does not obey to its employer's whims they don't get to eat. By constituting the at-will rule, enforcing it, and constructing the system in which this rule means so much to employees isn't the state at least marginally involved in quashing Novosel's political speech/participation rights? (again, the correct legal answer is *no*).

ix. OK, I Lied

We do recognize freedom of speech on the job, and there is no problem of direct or indirect application. But we do so for employers in the context of the National Labor Relations Act. Section 8(c) of the NLRA was read by the Supreme Court and Board as a statutory actualization of employers' freedom of speech on the job. A right that must be balanced against workers' right to organize.

For the Supreme Court in *Gissel*, it is obvious that this sort of freedom of speech application in a private workplace, and as a right against private actors (workers, unions) makes perfect sense. So, sometimes, private 1st Amendment rights do exist. Easy as 1,2,3; simple as A,B,C.

x. A rejection of a state obligation to Novosel - example from another realm

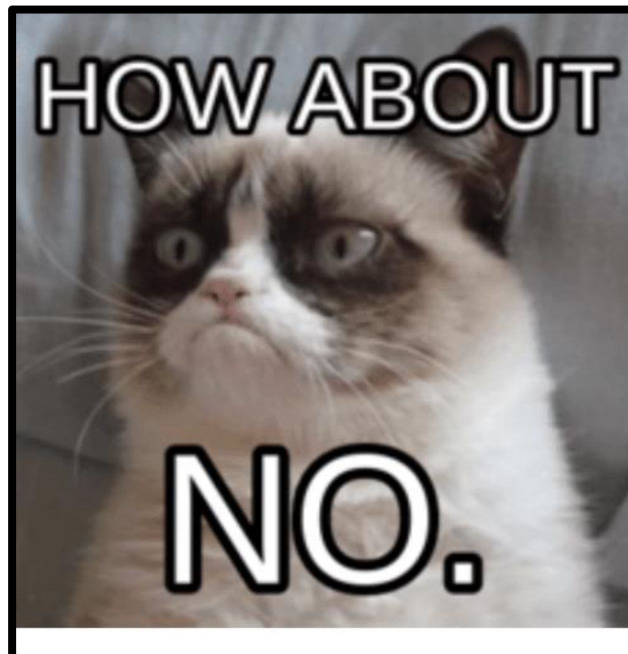
The first and third arguments for indirect application of the Constitution to private sector employers in the context of the at-will rule were not thoroughly explored (I tried to, here). However, the second argument– that the state has some obligation to intervene in private-person-on-private-person constitutional harms was rejected in one of the most heinous cases of the modern Supreme Court: *Deshaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989) (link). There, the Court debated whether a child-welfare agent (as a state actor) had a 14th Amendment obligation to shield a child from an abusive parent. The Court's answer was nope.

While the state in *Deshaney* did not create the rule under which the father harmed the child, it served a blow to those seeking to use the Constitution in the context of private-on-private harms. So, if the most straightforward relational obligation of welfare agent to a child in the context of significant bodily and mental harms does not create such an indirect Constitutional obligation to protect private actors from Constitutional harms caused by other private actors, Novosel does not have a good chance of facing a generalized state actor (courts) and much less harmful Constitutional harms (speech, political participation).

But, perhaps different, more humane legal and constitutional futures are imaginable.

See also:

- Lindke v. Freed, 601 U.S. 187, 195, 144 S. Ct. 756, 765 (2024) ("[A]bsent some very unusual facts, no one would credit a child's assertion of free speech rights against a parent, or a plaintiff 's complaint that a nosy neighbor unlawfully searched his garage.")



Court's response to plaintiffs asking for constitutional protections against their private-sector employers, an illustration

2.2.2.4.2. Further readings

- https://www.niskanencenter.org/the-politics-of-our-jobs/
- Volokh, Eugene. "Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation." *Tex. Rev. L. & Pol.* 16 (2011): 295.
- Lakier, Genevieve. "The Non-First Amendment Law of Freedom of Speech." *Harv. L. Rev.* 134 (2020): 2299.
- Craig R. Senn, Ending Political Discrimination in the Workplace, 87 Mo. L. Rev. 365 (2022).
- Anne Carey, Political Ideology as a Limited Protected Class Under Federal Title VII Antidiscrimination Law, 26 J.L. & Pol'y 637 (2018).

2.2.3. Intentional Infliction of Emotional Distress (IIED)

2.2.3.1. Restatement of Torts, Third, § 46

(link)

An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for that emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm.

…

> *a.* …. The outrage tort originated as a catchall to permit recovery in the narrow instance when an actor's conduct exceeded all permissible bounds of civilized society but an existing tort claim was unavailable. …

…

> *d*. *Extreme and outrageous conduct*. To be held liable under this Section, an actor must do more than intentionally or recklessly cause emotional harm. The actor must act in a way that is extreme and outrageous. Section 46 of the Second Restatement, on which this Section based, employed the "extreme and outrageous conduct" standard. That standard has been widely adopted, has been employed satisfactorily, and has become familiar. For these reasons, it is retained in this Section. unless liability under this Section is appropriately limited, freedom and socially productive conduct could be impeded. Individuals participating in society must be prepared to suffer emotional trauma-….- without legal recourse, in order to encourage freedom….
>
> Similarly, as a matter of policy, even if emotional harm is inflicted for no purpose other than to cause such harm, some degree of emotional harm must be expected in social

> interaction and tolerated without legal recourse. Under the "extreme and outrageous" requirement, an actor is liable only if the conduct goes beyond the bounds of human decency such that it would be regarded as intolerable in a civilized community. Ordinary insults and indignities are not enough for liability to be imposed, even if the actor desires to cause emotional harm.

….

Specific rules for when conduct is extreme and outrageous cannot be stated, nor can categories of conduct be identified for formulation into universal rules. Nevertheless, guidance can be found in cases in which courts have submitted defendants' conduct to the jury to determine whether it is extreme and outrageous, for example: surreptitiously videotaping a 16-year-old in various stages of undress; engaging in prolonged physical and mental abuse of another; sexually abusing another; committing suicide in another's home; and torturing or maliciously killing another's pet.

2.2.3.2. Hoy v. Angelone*, 554 Pa. 134, 720 A.2d 745 (1998)*

Full decision: (link); **Docket**: (link); **Oral argument**: ()

**** this case includes descriptions and analysis of sexual harassment ****

MR. JUSTICE CAPPY

In this appeal, we address important issues regarding sexual harassment litigation under the Pennsylvania Human Relations Act [and] under the common law tort of the intentional infliction of emotional distress. For the reasons that follow, we affirm the decision of the Superior Court and remand this matter for final disposition consistent with this opinion.

….

A brief recitation of the facts is necessary to resolve the issues raised in this appeal. Appellant, Ms. Louise Hoy, was employed by Appellee, Shop-Rite of Easton (Shop-Rite), as the only female meat wrapper in the store's meat department. Appellant's tenure with Shop-Rite began in September of 1972 and continued through August of 1994, when the store closed. Appellee Dominick Angelone's (Angelone) employment with Shop-Rite began in 1972. Angelone was first employed as a meat cutter and, in 1980, was promoted to the position of "chief journeyman." He also held the title of "meat manager." Defendant, Gregory Thomas, became the store manager of Shop-Rite in 1980 and remained in that position at all times relevant to this case. Thomas' responsibilities included supervision of the meat department.

The testimony at trial established that Angelone subjected Appellant to various forms of abusive treatment. Such behavior included sexual propositions, vile and filthy language, off-color jokes, physical contact with the back of Appellant's knee, and the posting of sexually suggestive pictures. Angelone did not disagree that the conduct occurred, rather, he asserted that such behavior was accepted and welcomed by Appellant.

In 1992, Appellant took medical leave from her job in order to receive psychiatric treatment. Appellant's treating physician testified that her condition was caused, at least in part, by the abusive conditions of her workplace. After Appellant returned to work, she provided

Thomas with a letter, dated February 1, 1992, requesting that she be transferred to another department. …. Appellant was ultimately transferred from the meat department in October, 1992.

On May 13, 1993, Appellant filed a two count complaint against Shop-Rite, Angelone, and Thomas. Count one alleged unlawful discrimination in violation of the Act. Count two alleged an intentional infliction of emotional distress. After a trial by jury, a verdict was returned in favor of Appellant. Specifically, the jury found that Angelone engaged in conduct constituting sexual harassment toward Appellant; that Angelone was a supervisory employee during the alleged incidents; that Thomas was aware, prior to February, 1992, of the sexual harassment of Appellant and failed to remedy the situation; and that Appellant had proven by a preponderance of the evidence that Angelone intentionally inflicted emotional distress upon her.
The jury awarded Appellant $ 51,000 for her claims under the Act, $ 25,000 in damages against Angelone for the intentional infliction of emotional distress, $ 50,000 in punitive damages against Angelone, $ 25,000 in punitive damages against Thomas, and $ 250,000 in punitive damages against Shop-Rite.
….
[Now], we address Appellant's common law claim for the intentional infliction of emotional distress. The Superior Court found that the trial court erred in denying Appellee Angelone's motion for judgment with respect to this claim. While the court found that the record established a sexually hostile work environment, it found that the record did not establish the requisite outrageousness required to recover under this theory of law. Specifically, the Superior Court found that the record was devoid of any evidence of retaliation against Appellant. Thus, the court found the evidence to be insufficient to allow recovery.

Appellant contends that the Superior Court erred in requiring a showing of retaliatory conduct in order to recover under this theory of law. Appellant argues that the Restatement (Second) of Torts § 46 sets forth the requirements of the tort of intentional infliction of emotional distress, otherwise known as the tort of outrageous conduct causing severe emotional distress. This tort is defined as follows:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Restatement (Second) of Torts § 46(1) (1965). Appellant submits that the Superior Court erred in adding the "additional element" of retaliation to the tort. …. [C]ourts have been chary to allow recovery for a claim of intentional infliction of emotional distress. Only if conduct which is extreme or clearly outrageous is established will a claim be proven. Indeed our Superior Court has noted, "the conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Buczek v. First National Bank of Mifflintown, 366 Pa. Super. 551, 558, 531

A.2d 1122, 1125 (1987). Described another way, "it has not been enough that the defendant has acted with intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort." Restatement (Second) of Torts § 46, comment d; Daughen v. Fox, 372 Pa. Super. 405, 412, 539 A.2d 858, 861 (1988).

Cases which have found a sufficient basis for a cause of action of intentional infliction of emotional distress have had presented only the most egregious conduct. See e.g., Banyas v. Lower Bucks Hospital, 293 Pa. Super. 122, 437 A.2d 1236 (1981) (defendants intentionally fabricated records to suggest that plaintiff had killed a third party which led to plaintiff being indicted for homicide); Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3d. Cir. 1979) (defendant's team physician released to press information that plaintiff was suffering from fatal disease, when physician knew such information was false).

Cases regarding this tort in the employment context have been few. As the Third Circuit in Cox v. Keystone Carbon, 861 F.2d 390, 395 (3rd. Cir. 1988) noted, "it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress." ….
As a general rule, sexual harassment alone does not rise to the level of outrageousness necessary to make out a cause of action for the intentional infliction of emotional distress. As we noted in Cox, 861 F.2d at 395-96, 'the only instances in which courts applying Pennsylvania law have found conduct outrageous in the employment context is where an employer engaged in both sexual harassment and other retaliatory behavior against an employee.' See Bowersox v. P.H. Glatfelter Co., 677 F. Supp. 307, 311 (M.D. Pa. 1988). The extra factor that is generally required is retaliation for turning down sexual propositions.

In light of recovery for the tort of intentional infliction of emotional distress being reserved by the courts for only the most clearly desperate and ultra extreme conduct, we believe that the factor of retaliation is an entirely appropriate consideration when determining the outrageousness of an employer's actions. Retaliatory conduct is typically indicative of discrimination of a more severe nature and usually has a greater detrimental impact upon the victim. Thus, we believe that retaliation is a critical and prominent factor in assessing the outrageousness of an employer's conduct.

To the extent that the Superior Court decision can be interpreted to mandate retaliatory conduct, such a reading of that court's opinion is rejected. We hold that consideration of retaliation in the context of a claim for the intentional infliction of emotional distress is one of a number of factors to be used in assessing such a claim. By regarding retaliation as a weighty factor, but not a mandated factor, we allow for the rare case in which a victim of sexual harassment is subjected to blatantly abhorrent conduct, but in which no retaliatory action is taken.

In this case the record establishes sexual harassment and a sexually hostile work environment. This harassment included sexual propositions, physical contact with the back of Appellant's knee, the telling of off-color jokes and the use of profanity on a regular basis, as well as the posting of a sexually suggestive picture. While we are well aware that sexual harassment is highly offensive and unacceptable conduct, the conduct exhibited by Appellees, while unacceptable, was not so extremely outrageous, and not akin to the cases noted above, that would allow for recovery under this most limited of torts. Importantly, there is absolutely no evidence that Appellees retaliated against Appellant. Thus, while we condemn in the strongest terms the type of conduct exhibited by Appellees, we are constrained to find that in applying the requirements of this circumscribed tort to the facts of this case, the Superior Court did not err in finding that Appellees' behavior did not allow recovery for the intentional infliction of emotional distress.

For the above stated reasons, the decision of the Superior Court is hereby affirmed.

<u>Mr. Justice Nigro files a concurring and dissenting opinion.</u>
…. I dissent from the majority's conclusion that the facts of this case are not sufficiently egregious to support the jury's finding that Appellant's supervisor is liable for intentional infliction of emotional distress.
….
In describing what constitutes extreme and outrageous behavior, the Restatement provides in part:

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"
> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.

Id. § 46, Comment d.
….
In the present case, Appellant established the existence of her alleged emotional distress with competent medical evidence. At issue is whether Appellant's supervisor's conduct in the workplace was sufficiently outrageous to support the jury's finding of intentional infliction of emotional distress.
Appellant testified at trial about her supervisor's vile language, sexual propositions, off color jokes, and physical touching at work. When asked to give the jury some examples of what her supervisor said to her, Appellant stated:

> A. He called me a f***ing c**t, a f***ing p***y, a b***h.

Q. Was this -- were these isolated instances that only happened three times?
A. No. It happened more than that.
Q. What response did you give to being called these names?
A. On several occasions, I told [her supervisor] that some day I would have him in court for sexual harassment.
Q. Is that because you wanted him to stop saying these things?
A. I wanted him to stop. I wanted him to realize that was wrong.
Q. And what response did you get from that statement that you made to him?
A. He laughed.
Q. He laughed?
A. He laughed.
Q. Did he keep calling you a f***ing p***y?
A. Yes.
Q. A f***ing c**t and a b***h?
A. Yes

With respect to sexual propositions, Appellant testified as follows about her supervisor:

A. He would say things like let's go to the Budget and I'll pay the motel, you bring the pizza. He would make remarks like if you've ever had sex with me, you wouldn't want anybody else. It's not what you have, it's how you use it. Things of that nature.
Q. These things happened only once or twice?
A. No. It happened on many occasions.

One day at work, Appellant had a cereal box in a basket of groceries in her work area. When she left the area and subsequently returned, Appellant found "Hi, Lou. I want to get in your pants" written on the box. Appellant testified that her supervisor was there and she believed he wrote the message based upon the handwriting. On another occasion, Appellant testified that a photograph of her supervisor was posted on the wall in her work area. She described the picture as follows:

A. It was a picture of Dominick in his white meat coat and I think he had his white hat on and he was standing in the meat room and he was holding a tenderloin between his legs.
Q. Was he smiling?
A. Yes.
Q. And was there a caption on that picture?
A. Yes.
Q. What did the caption say?
A. If you want a larger piece of meat, see Dom.
Q. And that was --
A. If you need a larger piece of meat, see Dom.
Q. That was posted near your work station.
A. Yes.

Appellant also testified that there was a poster in the work area of a young girl in a cut-off t-shirt and the t-shirt had the caption "Beer busts are better." Appellant's supervisor told salesmen and other people who came into the meat room that it was a picture of Appellant when she was

younger. Furthermore, Appellant testified that her supervisor physically touched her on occasion by grabbing her behind her knee in the back of her leg.

Appellant's supervisor's behavior in the workplace goes well beyond mere insults and is utterly intolerable in a civilized society. The record amply supports the jury's finding of intentional infliction of emotional distress. Thus, I would reverse the Superior Court's ruling on this issue.

2.2.3.2.a. Timeline

First filed: May 13, 1993 appellant filed complaint

Date	Case Name	Decision	Notes
May 13, 1993	*Hoy v. Angelone*	Appellant filed a two-count complaint against Shop-Rite, Angelone, and Thomas.	**First filed on this date, appellant filed complaint**
1993	*Hoy v. Angelone* Court of Common Pleas, Civil Division, Northampton County (1993)	Jury verdict was returned in favor of Hoy	Behavior was in violation of the Pennsylvania Human Relations Act Hoy proved, by a preponderance of the evidence, IIED
March 12, 1997	*Hoy v. Angelone* Superior Court of Pennsylvania (1997)	The Superior Court found that the trial court erred in denying the motion for judgment regarding the IIED.	The behavior was not extreme and outrageous enough to constitute an IIED No retaliation • Link
September 3, 1997	*Hoy v. Angelone* Supreme Court of Pennsylvania (1997)	Petition for Allowance of Appeal granted, Cross-Petition for Allowance of Appeal is denied.	• Link
November 24, 1998	*Hoy v. Angelone* Supreme Court of Pennsylvania (1998)	The Court affirmed the Superior Court’s rulings.	No provision that allowed for punitive damages Appellant did not

			prove IIED, conduct was not so extreme and outrageous, no retaliation ● Link

2.2.3.3. Notes

I. Safety Valve?

IIED is considered the safety valve of workplace harms. In extreme situations, with extraordinary harms, law offers some remedy via IIED. The court in *Hoy* clearly tries to balance between this role for IIED and the harms suffered by the plaintiff. And this metaphor also explains why the pervasiveness of a social phenomena like workplace harms is an argument against the application of IIED remedies, not an argument for applying the IIED framework. Therefore, the narrow application of IIED is a feature, not a bug. It almost doesn't matter what or which formulation the court will choose, as long as it makes clear that only a handful of cases will surpass that threshold.

But any allocation of scarce resources by people, judges included, is susceptible to bias. In this case, the courts allocate the scarce resource of legal remedy to unspecified emotional harms. Say we agree to the "safety valve" metaphor, how can courts do so in a way that would guarantee that it would not count some harms more than others?

II. Retaliation as the *key to IIED Liability*

Retaliation in the legal sense and in this context means something like "a negative response by an employer to the reporting of a harm." We can debate or describe what is "negative," what counts as "response,""report," or "harm," but that is roughly what it means.

An example of retaliation in the case of *Hoy* would be if the plaintiff was terminated or officially reprimanded in response to her complaints or in response to her non-compliance with the sexual propositions described.

Why does retaliation play such an important role in IIED? Well, some authors, cited below, argue that retaliation creates special harms. Something to the tune of adding insult to injury, or pouring salt on an open wound. And it is descriptively true, I take it, that retaliation is a key component of contemporary IIED theory.

But what if we don't buy the special kind of harm caused by retaliation? Intuitively, in some cases, 12 years of sexual harassment seems likely to be more harmful than 9 years of

retaliation. We can possibly explain it by pushing our instinct away from understanding IIED as responding to general severe harms into a tort of particular kinds of harms. Placing retaliation as the core of the IIED tort places that particular harm, regardless of its actual added severity, in the prohibited or discouraged conduct list for employers.

III. *The Dissent's Strategy*

Take note, if you haven't already done so, to the reframing of the facts by the dissent. Showcasing parts of the legal procedure outlying in greater detail the harms suffered, is a legal strategy that achieves multiple goals– it portrays the majority's analysis of the harms as not severe enough to raise to the level of an IIED tort in a ridiculous light; it exposes workplace harms that are far away from any sort of public attention at the time; and it validates the plaintiff's sense of injury and provides a formal high-level state record of what was done.

Doing so is a choice. Not doing so is also a choice. What do those choices tell us?

The question of whether or not this strategy is effective is hyper contextual, and the answer to this question may change in the short and long term perspectives. For now we will be satisfied by presenting the broad question of strategy in crafting judicial opinions.

iv. *Examples of Non-Extreme and Outrageous Conduct*

Consider the following examples, for actions *not* considered extreme and outrageous:

- *Cautilli v. GAF Corp.*, 531 F. Supp. 71 (E.D. Pa. 1982) (Tricking employees into forgoing other job opportunities with the false promise of termination protection; not extreme and outrageous) (link).
- *Bowersox v. P.H. Glatfelter Co*., 677 F. Supp. 307, 311 (M.D. Pa. 1988) (a supervisor's conduct, including statements about his sexual virility, his outings to strip joints, the sexual performance of other female employees, the plaintiff's ability to have sex after surgery, and her sexual performance, and also including his display of sexually explicit posters and newspaper clippings and his placing hands in his pants in front of her — was insulting, undignified, annoying, and perhaps representative of the 'rough edges of our society,' it did not "constitute the type of extreme and outrageous conduct" needed for an IIED claim).
- *Sebesta v. Kent Electronics Corp*., 886 S.W.2d 459, 462 (Tex.App.--Houston [1st Dist.] 1994, writ denied) (employee escorted out during busiest time of day in front of co-workers, being yelled at on one occasion; not extreme and outrageous) (link).

- *Randall's Food Markets, Inc., v Johnson*, 891 S.W.2d 640, 644 (Tex. 1995) (allegations of employee theft; not extreme and outrageous) (link).
- *Beiser v. Tomball Hospital Authority*, 902 S.W.2d 721, 725 (Tex.App.--Houston [1st Dist.] 1995, writ denied) (employer's violation of the law, though illegal behavior, was not extreme and outrageous) (link).
- *Cabello v. Ziafat*, NO. 07-96-0360-CV, 1998 Tex. App. LEXIS 3788, at *5-6 (Tex. App. June 24, 1998) (employer tried to reach personal medical records of a female employee from a hospital, later confronted the employee publicly on whether she is pregnant, and when she responded positively was told that "her services are no longer needed;" not extreme and outrageous).
- *Harris v. SmithKline Beecham*, 27 F. Supp. 2d 569 (E.D. Pa. 1998) (a coworker defendant, who frequently stared at the plaintiff's breasts, had suggestively asked the plaintiff to bend over, and who held a knife to her breast, not extreme and outrageous).
- *Graudins v. Retro Fitness, LLC*, 921 F. Supp. 2d 456, 465 (E.D. Pa. 2013) (Co-worker would put his hands around plaintiff at work, flip her upside down, and describe different sexual activity positions to her, as well as sexually proposition plaintiff, engage her in sexually explicit conversations, and show her pornographic images, but never retaliated against her for reporting this conduct, not extreme and outrageous).
- *Ebert v. Genpact Ltd.*, No. 3:21-CV-00980, 2022 U.S. Dist. LEXIS 60583 (M.D. Pa. Mar. 31, 2022) (Tricking an employee to submit an anonymous survey which was not in fact anonymized, thus causing the employee to disclose information and opinions which led to their termination; not extreme and outrageous) (link).
- *Mathews v. UPS Inc.*, 2024 BL 59774, M.D. Fla., No. 8:22-cv-01801, 2/23/24 (delivery driver unknowingly being part of a management-approved police stint that caused severe PTSD and depression; not extreme and outrageous) (link).

v. Employers are allowed to have feelings too

IIED charges are recognized as one of the exceptions to National Labor Relations Act (NLRA) preemption. This means that while the NLRA prohibits state interference into the relations of unions and employers, courts do allow for (state-based, state-adjudicated) IIED claims, because those are "rooted in local feelings," or, something like that. See more here.

IIED, alongside trespass and violence are the rare exceptions to the sweeping NLRA preemption regime. This make IIED claims a popular go-to for employers trying to stop or threat unions. For example, a Michigan employer sued for IIED against a union for sending letters describing unfair labor practices the employer allegedly did (here); or a business owner suing for IIED as part of their opposition to recognizing the union (here).

vi. IIED and Workers' Comp

For more than a hundred years now, most torts on the job are covered by designated state laws called Workers' Compensation schemes (colloquially known as "Workers Comp."). The grand bargain of Workers' Comp is creating a mandatory framework for adjudicating most torts that flow from the traditional risks of the job that *1)* eases proof of harms thus making it easier for workers to be compensated; and in return, *2)* caps damages for run-of-the-mill harms.

IIED exceptionalism is thus anchored in an institutional environment – one that in order to bring an IIED suit to court the harms alleged must be those excluded or not covered by the state's workers' comp regulations. Such a case cannot be a traditional workplace harm (arguing, discipline, termination) to escape the exclusivity of the workers' comp system.

Further readings:

- Holdren, Nate. *Injury impoverished: Workplace accidents, capitalism, and law in the progressive era*. Cambridge University Press, 2020.

vii. MacKinnon on Framing Sexual Harassment

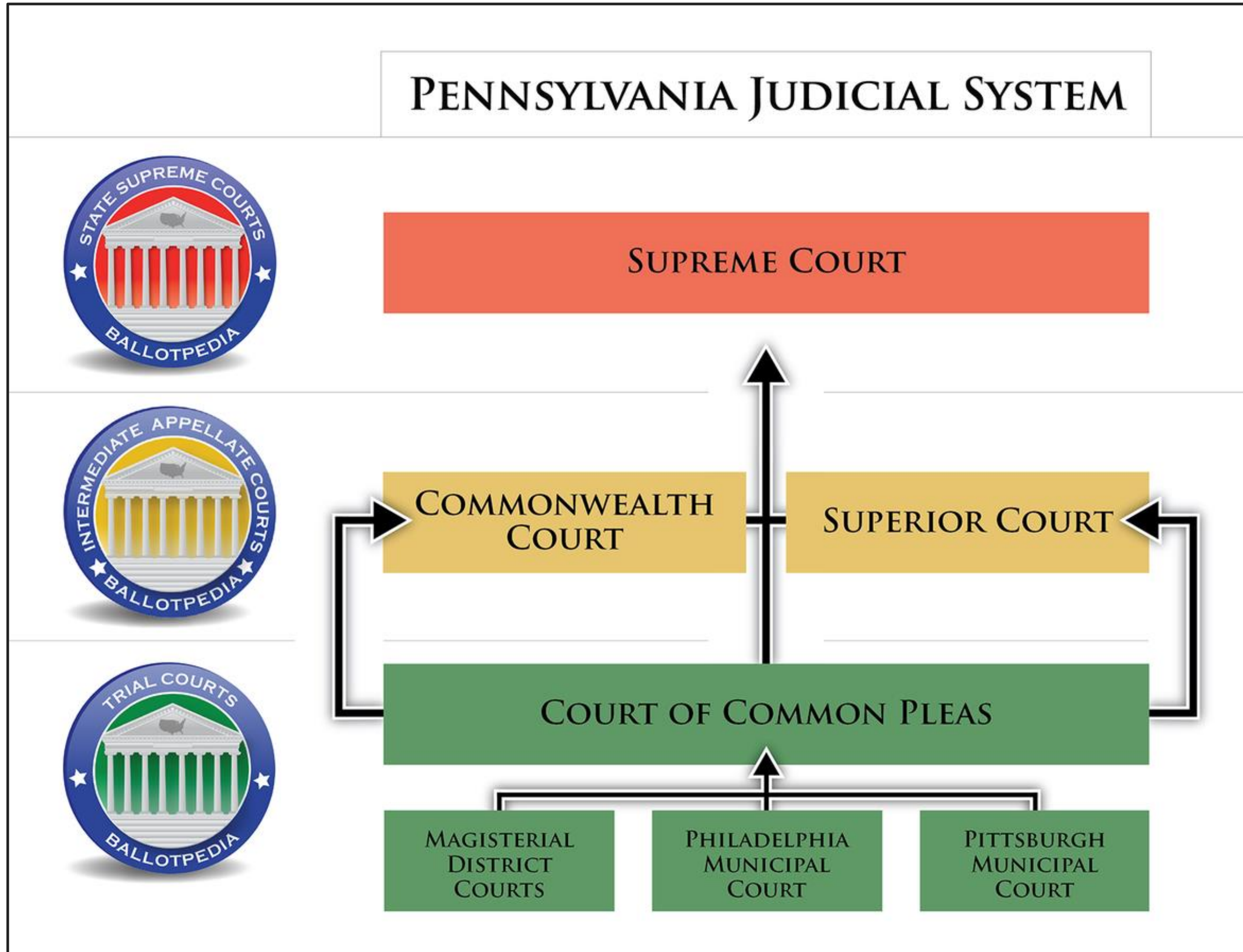
> The problem is probably as old as sex inequality. Its known past encompasses feudalism, which entitled lords to the first night of sex with vassals' new wives (*prima noche*); American slavery, under which enslaved women of African origin or descent were routinely sexually used by white masters; indentured servitude; world war and the white collar work.
>
> Long regarded as just life, such acts are usually beneath sanction by the criminal law, which treats them as uncoerced because the forms of power the rely upon are not exclusively physical. Sex under these conditions has also been long regarded as consensual because acquiesce acts also wen unremedied by the law of tort. Sexual harassment's modern legal history began in the mid-1970s with the women's movement in the United states, when injury became more publicly visible as a result of its legal recognition as a civil rights violation and form of sex discrimination.

Catherine A. MacKinnon, Sex Equality 1002-03 (3rd ed, 2016).

See also:

- MacKinnon, Catharine A. *Sexual harassment of working women: A case of Sex Discrimination*. 164-74 (1979).

2.2.3.4. Pennsylvania Judicial System



Source: Link

2.2.3.5. Further Reading

- Long, Alex B. "Using the IIED Tort to Address Discrimination and Retaliation in the Workplace." U. Ill. L. Rev. (2022): 1325.

2.2.4. Good Faith and Fair Dealings

2.2.4.1 Restatement of Employment Law,* § *2.07.

(link)

§ 2.07. Implied Duty of Good Faith and Fair Dealing

> (a) Each party to an employment relationship, including at-will employment owes a nonwaivable duty of good faith and fair dealing to each other party, which includes a party's obligation not to hinder the other party's performance under, or to deprive the other party of the benefit of, their contractual relationship.
>
> (b) The implied duty of good faith and fair dealing applies to at will employment relationships in manner consistent with the essential nature of such an at-will relationship.
>
> (c) In any employment relationship, including at-will employment, the employer's implied duty of good faith and fair dealing includes the duty not to terminate or seek to terminate the employment relationship for the purpose of:
>
> > (1) preventing the vesting or accrual of an employee right or benefit; or
> > (2) retaliating against the employee for performing the employee's obligations under the employment contract or law.

….

> *b. Consistency with at-will contracts.* As in all contracts, the implied duty of good faith and fair dealing serves as a supplementary aid in implementing the parties' reasonable expectations and should not be read as a means of overriding the basic terms of, or otherwise undermining the essential nature of, their contractual relationship. Jurisdictions that recognize the implied duty in the employment setting therefore also recognize that the duty applies to at will employment in a manner consistent with the essential nature of such an at-will relationship-namely, except to the extent provided by law or public policy, either party may terminate the relationship with or without cause.

2.2.4.2. Fortune v. Nat'l Cash Reg. Co.

373 Mass. 96, 364 N.E.2d 1251 (1977).
Full decision: (link); **Docket**: (link); **Oral argument**: ()
Opinion
ABRAMS, Justice.

Orville E. Fortune (Fortune), a former salesman of The National Cash Register Company (NCR), brought a suit to recover certain commissions allegedly due as a result of a sale of cash registers to First National Stores Inc. (First National) in 1968. Counts 1 and 2 of Fortune's amended declaration claimed bonus payments under the parties' written contract of employment… Judgment on a jury verdict for Fortune was reversed by the Appeals Court. We affirm the judgment of the Superior Court. We hold, for the reasons stated herein, there was no error in submitting the issue of “bad faith” termination of an employment at will contract to the jury.
….

Fortune was employed by NCR under a written “salesman's contract” which was terminable at will, without cause, by either party on written notice. The contract provided that Fortune would receive a weekly salary in a fixed amount plus a bonus for sales made within the “territory” (i.e., customer accounts or stores) assigned to him for “coverage or supervision,” whether the sale was made by him or someone else. The amount of the bonus was determined on the basis of “bonus credits,” which were computed as a percentage of the price of products sold. Fortune would be paid a percentage of the applicable bonus credit as follows: (1) 75% if the territory was assigned to him at the date of the order, (2) 25% if the territory was assigned to him at the date of delivery and installation, or (3) 100% if the territory was assigned to him at both times. …. In addition, NCR reserved the right to sell products in the salesman's territory without paying a bonus. However, this right could be exercised only on written notice.

In 1968, Fortune's territory included First National. This account had been part of his territory for the preceding six years; he had been successful in obtaining several orders from First National, including a million dollar order in 1963. Sometime in late 1967, or early 1968, NCR introduced a new model cash register, Class 5. Fortune corresponded with First National in an effort to sell the machine. He also helped to arrange for a demonstration of the Class 5 to executives of First National on October 4, 1968. NCR had a team of men also working on this sale.

On November 27, 1968, NCR's manager of chain and department stores, and the Boston branch manager, both part of NCR's team, wrote to First National regarding the Class 5. The letter covered a number of subjects, including price protection, trade-ins, and trade-in protection against obsolescence. While NCR normally offered price protection for only an eighteen-month term, apparently the size of the proposed order from First National caused NCR to extend its price protection terms for either a two-year or four-year period. On November 29, 1968, First National signed an order for 2,008 Class 5 machines to be delivered over a four-year period at a purchase price of approximately $5,000,000. Although Fortune did not participate in the negotiation of the terms of the order, his name appeared on the order form in the space entitled “salesman credited.” The amount of the bonus credit as shown on the order was $92,079.99.

On January 6, 1969, the first working day of the new year, Fortune found an envelope on his desk at work. It contained a termination notice addressed to his home dated December 2, 1968. Shortly after receiving the notice, Fortune spoke to the Boston branch manager with whom he was friendly. The manager told him, “You are through,” but, after considering some of the details necessary for the smooth operation of the First National order, told him to “stay on,” and to “(k)eep on doing what you are doing right now.” Fortune remained with the company in a position entitled “sales support.” In this capacity, he coordinated and expedited delivery of the machines to First National under the November 29 order as well as servicing other accounts.

Commencing in May or June, Fortune began to receive some bonus commissions on the First National order. Having received only 75% of the applicable bonus due on the machines which

had been delivered and installed, Fortune spoke with his manager about receiving the full amount of the commission. Fortune was told "to forget about it." Sixty-one years old at that time, and with a son in college, Fortune concluded that it "was a good idea to forget it for the time being."

NCR did pay a systems and installations person the remaining 25% of the bonus commissions due from the First National order although contrary to its usual policy of paying only salesmen a bonus. NCR, by its letter of November 27, 1968, had promised the services of a systems and installations person; the letter had claimed that the services of this person, Bernie Martin (Martin), would have a forecasted cost to NCR of over $45,000. As promised, NCR did transfer Martin to the First National account shortly after the order was placed.

Approximately eighteen months after receiving the termination notice, Fortune, who had worked for NCR for almost twenty-five years, was asked to retire. When he refused, he was fired in June of 1970. Fortune did not receive any bonus payments on machines which were delivered to First National after this date.

….

The central issue on appeal is whether this "bad faith" termination constituted a breach of the employment at will contract. Traditionally, an employment contract which is "at will" may be terminated by either side without reason. Although the employment at will rule has been almost uniformly criticised, see Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 Colum.L.Rev. 1404 (1967), it has been widely followed.

The contract at issue is a classic terminable at will employment contract. It is clear that the contract itself reserved to the parties an explicit power to terminate the contract without cause on written notice. It is also clear that under the express terms of the contract Fortune has received all the bonus commissions to which he is entitled. Thus, NCR claims that it did not breach the contract, and that it has no further liability to Fortune. According to a literal reading of the contract, NCR is correct.

However, Fortune argues that, in spite of the literal wording of the contract, he is entitled to a jury determination on NCR's motives in terminating his services under the contract and in finally discharging him. We agree. We hold that NCR's written contract contains an implied covenant of good faith and fair dealing, and a termination not made in good faith constitutes a breach of the contract.

We do not question the general principles that an employer is entitled to be motivated by and to serve its own legitimate business interests; that an employer must have wide latitude in deciding whom it will employ in the face of the uncertainties of the business world; and that an employer

needs flexibility in the face of changing circumstances. We recognize the employer's need for a large amount of control over its work force. However, we believe that where, as here, commissions are to be paid for work performed by the employee, the employer's decision to terminate its at will employee should be made in good faith. NCR's right to make decisions in its own interest is not, in our view, unduly hampered by a requirement of adherence to this standard.

On occasion some courts have avoided the rigidity of the “at will” rule by fashioning a remedy in tort. We believe, however, that in this case there is remedy on the express contract. In so holding we are merely recognizing the general requirement in this Commonwealth that parties to contracts and commercial transactions must act in good faith toward one another. Good faith and fair dealing between parties are pervasive requirements in our law; it can be said fairly, that parties to contracts or commercial transactions are bound by this standard. See G.L. c. 106, s 1-203 (good faith in contracts under Uniform Commercial Code).

….

Recent decisions in other jurisdictions lend support to the proposition that good faith is implied in contracts terminable at will. In a recent employment at will case, Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 552 (1974), the plaintiff alleged that her oral contract of employment had been terminated because she refused to date her foreman. The New Hampshire Supreme Court held that “(i)n all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two. . . . We hold that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice . . . constitutes a breach of the employment contract. . . . Such a rule affords the employee a certain stability of employment and does not interfere with the employer's normal exercise of his right to discharge, which is necessary to permit him to operate his business efficiently and profitably.”

….

In the instant case, we need not pronounce our adherence to so broad a policy nor need we speculate as to whether the good faith requirement is implicit in every contract for employment at will. It is clear, however, that, on the facts before us, a finding is warranted that a breach of the contract occurred. Where the principal seeks to deprive the agent of all compensation by terminating the contractual relationship when the agent is on the brink of successfully completing the sale, the principal has acted in bad faith and the ensuing transaction between the principal and the buyer is to be regarded as having been accomplished by the agent. Courts have often applied this rule to prevent overreaching by employers and the forfeiture by employees of benefits almost earned by the rendering of substantial services. See [citations].

NCR argues that there was no evidence of bad faith in this case; therefore, the trial judge was required to direct a verdict in any event. We think that the evidence and the reasonable inferences to be drawn therefrom support a jury verdict that the termination of Fortune's twenty-

five years of employment as a salesman with NCR the next business day after NCR obtained a $5,000,000 order from First National was motivated by a desire to pay Fortune as little of the bonus credit as it could. The fact that Fortune was willing to work under these circumstances does not constitute a waiver or estoppel; it only shows that NCR had him “at their mercy.” Commonwealth v. DeCotis, 366 Mass. 234, 243, 316 N.E.2d 748 (1974).

NCR also contends that Fortune cannot complain of his firing in June, 1970, as his employment contract clearly indicated that bonus credits would be paid only for an eighteen-month period following the date of the order. As we have said, the jury could have found that Fortune was stripped of his “salesman” designation in order to disqualify him for the remaining 25% Of the commissions due on cash registers delivered prior to the date of his first termination. Similarly, the jury could have found that Fortune was fired so that NCR would avoid paying him any commissions on cash registers delivered after June, 1970.

….

We think that NCR's conduct in June, 1970 permitted the jury to find bad faith.
….
Judgment of the Superior Court affirmed.

2.2.4.2a. Timeline

Date	Case Name	Decision	Notes
June 15, 1971	*Fortune v. National Cash Register Company* Superior Court (1971)	Court found in favor of Fortune.	**First filed in 1968 Plaintiff filed suit to recover particular commissions** Fortune filed a suit for wrongful termination, was awarded $45K ● Link
Argued January 16, 1976 **Decided June 23, 1976**	*Fortune v. National Cash Register Company* Appeals Court of Massachusetts, Norfolk (1976)	Court reversed the lower court’s decision, found in favor of National Cash Register Co. Court granted leave to obtain further appellate review.	“No evidence that the defendant ever expressly or impliedly promised to pay the plaintiff the "reasonable value" of any "services" rendered by him.”

			• [Link]
Decided July 20, 1977	*Fortune v. National Cash Register Company* Supreme Judicial Court of Massachusetts (1977)	The Massachusetts Supreme Court reversed the Appeals Court decision, found in favor of Fortune, affirming the Superior Court's decision.	Found that National Cash Register acted in bad faith • [Link]
August 2, 1977	*Fortune v. National Cash Register Company* Supreme Judicial Court of Massachusetts (1977)	Application for Rehearing filed.	
August 16, 1977	*Fortune v. National Cash Register Company* Supreme Judicial Court of Massachusetts (1977)	Application for Rehearing denied.	

2.2.4.3. Notes

i. Explicit Contract and Implicit Additions

Note the distinction between the explicit contract the parties in *Fortune* signed, and the implicit addition the court makes. The court makes two of those:

1. The court added a default "at will" rule and its downstream meanings.
2. The court added a gap-filler good faith provision.

According to the contract, the employer had no obligation to maintain the employee's employment at the firm. Moreover, the employer had explicit discretion in terminating the employment contract. The court agrees to all of that, but adds that there is an implicit clause in the contract, limiting the termination of the contract in certain circumstances.

This addition to the contract, the authority of the court to insert it into the contract, and the scope and direction of the court's judgment of when to insert such a clause, is the crux of this case. This also raises the spectre of writing more explicit provisions governing the termination of salesman.

ii. When do courts add contractual clauses to employment contracts?

We have seen one major addition courts read into contracts - the at-will rule. The at-will clause is an implicit clause in all open-ended employment contracts. The legal trigger for the insertion of at-will clause is the open-endedness of the contract. Good faith requires no such trigger– it applies in all contracts. But much like the at-will rule, its application by courts determines much of its effect.

One possible way to think about implicit contract additions is putting into legal effect what the parties would have bargained for had they had the relevant resources/information. Good faith provisions are framed here as obvious additions to the standard formulation of contracts that most reasonable parties would have liked their contracts to include. No serious empirical research can support this kind of legal notion about reasonable contracts, but the lack of research never stopped courts from deciding issues.

Another possible way to think about the good faith provision is, as in the case of the IIED tort, as a safety valve. Good faith provisions are always there at the discretion of courts to utilize in severe enough circumstances. The unique formulation we saw in the case of an employer terminating an employee before the fruition of a contractual good is a limiting phrasing for when to apply such a safety valve.

iii. A Duty to Bargain in Good Faith under the National Labor Relations Act (NLRA)

One domain in work law where we find a codified good faith requirement is the NLRA (covered generally here, and wrt bargaining subjects here). The statutory scheme is wordy, but to the point.

Section 8(a)(5) of the NLRA makes it an unfair labor practice “to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).” **Section 9(a)**, in turn, declares unions as exclusive represantatives of the covered bargaining unit, but allow room for individual channels of communication between workers and management.

Section 8(d) then defines the obligation to bargain collectively as

> [T]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and *confer in good faith* with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract

> incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . [my italics, GR].

iv. A Good Faith Requirement under the ADA?

The Americans with Disabilities Act (ADA) provides that employers must make "reasonable accommodations" for certain disabilities of covered individuals (ADA. Sec. 102(b)(5)(A)).

To facilitate the accommodation process, it is usually the obligation of the employee to initiate what the regulations actualizing the ADA call an "interactive process":

> **(3)** To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, *interactive process* with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations [my italics, GR].

29 C.F.R. § 1630.2

Courts have generally inferred a duty of mutual good faith in the interactive process. Meaning, that both employers and employees are bounded by some ground-rules during the process of identifying a reasonable accommodation.

v. Radical Statutory Good Faith

Legislatures in North Carolina have offered (but not adopted) a radical read of the good faith principle, one that completely swallows the at will rule. Of note here are both the form (statutory intervention) and the substance (abolishing the at will rule). But for our purposes note the disagreement about the compatibility of the at-will rule and the good faith provision.

H.B. 958 May 1, 2024

AT-WILL EMPLOYMENT ABOLISHED 8

SECTION 1.1. Abolish At-Will Employment. – The General Assembly finds that:

> (1) The origin of the employment at-will doctrine has been traced back to an 1877 treatise that legal scholars have since questioned. The employment at-will doctrine is disfavored by several states and by almost all modern, industrialized nations. The employment at-will doctrine allows an employer to terminate an employee for unfair reasons or for no

reason at all, with this imbalance of power created by the employment at-will doctrine adversely affecting personal freedom and economic security.

(2) The implied covenant of good faith and fair dealing is an important legal doctrine . . . The implied covenant of good faith and fair dealing is recognized by the American Law Institute as Section 205 of the Restatement (Second) of Contracts.

(3) Good public policy dictates that acts of bad faith should not be tolerated just because they are committed as part of an employment contract, thus warranting the statutory prohibition of at-will employment contained in this act.

SECTION 1.2.

§ 95-31.1. Covenant of good faith and fair dealing; at-will employment abolished.

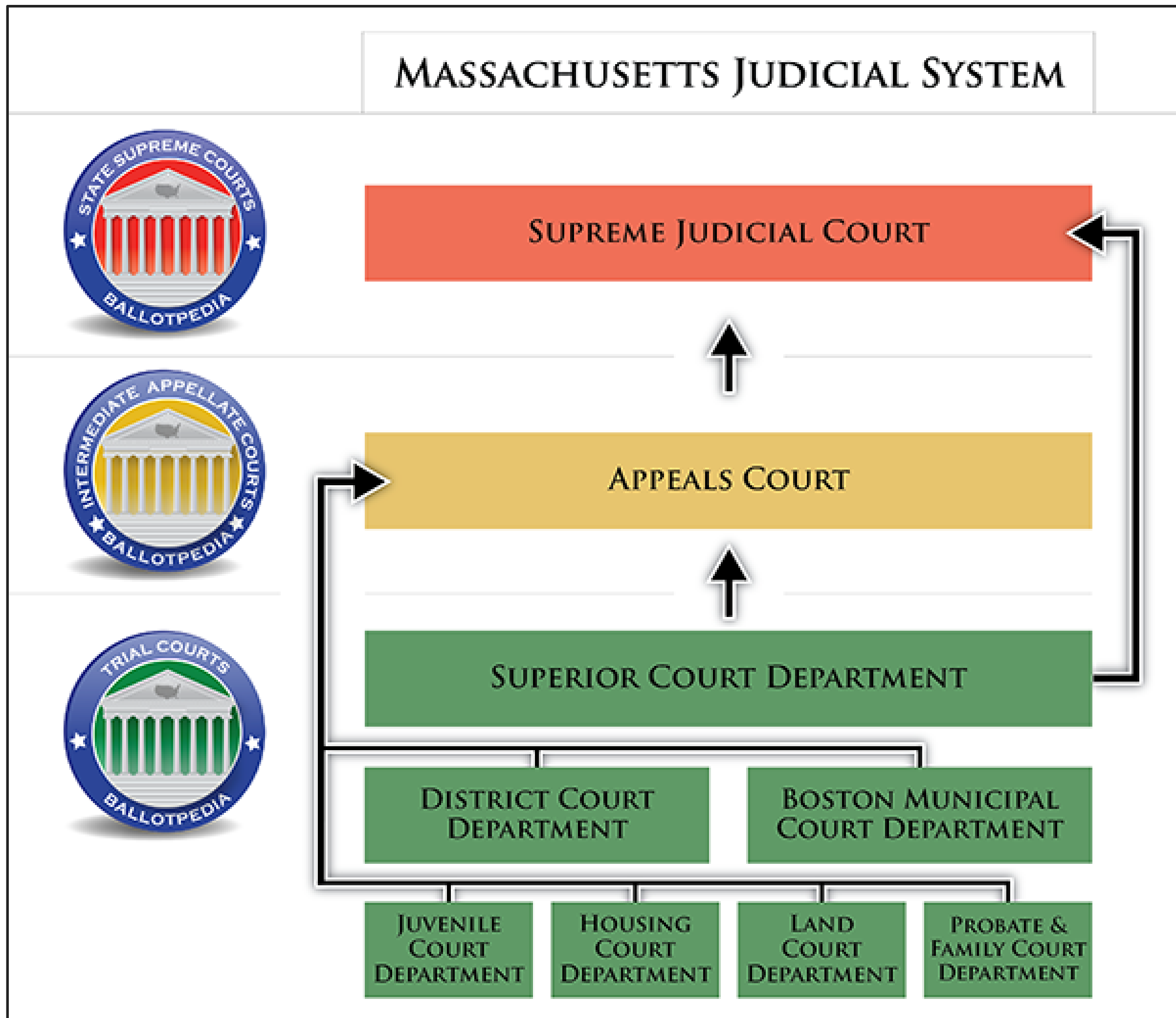
(a) The General Assembly finds that every contract for employment, whether the contract is written or oral, consists of both express and implied terms that are legal covenants between the parties to the contract. Further, the General Assembly declares that an implied covenant of good faith and fair dealing is part of every employment contract in this State. Therefore, it is the public policy of this State that the employment at-will doctrine is inconsistent with the implied covenant of good faith and fair dealing that is part of every employment contract in this State.

(b) The doctrine of at-will employment is abolished in this State.

(c) An employee in this State may only be fired for just cause.

(source)

2.2.4.4. Massachusetts Judicial System



Source: Link

2.2.4.5. Further Readings

- Lillard, Monique C. "Fifty Jurisdictions in Search of a Standard: The Covenant of Good Faith and Fair Dealing in the Employment Context." Mo. L. Rev. 57 (1992): 1233 (link).
- Prince, Samantha J., Megacompany Employee Churn Meets 401(k) Vesting Schedules: A Sabotage on Workers' Retirement Wealth (November 1, 2022). Yale Law & Policy Review, Forthcoming, Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4054884.
- Sabine Tsuruda, *GOOD FAITH IN EMPLOYMENT*, 24 THEORETICAL INQUIRIES IN LAW (2023) (link).

2.3. Mid-Term Contract Alteration

2.3.1. Restatement of Law, Employment Law, §§ 2.05 & 2.06

(link)

§ 2.05. Binding Employer Policy Statements

Policy statements by an employer in documents such as employee manuals, personnel handbooks, and employment policy directives that are provided or made accessible to employees, whether by physical or electronic means, and that, reasonably read in context, establish limits on the employer's power to terminate the employment relationship, are binding on the employer until modified or revoked (as provided in § 2.06).

§ 2.06. Modification or Revocation of Binding Employer Policy Statements

(a) An employer may prospectively modify or revoke its binding policy statements if it provides reasonable advance notice of, or reasonably makes accessible, the modified statement or revocation to the affected employees.

(b) Modifications and revocations apply to all employees hired, and all employees who continue working, after the notice is given and the modification or revocation becomes effective.

(c) Modifications and revocations cannot adversely affect vested or accrued employee rights that may have been created by the statement, an agreement based on the statement, or reasonable detrimental reliance on a promise in the statement.

2.3.2. Asmus v. Pac. Bell

Asmus v. Pac. Bell, 23 Cal. 4th 1, 96 Cal. Rptr. 2d 179, 999 P.2d 71 (2000).
Full decision: (link); **Docket**: (link); **Oral argument**: ()

Supreme Court of California.

Opinion
CHIN, J.

We granted the request of the United States Court of Appeals for the Ninth Circuit for an answer to the following certified question of law: “Once an employer's unilaterally adopted policy—which requires employees to be retained so long as a specified condition does not occur—has become a part of the employment contract, may the employer thereafter unilaterally [terminate] the policy, even though the specified condition has not occurred?”

We conclude the answer to the certified question is yes. An employer may unilaterally terminate a policy that contains a specified condition, if the condition is one of indefinite duration, and the

employer effects the change after a reasonable time, on reasonable notice, and without interfering with the employees' vested benefits.

I. BACKGROUND

….

Facts

In 1986, Pacific Bell issued the following "Management Employment Security Policy" (MESP):

> It will be Pacific Bell's policy to offer all management employees who continue to meet our changing business expectations employment security through reassignment to and retraining for other management positions, even if their present jobs are eliminated. This policy will be maintained so long as there is no change that will materially affect Pacific Bell's business plan achievement.

In January 1990, Pacific Bell notified its managers that industry conditions could force it to discontinue its MESP. In a letter to managers, the company's chief executive officer wrote:

> [W]e intend to do everything possible to preserve our Management Employment Security policy. However, given the reality of the marketplace, changing demographics of the workforce and the continued need for cost reduction, the prospects for continuing this policy are diminishing — perhaps, even unlikely. We will monitor the situation continuously; if we determine that business conditions no longer allow us to keep this commitment, we will inform you immediately.

Nearly two years later, in October 1991, Pacific Bell announced it would terminate its MESP on April 1, 1992, so that it could achieve more flexibility in conducting its business and compete more successfully in the marketplace. That same day, Pacific Bell announced it was adopting a new layoff policy (the Management Force Adjustment Program) that replaced the MESP but provided a generous severance program designed to decrease management through job reassignments and voluntary and involuntary terminations. Employees who chose to continue working for Pacific Bell would receive enhanced pension benefits. Those employees who opted to retire in December 1991 would receive additional enhanced pension benefits, including increases in monthly pension and annuity options. Employees who chose to resign in November 1991 would receive these additional enhanced pension benefits as well as outplacement services, medical and life insurance for one year, and severance pay equaling the employee's salary and bonus multiplied by a percentage of the employee's years of service.

Plaintiffs are 60 former Pacific Bell management employees who were affected by the MESP cancellation. They chose to remain with the company for several years after the policy termination and received increased pension benefits for their continued employment while working under the new Management Force Adjustment Program. All but eight of them signed releases waiving their right to assert claims arising from their employment under the MESP or its termination.

Plaintiffs filed an action in federal district court against Pacific Bell, seeking declaratory and injunctive relief, as well as damages for breach of contract, breach of fiduciary duty, fraud, and violations of the Employee Retirement Income Security Act (ERISA) (29 U.S.C. § 1000 et seq.)….
….

II. DISCUSSION

A. California Employment Law

We held in *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654 (*Foley*), that an implied-in-fact contract term not to terminate an employee without good cause will rebut the statutory presumption of Labor Code section 2922 that employment for an indefinite period is terminable at will. The *Foley* court observed that the trier of fact can infer an agreement to limit grounds for an employee's termination based on the employee's reasonable reliance on company policy manuals. In *Scott,* we stated that, in light of *Foley,* we could find "no rational reason why an employer's policy that its employees will not be demoted except for good cause, like a policy restricting termination or providing for severance pay, cannot become an implied term of an employment contract. In each of these instances, an employer promises to confer a significant benefit on the employee, and it is a question of fact whether that promise was reasonably understood by the employee to create a contractual obligation." (*Scott, supra*).
Both *Scott* and *Foley* emphasized that employment policies, manuals, and offers were not exempt from the rules governing contract interpretation.

In some cases, an employer adopts a no-layoff policy or provides employees with an employment security policy in order to earn the employees' loyalty in exchange for granting them job security. This exchange is fair and it may, depending on the facts, provide the basis for an enforceable unilateral contract ….

In a unilateral contract, there is only one promisor, who is under an enforceable legal duty. The promise is given in consideration of the promisee's act or forbearance. As to the promisee, in general, any act or forbearance, including continuing to work in response to the unilateral promise, may constitute consideration for the promise.

As a Court of Appeal observed, "Of late years the attitude of the courts (as well as of employers in general) is to consider [employment security agreements] which offer additional advantages to employees as being in effect offers of a unilateral contract which offer is accepted if the employee continues in the employment, and not as being mere offers of gifts. They make the employees more content and happier in their jobs, cause the employees to forego their rights to seek other employment, assist in avoiding labor turnover, and are considered of advantage to both the employer and the employees." (*Chinn v. China Nat. Aviation Corp.* (1955) 138

Cal.App.2d 98, 99–100 (*Chinn*) [employer's agreement to pay severance benefits becomes enforceable unilateral contract if employee accepts benefit offer by continuing employment]; see also *Lang v. Burlington Northern R. Co.* (D.Minn.1993) 835 F.Supp. 1104, 1106 [continued employment constitutes acceptance of arbitration policy added to employment manual after employment commenced]; *Hunter v. Sparling* (1948) 87 Cal.App.2d 711, 723 [continuing services of employee is adequate consideration for employer's promise to pay future pension].)

The parties agree that California law permits employers to implement policies that may become unilateral implied-in-fact contracts when employees accept them by continuing their employment. We do not further explore the issue in the context here, although we note that whether employment policies create unilateral contracts will be a factual question in each case. The parties here disagree on how employers may terminate or modify a unilateral contract that has been accepted by the employees' performance. Plaintiffs assert that Pacific Bell was not entitled to terminate its MESP until it could demonstrate a change materially affecting its business plan, i.e., until the time referred to in a clause in the contract. Pacific Bell asserts that because it formed the contract unilaterally, it could terminate or modify that contract as long as it did so after a reasonable time, gave affected employees reasonable notice, and did not interfere with the employees' vested benefits (e.g., pension and other retirement benefits). ….

B. Other Jurisdictions

Because there is no case in point on the present question in this state, the parties each rely on the rule as stated in other jurisdictions to support their particular views.

Pacific Bell points to the rule in the majority of jurisdictions that have addressed the question whether and how an employer may terminate or modify an employment security policy that has become an implied-in-fact unilateral contract. Regardless of the legal theory employed, the majority of other jurisdictions that have addressed the question conclude that an employer may terminate or modify a contract with no fixed duration period after a reasonable time period, if it provides employees with reasonable notice, and the modification does not interfere with vested employee benefits. [citations omitted].

Most of these courts refer to general contract law in deciding whether an employer may terminate or modify an employment contract. They reason that because the employer created the policy's terms unilaterally, the employer may terminate or modify them unilaterally with reasonable notice. [citations omitted]

Fleming indicated that of the three possible approaches to the termination question, it favored the majority approach as the one most consistent with unilateral contract principles. (*Fleming, supra,* 450 S.E.2d at pp. 594–595.) The first approach—to allow termination without notice at any time before completion of the contract—struck the *Fleming* court as too harsh. (*Ibid.*) That approach is now considered obsolete in California. (*Drennan v. Star Paving Co.* (1958) 51

Cal.2d 409) *Fleming* also rejected an alternative minority model that would impose bilateral concepts on a unilateral contract to require mutual assent and additional consideration to support the termination. (*Fleming, supra,* 450 S.E.2d at p. 595.) The court settled on the majority approach after recognizing that the employer-employee relationship is not static. *Fleming* stated that "[e]mployers must have a mechanism which allows them to alter the employee handbook to meet the changing needs of both business and employees." (*Ibid.*)

As plaintiffs observe, a minority of jurisdictions today hold that an employer cannot terminate or modify a unilateral employment contract without the employees' express knowledge and consent. (See *Torosyan v. Boehringer Ingelheim Pharm.* (1995) 234 Conn. 1, 662 A.2d 89, 99; *Brodie v. General Chemical Corp.* (Wyo.1997) 934 P.2d 1263, 1268; *Robinson v. Ada S. McKinley Community Services* (7th Cir.1994) 19 F.3d 359, 364.) Like the dissent, they reason that *any* termination or modification of a unilateral employment contract requires additional consideration and acceptance by the affected employees, because their only choices in light of a pending termination would be to resign or to continue working. (See, e.g., *Demasse v. ITT Corp.* (1999) 194 Ariz. 500 (*Demasse*).)

….

We turn now to plaintiffs' several arguments that would restrict Pacific Bell's right to terminate or modify its MESP.

C. Application of Legal Principles

1. *Consideration*

…. The general rule governing the proper termination of unilateral contracts is that once the promisor determines after a reasonable time that it will terminate or modify the contract, and provides employees with reasonable notice of the change, additional consideration is not required. The mutuality of obligation principle requiring new consideration for contract termination applies to bilateral contracts only. (*Ibid.*) In the unilateral contract context, there is no mutuality of obligation. (*Ibid.*) For an effective modification, there is consideration in the form of continued employee services. (*Ibid.*) The majority rule correctly recognizes and applies this principle. (See *ante,* 96 Cal.Rptr.2d at pp. 185–187) Here, Pacific Bell replaced its MESP with a subsequent layoff policy. Plaintiffs' continued employment constituted acceptance of the offer of the modified unilateral contract. …

The corollary is also true. Just as employers must accept the employees' continued employment as consideration for the original contract terms, employees must be bound by amendments to those terms, with the availability of continuing employment serving as adequate consideration from the employer. When Pacific Bell terminated its original MESP and then offered continuing employment to employees who received notice and signed an acknowledgement to that effect, the employees accepted the new terms, and the subsequent modified contract, by continuing to

work. Continuing to work after the policy termination and subsequent modification constituted acceptance of the new employment terms. (See *Pine River State Bank v. Mettille* (Minn.1983) 333 N.W.2d 622, 626–627 [continued employment is sufficient consideration for employment contract modification].)

2. *Illusoriness*
Plaintiffs alternatively claim that Pacific Bell's MESP would be an illusory contract if Pacific Bell could unilaterally modify it. Plaintiffs rely on the rule that when a party to a contract retains the unfettered right to terminate or modify the agreement, the contract is deemed to be illusory.

Plaintiffs are only partly correct. …. As Pacific Bell observes, the MESP was not illusory because plaintiffs obtained the benefits of the policy while it was operable. In other words, Pacific Bell was obligated to follow it as long as the MESP remained in effect. Although a permanent no-layoff policy would be highly prized in the modern workforce, it does not follow that anything less is without significant value to the employee or is an illusory promise. As long as the MESP remained in force, Pacific Bell could not treat the contract as illusory by refusing to adhere to its terms; the promise was not optional with the employer and was fully enforceable until terminated or modified.

3. *Vested Benefits*
….
4. *Condition as Definite Duration Clause*
Plaintiffs alternatively contend that a contract specifying termination on the occurrence (or nonoccurrence) of a future happening, in lieu of a specific date, is one of definite duration that cannot be terminated or modified until the event occurs. (See *Wittmann v. Whittingham* (1927) 85 Cal.App. 140, 145, 259 P. 63 [contract to deliver shares of stock when stock dividends or profits had paid note is contract of definite duration]; *La Jolla Casa deManana v. Hopkins* (1950) 98 Cal.App.2d 339, 348, 219 P.2d 871 [contracts specified to last until " 'termination of the present war' " and until plaintiff " 'can reasonably build a home for herself' " are contracts for definite duration].) Because Pacific Bell declared that it would maintain its MESP "so long as" its business conditions did not substantially change, plaintiffs, like the dissent, assert that the specified condition is automatically one for a definite duration that Pacific Bell is obliged to honor until the condition occurs.

Contrary to plaintiffs and the dissent, a "specified condition" may be one for either definite or indefinite duration. Indeed, both plaintiffs and the dissent fail to recognize that courts have interpreted a contract that conditions termination on the happening of a future event as one for a definite duration or time period only when "there is an ascertainable event which necessarily implies termination." As Pacific Bell observes, even though its MESP contained language specifying that the company would continue the policy "so long as" it did not undergo changes

materially affecting its business plan achievement, the condition did not state an ascertainable event that could be measured in any reasonable manner.

As Pacific Bell explains, when it created its MESP, the document referred to changes that would have a significant negative effect on the company's rate of return, earnings and, "ultimately the viability of [its] business." The company noted that if the change were to occur, it would result from forces beyond Pacific Bell's control, and would include "major changes in the economy or the public policy arena." These changes would have nothing to do with a fixed or ascertainable event that would govern plaintiffs' or Pacific Bell's obligations to each other under the policy. Therefore, the condition in the MESP did not restrict Pacific Bell's ability to terminate or modify it, as long as the company made the change after a reasonable time, on reasonable notice, and in a manner that did not interfere with employees' vested benefits. (See, e.g., *Consolidated Theatres, Inc. v. Theatrical Stage Employees Union* (1968) 69 Cal.2d 713 [contract for indefinite duration terminable after a reasonable time on reasonable notice].)

The facts show that those conditions were met here. Pacific Bell implemented the MESP in 1986, and it remained in effect until 1992, when the company determined that maintaining the policy was incompatible with its need for flexibility in the marketplace. The company then implemented a new Management Force Adjustment Program in which employees whose positions were eliminated would be given 60 days to either find another job within the company, leave the company with severance benefits after signing a release of any claims, or leave the company without severance benefits. The employees were provided with a booklet entitled Voluntary Force Management Programs detailing the new benefits the company provided following the MESP cancellation.

Thus, the MESP was in place for a reasonable time and was effectively terminated after Pacific Bell determined that it was no longer a sound policy for the company. Contrary to the dissent, Pacific Bell did not engage in behavior that one could characterize as "manipulative" or "oppressive." Employees were provided ample advance notice of the termination, and the present plaintiffs even enjoyed at least two more years of employment and corresponding benefits under a modified policy before they were eventually laid off. In sum, Pacific Bell maintained the MESP for a reasonable time, it provided more than reasonable notice to the affected employees that it was terminating the policy, and it did not interfere with employees' vested benefits. The law requires nothing more.

III. CONCLUSION

As discussed, our employment cases support application of contract principles in the decision whether an employer may unilaterally terminate an employment security policy that has become an implied in-fact unilateral contract. Under contract theory, an employer may terminate a unilateral contract of indefinite duration, as long as its action occurs after a reasonable time, and

is subject to prescribed or implied limitations, including reasonable notice and preservation of vested benefits. The facts clearly show that employees enjoyed the benefits of the MESP for a reasonable time period, and that Pacific Bell gave its employees reasonable and ample notice of its intent to terminate the MESP. The company also did not at any time interfere with employees' vested benefits in effecting the MESP termination. In addition, the employees accepted the company's modified policy by continuing to work in light of the modification. Therefore, in response to the Ninth Circuit's certification request, we conclude that we should answer as follows: An employer may terminate a written employment security policy that contains a specified condition, if the condition is one of indefinite duration and the employer makes the change after a reasonable time, on reasonable notice, and without interfering with the employees' vested benefits.

[dissent and concurring opinions omitted]

2.3.2.1. Timeline

Date	Case Name	Decision	Notes
May 5, 1997	*Asmus v. Pacific Bell* United States District Court for the Northern District of California (1997)	Granted summary judgment in favor of the defendants on all claims brought by the 52 appellants who signed releases and the breach of contract claim in favor of the eight plaintiffs who did not sign releases.	**First filed in 1997** Concluded that the defendant could not terminate MESP unless it first demonstrated a change that will materially alter the defendant's business plan. On May 5, 1997, district court entered an order approving the stipulation and entered judgment in plaintiffs' favor on the issue.
October 23, 1998	*Asmus v. Pacific Bell* United States Court of Appeals, Ninth Circuit (1998)	This court did not make a ruling, but instead asked the California Supreme Court	• Link
June 1, 2000	*Asmus v. Pacific Bell* Supreme Court of California (2000)	Answered the Ninth Circuit Court by saying that an employer can	Judgment of the district court was reversed and the case remanded.

		unilaterally modify a contract if the condition is one of indefinite duration and the employer makes the change after a reasonable time, on reasonable notice, and without interfering with employees' vested benefits.	• Link Defendant had the right to terminate MESP as it did. Plaintiff's motion for summary judgment should have been denied and defendant's cross motion for summary judgment should have been granted. • Link
August 16, 2000	*Asmus v. Pacific Bell* Supreme Court of California (2000)	Appellant's petition for rehearing denied.	Pacific Bell had the right to terminate its policy in the way that it did.

2.3.2.1. Notes

i. *Wait, what?*

For most students the decision in *Asmus* is surprising. Based on generally accepted intuitions, the obvious answer to the question posed to the court– whether or not employers may unilaterally modify and terminate a contractual clause during an employee's employment– is a clear *no*. The answer in *Asmus* is a clear *yes*. A conditional yes, but still very much a yes. Try and reflect on why we have such a discrepancy between our beliefs about the law and the law itself.

One option is that we have some ideal image of what a contract is– a mutually binding agreement between two parties, a meeting of the minds, as your Contracts professor might say. Contrasting that image with the legal analysis in *Asmus* is thus very different. But consider other contractual relations in your life: when you signed in to Google Docs or SSRN to read this document you consented to the terms and conditions of using this site. When you were admitted to your college or University you agreed to multiple one-sided statements made by those institutions regarding a whole host of issues. When you use your favorite social media site, you always (many times implicitly) agree to abide by a long (and ever changing) list of terms. Often all of those contractual relations can be unilaterally modified. How can the ideal image of mutually binding contracts still persist?

Another option is that we know all of that. Yet we believe that employment is different somehow. Sure, signing onto X (the social network previously called Twitter) is also accepting

X's terms of service, but employment is not like X. Why? Well perhaps employment is more important than social media, perhaps employment is more personal, more binding, and more guarded by someone or something out there.

But *Asmus* and similar cases tell us that none of the notions above are true. Contracts are not necessarily mutual and stable; there is nothing out there making employment contracts more protective, or more secure than your relations to X. Perhaps it is the other way around.

ii. *Is* Asmus *about At-Will Contracts?*

Employment at-will is defined by the ability of the employer to terminate an employee for good reason, bad reason, or no reason at all. Employment at-will contracts are thus incredibly easy (legally speaking) to modify. Most courts treat at-will as a constantly negotiated contractual relationship, where every second of every workday an employer concedes to receive services for pay, and the relationship is being constantly agreed upon (at least from a legal point of view). Thus, modifying at-will contracts is a simple matter of the employer proclaiming new terms, and the employee consents by working under those terms.

However, in *Asmus*, employees were guaranteed job security, and the employer conceded (at least in this phase in the litigation) that its unilateral policy proclamations of job security were embedded in the employment contract. Thus, employees both had more at stake and had, at least plausibly, shifted away from this tentative at-will mode of contract making.

However, the *Asmus* court treats this fact– that the nature of the guaranteed right here is job security– as dispositive for the contractual analysis. Consider Rachel Arnow-Richman's position on this:

> Of all of the mid-term modification scenarios, it is surprising that courts would favor unilateral modification in the handbook context given the nature of the underlying rights [i.e. job security]. As *Asmus* illustrates, the terms at issue in handbook modification disputes generally involve limitations on the employer's right to terminate. This would appear to do away with the rationale for the unilateral modification approach articulated by courts in the noncompete and arbitration contexts. If the employer's original handbook altered the at-will nature of the relationship, then the employer is no longer in a position to lawfully terminate the employee and rehire on new terms. Whereas the employee faced with a mid-term noncompete or arbitration agreement is at will, the employee in the handbook context is ostensibly protected by the policy's original terms. Unilateral modification in this context would appear to be the equivalent of a breach of contract.
>
> Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 B.C. L. Rev. 427, 451 (2016) (link).

The explanation, per Arnow-Richman, is in the wrong assumption we (or the employees) make that the unilateral employers' statements actually modified the at-will rule. Courts are hard-pressed to frame such unilateral announcements as actual changes in at-will status, and their modification analysis follows the original, un-altered status.

iii. *It is Law all the way down*

Note that *Asmus* is not the product of a lack of law. It is not a gap in legal coverage. *Asmus* is not a *lacuna* in the law– *Asmus* is the law no less (but no more) than *O'Connor v. Uber*, *Hoy*, or any other case in the textbook. It is the law that allows employers to unilaterally modify or terminate contractual provisions in employment contracts, given some minor conditions like notice and vested interests, etc.

Asmus is not less of a law than an imaginary counterfactual decision stating that employers *cannot* unilaterally modify at-will contracts. Both are plausible legal rules, both are plausible solutions to the legal question posed at *Asmus*. But the *Asmus* court, as many like it, chose one legal path over the other. It chose this path using the traditional toolkit of common law courts: precedent, principle, and policy. One cannot escape providing a legal answer to a legal question, it is law all the way down.

iv. *Illusory Contracts?*

One possible reaction to *Asmus* is that employment contracts and the employer's statements embedded in those contracts are illusory. By illusory here I mean not real, fake, or lacking legally binding power. The argument here is that because those contracts can be modified unilaterally at will, at any time, they are pragmatically meaningless.

The *Asmus* court's answer here is *no*. First, those contracts are not illusory because while in force they have legally binding power. Second, those contracts are not illusory because the court enforces all kinds of mechanisms for change - reasonable notice, for example.

Do you buy this argument?

v. Unilateral modification – The Union Alternative

The authority of employers to engage in unilateral modifications on the job is challenged in a different realm of work law – labor law.

What would happen if the employees in *Asmus* were unionized, and the change was being done to a term covered by a collective bargaining agreement and not a unilateral management policy?

Under the National Labor Relations Act an employer must negotiate with a representative union any and all maters pertaining to mandatory bargaining subjects. Even while a contract is in place, an employer is legally permitted to unilaterally change only "permissive" bargaining subjects. Defining what is a "mandatory" bargaining subject is tricky, as illustrated here, but termination rules and procedures like those in *Asmus* are definetly mandatory.

Therefore, in the alternative world where *Asmus* is taking place in a unionized workplace, the employer must negotiate those changes with the union. However, the employer might still have an out. An employer is not mandated to negotiate midterm changes in mandatory bargaining subjects if the union expressly waived its right to negotiate those.

In the union-hypothetical, the conflict would then turn to the language of the conditional clause (if existing) and whether it was explicit enough to be considered a "true" waiver. Unsurprisingly, the standards for what counts as such a valid waiver for midterm-bargaining changes between dependent on which party nominated the majority of the Board.

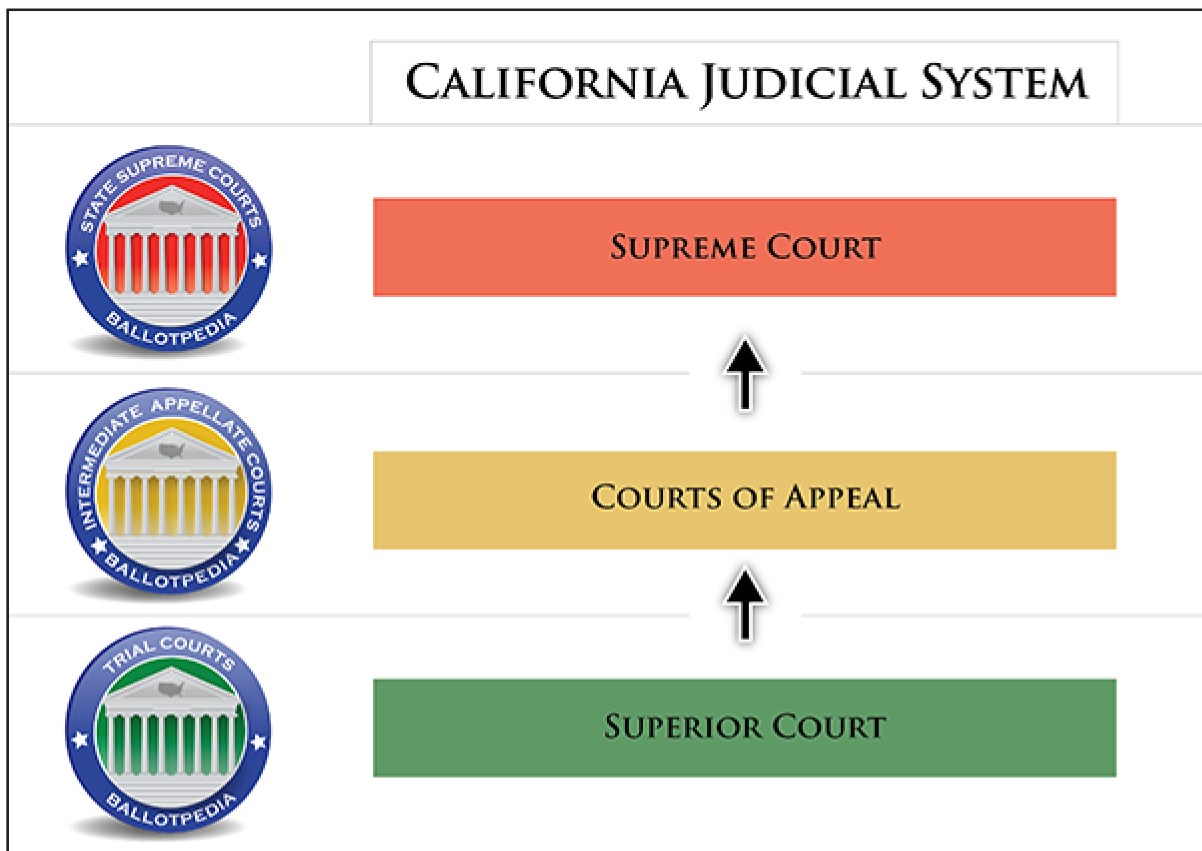
The bottom line is, thus, double:

1. It is harder for employers to legally modify important contractual terms in a unionized v. non unionzed workplaces. Or, in other words, statutory language is better than the common law in protecting workers' bargaining achievments.

2. While it is harder to unilateral modify contractual language in a unionized workplace, it is still possible. But, instead of general principles handed down from generations of common law, courts and Board would examine the specific contractual language. This, in turn, gives unions (and employers) some agency in determining how flexible their bargaining achievements are.

Unionized employers to their lawyers on unilateral modification, an illustration

2.3.4. The Structure of the California Judicial System



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2.4. Employee Privacy

2.4.1. K-Mart Corp. Store No. 7441 v. Trotti, 677 S.W.2d 632 (Tex. App. 1984)

K-Mart Corporation appeals from a judgment awarding the appellee, Trotti, $8,000.00 in actual damages and $100,000.00 in exemplary damages for invasion of privacy.

We reverse and remand.

The appellee was an employee in the hosiery department at the appellants' store number 7441. Her supervisors had never indicated any dissatisfaction with her work nor any suspicion of her honesty.

The appellants provided their employees with lockers for the storage of personal effects during working hours. There was no assignment of any given locker to any individual employee. The employees could, on request, receive locks for the lockers from the appellants, and if the appellants provided the lock to an employee they would keep either a copy of the lock's combination or a master key for padlocks. Testimony indicated that there was some problem in providing a sufficient number of locks to employees, and, as a result, the store's administrative personnel permitted employees to purchase and use their own locks on the lockers, but in these instances, the appellants did not require the employee to provide the manager with either a combination or duplicate key. The appellee, with appellants' knowledge, used one of these lockers and provided her own combination lock.

On October 31, 1981, the appellee placed her purse in her locker when she arrived for work. She testified that she snapped the lock closed and then pulled on it to make sure it was locked. When she returned to her locker during her afternoon break, she discovered the lock hanging open. Searching through her locker, the appellee further discovered her personal items in her purse in considerable disorder. Nothing was missing from either the locker or the purse. The store manager testified that, in the company of three junior administrators at the store, he had that afternoon searched the lockers because of a suspicion raised by the appellants' security personnel that an unidentified employee, not the appellee, had stolen a watch. The manager and his assistants were also searching for missing price-marking guns. The appellee further testified that, as she left the employee's locker area after discovering her locker open, she heard the manager suggest to his assistants, "Let's get busy again." The manager testified that none of the parties searched through employees' personal effects.

The appellee approached the manager later that day and asked if he had searched employees' lockers and/or her purse. The manager initially denied either kind of search and maintained this denial for approximately one month. At that time, the manager then admitted having searched the employees' lockers and further mentioned that they had, in fact, searched the appellee's purse, later saying that he meant that they had searched only her locker and not her purse.

The manager testified that during the initial hiring interviews, all prospective employees received verbal notification from personnel supervisors that it was the appellants' policy to conduct ingress-egress searches of employees and also to conduct unannounced searches of lockers. A personnel

supervisor and an assistant manager, however, testified that, although locker searches did regularly occur, the personnel supervisors did not apprise prospective employees of this policy.

. . . .

The fundamental and basic right to be left alone constitutes the essence of the right to privacy.

> The right of privacy has been defined as the right of an individual to be left alone, to live a life of seclusion, to be free from unwarranted publicity. *Billings v. Atkinson*, 489 S.W.2d 858, 859 (Tex. 1973).

This right to privacy is so important that the United States Supreme Court has repeatedly deemed it to stem implicitly from the Bill of Rights. Our State courts have long recognized a civil cause of action for the invasion of the right to privacy and have defined such an invasion in many ways: As an intentional intrusion upon the solitude or seclusion of another that is highly offensive to a reasonable person, *Gill v. Snow*, 644 S.W.2d 222, 224 (Tex. App. -- Ft. Worth 1982, no writ); and as the right to be free from the wrongful intrusion into one's private activities in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities, *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668, 682 (Tex. 1976); *Billings v. Atkinson, supra*, at 859.

The appellants requested the trial court to define an "invasion of privacy" as "the intentional intrusion upon the solitude or seclusion of another that is highly offensive to a reasonable person." This is the definition enunciated in *Gill v. Snow, supra*, and in the Restatement (Second) of Torts, Sec. 652B (1977). The court refused to include the part of the requested instruction, ". . . that is highly offensive to a reasonable person." The appellants argue that this refusal constituted an abuse of discretion because the Rules of Civil Procedure require such an instruction. Tex. R. Civ. P. 273 and 277. The appellee alleges that the record establishes that the intrusion was highly offensive as a matter of law, and that, therefore, the instruction was unnecessary.

. . . .

The definition of "invasion of privacy" that the appellant requested is one widely and repeatedly accepted. Although the Texas Supreme Court has not adopted a verbatim rendition of this definition, it is clear that, in Texas, an actionable invasion of privacy by intrusion must consist of an unjustified intrusion of the plaintiff's solitude or seclusion of such magnitude as to cause an ordinary individual to feel severely offended, humiliated, or outraged. *Industrial Foundation of the South v. Texas Industrial Accident Board, supra; Billings v. Atkinson, supra*.

The appellants correctly point out that no Texas case yet reported has ever declined to include a requirement that the intrusion complained of be highly offensive to a reasonable person, and the appellee agrees with this statement. Nevertheless, the appellee urges that since the facts of this case established the highly objectionable nature of the intrusion as a matter of law, the requested instruction was unnecessary, and thus the trial court properly refused to include it.

We disagree with the appellee's contention. The record does indicate the appellee's outrage upon discovering the appellants' activities but fails to demonstrate that there could be no dispute as to the severity of the offensiveness of the intrusion, thereby making it impossible for us to conclude that the facts established the disputed portion of the instruction as a matter of law.

Moreover, we note that the result of accepting this contention would be to raise the legal theory of invasion of privacy from the realm of intentional torts into the sphere of strict liability. It would make any wrongful intrusion actionable, requiring a plaintiff to establish merely that the intrusion occurred and that the plaintiff did not consent to it. Because of the stern form of liability which already stems from an invasion of privacy, discussed, *infra*, accepting a definition of invasion of privacy which lacked a standard of high offensiveness would result in fundamentally unfair assessments against defendants who offended unreasonably sensitive plaintiffs, but whose transgressions would not realistically fill either an ordinary person or the general society with any sense of outrage. A business executive, for example, could find himself liable for entering an associate's office without express permission; so could a beautician who opened a co-worker's drawer in order to find some supplies needed for a customer.

We hold that the element of a highly offensive intrusion is a fundamental part of the definition of an invasion of privacy, and that the term "invasion of privacy" is a highly technical, legal term, requiring, under Rule 277, an explanation to the jury. In the instant case, the definition of an invasion of privacy necessarily required the inclusion of the requested standard of offensiveness.

. . . .

The lockers undisputably were the appellants' property, and in their unlocked state, a jury could reasonably infer that those lockers were subject to legitimate, reasonable searches by the appellants. This would also be true where the employee used a lock provided by the appellants, because in retaining the lock's combination or master key, it could be inferred that the appellants manifested an interest both in maintaining control over the locker and in conducting legitimate, reasonable searches. Where, as in the instant case, however, the employee purchases and uses his own lock on the lockers, with the employer's knowledge, the fact finder is justified in concluding that the employee manifested, and the employer recognized, an expectation that the locker and its contents would be free from intrusion and interference.

In the present case, there is evidence that the appellee locked the locker with her own lock; that when the appellee returned from a break, the lock was lying open; that upon searching her locker, the appellee discovered that someone had rifled her purse; that the appellants' managerial personnel initially denied making the search but subsequently admitted searching her locker and her purse. We find this is far more evidence than a "mere scintilla," and we hold that there is some evidence to support the jury's finding.

As to the "insufficiency" point, after examining the record as a whole, we find it indicates all of the above. The appellee remembers having locked the locker and having seen the lock closed before starting work that day. The record indicates that the searching personnel denied having gone through any employee's purses, yet nothing in the record directly challenges the appellee's testimony as to the disruption of her personal effects inside her purse, and, therefore, the jury could make a reasonable inference that the managerial personnel had, in fact, gone through her personal

effects. The record also establishes that other employees knew these searches were going on. The store manager testified that all employees received notification of these sporadic searches during their hiring interviews; however, two administrators, including a former personnel supervisor, denied that employees ever received this notification. We hold that the weight of the evidence indicates that the appellants' employees came upon a locker with a lock provided by an employee, disregarded the appellee's demonstration of her expectation of privacy, opened and searched the locker, and probably opened and searched her purse as well; and, in so holding, we consider it is immaterial whether the appellee actually securely locked her locker or not. It is sufficient that an employee in this situation, by having placed a lock on the locker at the employee's own expense and with the appellants' consent, has demonstrated a legitimate expectation to a right of privacy in both the locker itself and those personal effects within it. We accordingly overrule appellants' fifth point of error.

. . . .

The basis of a cause of action for invasion of privacy is that the defendant has violated the plaintiff's rights to be left alone. This intrusion itself is actionable, and the plaintiff can receive at least nominal damages for that actionable intrusion without demonstrating physical detriment. *Industrial Foundation of the South v. Texas Industrial Accident Board, supra*, at 682; *Billings v. Atkinson, supra*, at 860; *Trevino v. Southwestern Bell Telephone Co.*, 582 S.W.2d 582, 584 (Tex. Civ. App. -- Corpus Christi 1979, no writ). The appellants' improper intrusion of an area where the appellee had manifested an expectation of privacy alone raised her right to recover. We overrule the appellants' fifteenth point of error.

. . . .

The appellants argue that no malice exists in this case because: (1) the appellants acted correctly and lawfully in opening and searching the lockers; and (2) even if the appellants wrongfully searched the lockers, they did so in a good faith belief that they had the right to do so. Neither of the appellants' allegations has merit.

First, the record establishes, and we have held herein, that the appellants' search of the appellee's locker and purse was wrongful. The mere suspicion either that another employee had stolen watches, or that unidentified employees may have stolen price-marking guns was insufficient to justify the appellants' search of appellee's locker and personal possessions without her consent. The record also demonstrates that the appellants lied to appellee and concealed the truth of their wrongful search for approximately one month.

The record indicates, particularly through the appellants' subsequent denial of their activities, that there was sufficient evidence from which the jury could reasonably conclude that the appellants acted with malicious disregard for both the appellee's rights of privacy and the rights of privacy of her co-workers. We find that there was sufficient evidence to support the jury's finding of malice.

. . . .

The appellants intentionally intruded upon an area where the appellee had a legitimate expectation of privacy. The evidence supports a further finding that the appellants wrongfully intruded upon the appellee's personal property. The conduct of this inspection, and the appellants' subsequent denial and ultimate admission support the conclusion that they were aware that their actions constituted a covert intrusion. The appellants clearly made this wrongful intrusion with neither the appellee's permission nor justifiable suspicion that the appellee had stolen any store inventory. Sufficient factors exist to enable this court to conclude that the jury's award of exemplary damages was the result of proper motivations. We disagree with the appellant that any set ratio of exemplary to actual damages constitutes a ceiling beyond which a greater award would be excessive, and even were we to agree with appellants, we do not find that the exemplary damages in the instant case exceed that ceiling.

The evidence supports the jury's award of exemplary damages from the factors cited. There is no evidence to support a conclusion that the jury acted as a result of passion or prejudice. We overrule the appellants' eleventh through fourteenth and sixteenth and seventeenth points of error.

The appellants claim in their last point of error that the cumulative effect of their foregoing twenty-one complaints is that they received an unfair trial. While we have noted individual errors, *supra*, we do not find such a cumulative effect to have occurred. We overrule the appellants' twenty second and last point of error.

[overruled]

3. Constitutional Rights and Challenges

3.A. Early and Later Constitutional Attacks on Work Law

3.A.1. Lochner v. New York, 198 U.S. 45 (1905) and related provisions

The 14th Amendment:

> *.... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.*

Source: link
Lochner v. New York:
Full decision: (link); **Docket**: (link); **Oral argument**: ()

MR. JUSTICE PECKHAM,

The indictment charges that the plaintiff violated the one hundred and tenth section of article 8, chapter 415, of the Laws of 1897, known as the labor law of the State of New York, in that he wrongfully and unlawfully required and permitted an employee working for him to work more

than sixty hours in one week. …. The mandate of the statute that "no employee shall be required or permitted to work," is the substantial equivalent of an enactment that "no employee shall contract or agree to work," more than ten hours per day…. It is not an act merely fixing the number of hours which shall constitute a legal day's work, but an absolute prohibition upon the employer, permitting, under any circumstances, more than ten hours work to be done in his establishment. The employee may desire to earn the extra money, which would arise from his working more than the prescribed time, but this statute forbids the employer from permitting the employee to earn it.

The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere.

The State, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment. Contracts in violation of a statute, either of the Federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution, as coming under the liberty of person or of free contract. Therefore, when the State, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are *sui juris* (both employer and employe), it becomes of great importance to determine which shall prevail -- the right of the individual to labor for such time as he may choose, or the right of the State to prevent the individual from laboring or from entering into any contract to labor, beyond a certain time prescribed by the State.

This court has recognized the existence and upheld the exercise of the police powers of the States in many cases which might fairly be considered as border ones, and it has, in the course of its

determination of questions regarding the asserted invalidity of such statutes, on the ground of their violation of the rights secured by the Federal Constitution, been guided by rules of a very liberal nature, the application of which has resulted, in numerous instances, in upholding the validity of state statutes thus assailed. Among the later cases where the state law has been upheld by this court is that of *Holden* v. *Hardy*, 169 U.S. 366. A provision in the act of the legislature of Utah was there under consideration, the act limiting the employment of workmen in all underground mines or workings, to eight hours per day, "except in cases of emergency, where life or property is in imminent danger." It also limited the hours of labor in smelting and other institutions for the reduction or refining of ores or metals to eight hours per day, except in like cases of emergency. The act was held to be a valid exercise of the police powers of the State. A review of many of the cases on the subject, decided by this and other courts, is given in the opinion. It was held that the kind of employment, mining, smelting, etc., and the character of the employes in such kinds of labor, were such as to make it reasonable and proper for the State to interfere to prevent the employes from being constrained by the rules laid down by the proprietors in regard to labor. The following citation from the observations of the Supreme Court of Utah in that case was made by the judge writing the opinion of this court, and approved: "The law in question is confined to the protection of that class of people engaged in labor in underground mines, and in smelters and other works wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters, and other works for the reduction and refining of ores. Therefore it is not necessary to discuss or decide whether the legislature can fix the hours of labor in other employments."

…. There is no dispute concerning this general proposition [that] the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext -- become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State? and that question must be answered by the court.

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.

It is a question of which of two powers or rights shall prevail -- the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.
….
We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employe, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go. ….

…. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and

the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family. In our large cities there are many buildings into which the sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the business of bankers, brokers, lawyers, real estate, and many other kinds of business, aided by many clerks, messengers, and other employes. Upon the assumption of the validity of this act under review, it is not possible to say that an act, prohibiting lawyers' or bank clerks, or others, from contracting to labor for their employers more than eight hours a day, would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real estate clerk, or the broker's clerk in such offices is therefore unhealthy, and the legislature in its paternal wisdom must, therefore, have the right to legislate on the subject of and to limit the hours for such labor, and if it exercises that power and its validity be questioned, it is sufficient to say, it has reference to the public health; it has reference to the health of the employes condemned to labor day after day in buildings where the sun never shines; it is a health law, and therefore it is valid, and cannot be questioned by the courts.

It is also urged, pursuing the same line of argument, that it is to the interest of the State that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employes, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the State be impaired. We mention these extreme cases because the contention is extreme. We do not believe in the soundness of the views which uphold this law. On the contrary, we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employes named, is not within that power, and is invalid. The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employes, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employes, if the hours of labor are not curtailed. If this be not clearly the case the individuals, whose rights are thus made the subject of

legislative interference, are under the protection of the Federal Constitution regarding their liberty of contract as well as of person; and the legislature of the State has no power to limit their right as proposed in this statute…

….

It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to and no such substantial effect upon the health of the employe, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employes (all being men, *sui juris*), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employes. Under such circumstances the freedom of master and employe to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.

Reversed.

MR. JUSTICE HARLAN, with whom MR. JUSTICE WHITE and MR. JUSTICE DAY concurred, dissenting.

…. By the statute in question it is provided that, "No employe shall be required or permitted to work in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employe shall work."

It is plain that this statute was enacted in order to protect the physical well-being of those who work in bakery and confectionery establishments. It may be that the statute had its origin, in part, in the belief that employers and employes in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength. Be this as it may, the statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor. Whether or not this be wise legislation it is not the province of the court to inquire. Under our systems of government the courts are not concerned with the wisdom or policy of legislation. So that in determining the question of power to interfere with liberty of contract, the court may inquire whether the means devised by the State are germane to an end which may be lawfully accomplished and have a real or substantial relation to the protection of health, as involved in the daily work of the persons, male and female, engaged in bakery and confectionery establishments.

….
Professor Hirt in his treatise on the "Diseases of the Workers" has said: "The labor of the bakers is among the hardest and most laborious imaginable, because it has to be performed under conditions injurious to the health of those engaged in it. It is hard, very hard work, not only because it requires a great deal of physical exertion in an overheated workshop and during unreasonably long hours, but more so because of the erratic demands of the public, compelling the baker to perform the greater part of his work at night thus depriving him of an opportunity to enjoy the necessary rest and sleep, a fact which is highly injurious to his health." Another writer says: "The constant inhaling of flour dust causes inflammation of the lungs and of the bronchial tubes. The eyes also suffer through this dust, which is responsible for the many cases of running eyes among the bakers. The long hours of toil to which all bakers are subjected produce rheumatism, cramps and swollen legs. The intense heat in the workshops induces the workers to resort to cooling drinks, which together with their habit of exposing the greater part of their bodies to the change in the atmosphere, is another source of a number of diseases of various organs. Nearly all bakers are pale-faced and of more delicate health than the workers of other crafts, which is chiefly due to their hard work and their irregular and unnatural mode of living, whereby the power of resistance against disease is greatly diminished. The average age of a baker is below that of other workmen; they seldom live over their fiftieth year, most of them dying between the ages of forty and fifty. During periods of epidemic diseases the bakers are generally the first to succumb to the disease, and the number swept away during such periods far exceeds the number of other crafts in comparison to the men employed in the respective industries. When, in 1720, the plague visited the city of Marseilles, France, every baker in the city succumbed to the epidemic, which caused considerable excitement in the neighboring cities and resulted in measures for the sanitary protection of the bakers."

In the Eighteenth Annual Report by the New York Bureau of Statistics of Labor it is stated that among the occupations involving exposure to conditions that interfere with nutrition is that of a baker. In that Report it is also stated that "from a social point of view, production will be increased by any change in industrial organization which diminishes the number of idlers, paupers and criminals. Shorter hours of work, by allowing higher standards of comfort and purer family life, promise to enhance the industrial efficiency of the wage-working class -- improved health, longer life, more content and greater intelligence and inventiveness."

Statistics show that the average daily working time among workingmen in different countries is, in Australia, 8 hours; in Great Britain, 9; in the United States, 9 3/4; in Denmark, 9 3/4; in Norway, 10; Sweden, France and Switzerland, 10 1/2; Germany, 10 1/4; Belgium, Italy and Austria, 11; and in Russia, 12 hours.

We judicially know that the question of the number of hours during which a workman should continuously labor has been, for a long period, and is yet, a subject of serious consideration among civilized peoples, and by those having special knowledge of the laws of health. Suppose the statute prohibited labor in bakery and confectionery establishments in excess of eighteen

hours each day. No one, I take it, could dispute the power of the State to enact such a statute. But the statute before us does not embrace extreme or exceptional cases. It may be said to occupy a middle ground in respect of the hours of labor. What is the true ground for the State to take between legitimate protection, by legislation, of the public health and liberty of contract is not a question easily solved, nor one in respect of which there is or can be absolute certainty. There are very few, if any, questions in political economy about which entire certainty may be predicated. One writer on relation of the State to labor has well said: "The manner, occasion, and degree in which the State may interfere with the industrial freedom of its citizens is one of the most debatable and difficult questions of social science."

We also judicially know that the number of hours that should constitute a day's labor in particular occupations involving the physical strength and safety of workmen has been the subject of enactments by Congress and by nearly all of the States. Many, if not most, of those enactments fix eight hours as the proper basis of a day's labor.

…. [In a previous case the Court said] what may well be here repeated: "The responsibility therefor rests upon legislators, not upon the courts. No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true -- indeed, the public interests imperatively demand -- that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution."

MR. JUSTICE HOLMES dissenting.
I regret sincerely that I am unable to agree with the judgment in this case, and that I think it my duty to express my dissent.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere

with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law. *Jacobson* v. *Massachusetts*, 197 U.S. 11. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. *Northern Securities Co.* v. *United States*, 193 U.S. 197. Two years ago we upheld the prohibition of sales of stock on margins or for future delivery in the constitution of California. *Otis* v. *Parker*, 187 U.S. 606. The decision sustaining an eight hour law for miners is still recent. *Holden* v. *Hardy*, 169 U.S. 366. Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.

3.A.1.1 Timeline

Date	Case Name	Decision	Notes
Entered February 12, 1902	*Lochner v. New York* County Court of Oneida County	Lochner convicted of violating the Bakeshop Act	**First convicted in 1899** Lochner had violated the Bakeshop act twice: first in 1899 (when he was fined $25) and again in 1901

Decided May 13, 1902	*New York v. Lochner* Appellate Division of the New York Supreme Court, Fourth Department (1902)	Affirmed the lower court's decision, found in favor of NY.	3-2 decision for NY ● Link ● Link
Argued October 16, 1903 **Decided January 12, 1904**	*People v. Lochner* New York Court of Appeals (1904)	Affirmed the lower court's decision, found in favor of NY.	4-3 decision for NY ● Link
April 17, 1905	*Lochner v. New York* Supreme Court of the United States (1905)	Overturned the lower courts' decisions, found in favor of Lochner.	5-4 decision for Lochner Beginning of the Lochner era ● Link

3.A.1.2. The Fuller Court (1888-1910)

Source: Link

3.A.1.3. Notes

i. New Actors, New Institutions

Note that this is the first we stumble on two new actors: The Supreme Court of the United States, and a state (NY) as a litigant. Up until now, we were reading materials from either lower federal courts or state courts. The Supreme Court is a prominent actor in US policy-making, and work law policies are just one example of that. Throughout the book, we will question whether or not we think this role is just.

Another novelty is the lack of a worker as a plaintiff. We see the employer, Lochner, as we saw employers argue before courts in the Common Law Section of this book. But in *Lochner,* it is the first time we are seeing the state as a proxy for the employee side of the litigation. This procedural fact might have some significant implications for questions of voice and power over the legal trajectory of disputes. In a substantive manner, the state as a legal party carries with it a whole slew of interests (some public-oriented, others less so) that simply lack in the common law section of this course.

ii. The Political Pragmatics of the Supreme Court as a Policy Venue

Why didn't Lochner and his fellow baker-employers go to the NY state legislature to change the law? Why go to the Supreme Court? There is a pragmatic answer to that question. In the state, in order to win policy-making, you need political power, stemming, for example from majority support. If Lochner suspected he did not have majority support for his policies, then going to the state is a sure loss. In such cases, going to the Supreme Court, or to adjudication more broadly, offers *political losers* a second bite of the apple, another chance at policy-making. Not only can political losers win policy-making authority through the courts, but if they win a Supreme Court case they not only win NY policies, but they also might win the entire nation. The Supreme Court offers political losers a chance to win big.

Of course, we all have our favorite political losers. But the nagging question of why are we allowing such a way to short-circuit majoritarian decision making is a persistent one.

iii. Legal v. Political Questions and How to Tell Those Apart?

One possibility to explain why to allow courts as a policy-making venue for political losers is that courts decide on legal questions, and legislatures decide on political questions. We can find all kinds of formulations for this tension. Maybe "legal" can be replaced with "constitutional"? Or "foundational," or "principled," or "basic"? And maybe "political" can be replaced by the *Lochner* formulation of the "police powers of the state"?

In *Lochner*, the Court makes sure to frame the issue as a matter of a constitutional question. Now, the policy pragmatics would sometimes lead political losers to frame their claims in constitutional rhetoric, fitting for the court to decide. That is completely understandable. But how do courts decide which question is up for their decision-making and which question is up to the legislature? Finding a non-circular way of answering the question is hard.

One possible answer is to collapse the distinction between the courts and the policy-making parties. Courts are made of members, judges, and justices. And they decide a policy matter to be legal or political according to which venue they rather end up winning - courts or legislatures. So, as policy-seeking actors, courts (as in judges and justices) would frame issues that they would lose on in majority venues as constitutional, and frame issues that they might win a majority with as political. No legal magic here, simply pragmatics.

Consider this answer as the path of least resistance - pragmatics all the way down. What is your answer to this question?

iv. Rule Disagreement
In Supreme Court cases the rules themselves, as opposed to their application, are explicitly up for grabs. One line of dispute in the opinion is about the application of the exceptions to the rule– the state may not intervene in the freedom of contracts. The Court suggests some of those exceptions– public safety and health, dangerous sectors, wards of the state, etc. And we can read the dispute between the dissent and the majority as a dispute about the application of those exceptions to the case of bakers.

But, another layer in the opinion is the disagreement about the substance of the 14th Am. itself. See if you can identify in the opinions of the justices two substantive readings for what the 14th Am. stands for. Do we have two competing substantive visions in *Lochner*? Perhaps two differing roles for the Court in Constitutional interpretation cases?

3.A.2. W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)
Full decision: (link); **Docket**: (link); **Oral argument**: ()

Opinion

Mr. Chief Justice HUGHES delivered the opinion of the Court.

This case presents the question of the constitutional validity of the minimum wage law of the state of Washington.

The act, entitled 'Minimum Wages for Women,' authorizes the fixing of minimum wages for women and minors. Laws 1913 (Washington) c. 174, p. 602, Remington's Rev.Stat.(1932) s 7623 et seq. It provides:

> Section 1. The welfare of the State of Washington demands that women and minors be protected from conditions of labor which have a pernicious effect on their health and morals. The State of Washington, therefore, exercising herein its police and sovereign power declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect.
>
> § 2. It shall be unlawful to employ women or minors in any industry or occupation within the State of Washington under conditions of labor detrimental to their health or morals; and it shall be unlawful to employ women workers in any industry within the State of Washington at wages which are not adequate for their maintenance.
>
> § 3. There is hereby created a commission to be known as the 'Industrial Welfare Commission' for the State of Washington, to establish such standards of wages and conditions of labor for women and minors employed within the State of Washington, as shall be held hereunder to be reasonable and not detrimental to health and morals, and which shall be sufficient for the decent maintenance of women.'

Further provisions required the commission to ascertain the wages and conditions of labor of women and minors within the state. Public hearings were to be held. If after investigation the commission found that in any occupation, trade, or industry the wages paid to women were 'inadequate to supply them necessary cost of living and to maintain the workers in health,' the commission was empowered to call a conference of representatives of employers and employees together with disinterested persons representing the public. The conference was to recommend to the commission, on its request, an estimate of a minimum wage adequate for the purpose above stated, and on the approval of such a recommendation it became the duty of the commission to issue an obligatory order fixing minimum wages. ….

The appellant conducts a hotel. The appellee Elsie Parrish was employed as a chambermaid and (with her husband) brought this suit to recover the difference between the wages paid her and the minimum wage fixed pursuant to the state law. The minimum wage was $14.50 per week of 48 hours. The appellant challenged the act as repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States. The Supreme Court of the state, reversing the trial court, sustained the statute and directed judgment for the plaintiffs. The case is here on appeal.

The appellant relies upon the decision of this Court in Adkins v. Children's Hospital, 261 U.S. 525, which held invalid the District of Columbia Minimum Wage Act which was attacked under the due process clause of the Fifth Amendment.

….

The principle which must control our decision is not in doubt. …. [T]he violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

This essential limitation of liberty in general governs freedom of contract in particular. More than twenty-five years ago we set forth the applicable principle in these words, after referring to the cases where the liberty guaranteed by the Fourteenth Amendment had been broadly described.

> '…. [F]reedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.' Chicago, Burlington & Quincy R. Co. v. McGuire, 219 U.S. 549.

This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day (Holden v. Hardy, 169 U.S. 366); in requiring redemption in cash of store orders or other evidences of indebtedness issued in the payment of wages (Knoxville Iron Co. v. Harbison, 183 U.S. 13); in forbidding the payment of seamen's wages in advance (Patterson v. The Bark Eudora, 190 U.S. 169); in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine (McLean v. Arkansas, 211 U.S. 539); in prohibiting contracts limiting liability for injuries to employees (Chicago, Burlington & Quincy R. Co. v. McGuire, supra); in limiting hours of work of employees in manufacturing

establishments (Bunting v. Oregon, 243 U.S. 426,); and in maintaining workmen's compensation laws (New York Central R. Co. v. White, 243 U.S. 188).

In dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. Chicago, Burlington & Quincy R. Co. v. McGuire, supra. The point that has been strongly stressed that adult employees should be deemed competent to make their own contracts was decisively met nearly forty years ago in Holden v. Hardy, supra, where we pointed out the inequality in the footing of the parties. We said (Id., 169 U.S. 366, 397):

> ‘The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority.’

And we added that the fact ‘that both parties are of full age, and competent to contract, does not necessarily deprive the state of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself.’ ‘The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer.’

It is manifest that this established principle is peculiarly applicable in relation to the employment of women in whose protection the state has a special interest. …. We emphasized the consideration that ‘woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence’ and that her physical well being ‘becomes an object of public interest and care in order to preserve the strength and vigor of the race.’ We emphasized the need of protecting women against oppression despite her possession of contractual rights. We said that ‘though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right.’ Hence she was ‘properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained.’ We concluded that the limitations which the statute there in question ‘places upon her contractual powers, upon her right to agree with her

employer, as to the time she shall labor' were 'not imposed solely for her benefit, but also largely for the benefit of all.' ….

….

The minimum wage to be paid under the Washington statute is fixed after full consideration by representatives of employers, employees, and the public. It may be assumed that the minimum wage is fixed in consideration of the services that are performed in the particular occupations under normal conditions. Provision is made for special licenses at less wages in the case of women who are incapable of full service. The statement of Mr. Justice Holmes in the Adkins Case is pertinent: 'This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden. In short the law in its character and operation is like hundreds of so-called police laws that have been up-held.' 261 U.S. 525, at page 570. …

….

With full recognition of the earnestness and vigor which characterize the prevailing opinion in the Adkins Case, we find it impossible to reconcile that ruling with these well-considered declarations. What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The Legislature of the state was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The Legislature was entitled to adopt measures to reduce the evils of the 'sweating system,' the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. The Legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many states evidences a deep seated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the Legislature is entitled to its judgment.

There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to

pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. While in the instant case no factual brief has been presented, there is no reason to doubt that the state of Washington has encountered the same social problem that is present elsewhere. The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest. The argument that the legislation in question constitutes an arbitrary discrimination, because it does not extend to men, is unavailing. This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The Legislature 'is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.' If 'the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.' There is no 'doctrinaire requirement' that the legislation should be couched in all embracing terms. Their relative need in the presence of the evil, no less than the existence of the evil itself, is a matter for the legislative judgment.

Our conclusion is that the case of Adkins v. Children's Hospital, supra, should be, and it is, overruled. The judgment of the Supreme Court of the state of Washington is affirmed.
Affirmed.

Mr. Justice SUTHERLAND.

Mr. Justice VAN DEVANTER, Mr. Justice McREYNOLDS, Mr. Justice BUTLER, and I think the judgment of the court below should be reversed.

The principles and authorities relied upon to sustain the judgment were considered in Adkins v. Children's Hospital, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785, 24 A.L.R. 1238, and Morehead v. New York ex rel. Tipaldo, 298 U.S. 587, 56 S.Ct. 918, 80 L.Ed. 1347, 103 A.L.R. 1445, and their lack of application to cases like the one in hand was pointed out. A sufficient answer to all that is now said will be found in the opinions of the court in those cases. Nevertheless, in the circumstances, it seems well to restate our reasons and conclusions.
Under our form of government, where the written Constitution, by its own terms, is the supreme law, some agency, of necessity, must have the power to say the final word as to the validity of a statute assailed as unconstitutional. The Constitution makes it clear that the power has been intrusted to this court when the question arises in a controversy within its jurisdiction; and so long as the power remains there, its exercise cannot be avoided without betrayal of the trust.
It has been pointed out many times, as in the Adkins Case, that this judicial duty is one of gravity and delicacy; and that rational doubts must be resolved in favor of the constitutionality of the statute. But whose doubts, and by whom resolved? Undoubtedly it is the duty of a member of the

court, in the process of reaching a right conclusion, to give due weight to the opposing views of his associates; but in the end, the question which he must answer is not whether such views seem sound to those who entertain them, but whether they convince him that the statute is constitutional or engender in his mind a rational doubt upon that issue. The oath which he takes as a judge is not a composite oath, but an individual one. And in passing upon the validity of a statute, he discharges a duty imposed upon him, which cannot be consummated justly by an automatic acceptance of the views of others which have neither convinced, nor created a reasonable doubt in, his mind. If upon a question so important he thus surrender his deliberate judgment, he stands forsworn. He cannot subordinate his convictions to that extent and keep faith with his oath or retain his judicial and moral independence.

….

It is urged that the question involved should now receive fresh consideration, among other reasons, because of 'the economic conditions which have supervened'; but the meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written—that is, that they do not apply to a situation now to which they would have applied then—is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise.

The words of Judge Campbell in People ex rel. Twitchell v. Blodgett, 13 Mich. 127, 139, 140, apply with peculiar force. 'But it may easily happen,' he said, 'that specific provisions may, in unforeseen emergencies, turn out to have been inexpedient. This does not make these provisions any less binding. Constitutions can not be changed by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of Government, until they are amended or abrogated by the action prescribed by the authority which created them. It is not competent for any department of the Government to change a constitution, or declare it changed, simply because it appears ill adapted to a new state of things. * * *

'Restrictions have, it is true, been found more likely than grants to be unsuited to unforeseen circumstances. * * * But, where evils arise from the application of such regulations, their force cannot be denied or evaded; and the remedy consists in repeal or amendment, and not in false construction.'

The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase 'supreme law of the land' stands for and to convert what was intended as inescapable and enduring mandates into mere moral reflections.

If the Constitution, intelligently and reasonably construed in the light of these principles, stands in the way of desirable legislation, the blame must rest upon that instrument, and not upon the court for enforcing it according to its terms. The remedy in that situation—and the only true remedy—is to amend the Constitution. …. much of the benefit expected from written Constitutions would be lost if their provisions were to be bent to circumstances or modified by public opinion. He pointed out that the common law, unlike a Constitution, was subject to modification by public sentiment and action which the courts might recognize; but that 'a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. * * * What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.'
….
[Regarding] the Washington statute, it first is to be observed that it is in every substantial respect identical with the statute involved in the Adkins Case. Such vices as existed in the latter are present in the former. And if the Adkins Case was properly decided, as we who join in this opinion think it was, it necessarily follows that the Washington statute is invalid.
In support of minimum-wage legislation, it has been urged, on the one hand, that great benefits will result in favor of underpaid labor, and, on the other hand, that the danger of such legislation is that the minimum will tend to become the maximum and thus bring down the earnings of the more efficient toward the level of the less-efficient employees. But with these speculations we have nothing to do. We are concerned only with the question of constitutionality.

That the clause of the Fourteenth Amendment which forbids a state to deprive any person of life, liberty, or property without due process of law includes freedom of contract is so well settled as to be no longer open to question. Nor reasonably can it be disputed that contracts of employment of labor are included in the rule…. [T]he Court said, 'The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. * * * In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.'

In the Adkins Case we referred to this language, and said that while there was no such thing as absolute freedom of contract, but that it was subject to a great variety of restraints, nevertheless, freedom of contract was the general rule and restraint the exception; and that the power to abridge that freedom could only be justified by the existence of exceptional circumstances. This statement of the rule has been many times affirmed; and we do not understand that it is questioned by the present decision.

…. Minimum wage legislation such as that here involved does not deal with any business charged with a public interest, or with public work, or with a temporary emergency, or with the character, methods, or periods of wage payments, or with hours of labor, or with the protection of persons under legal disability, or with the prevention of fraud. It is, simply and exclusively, a law fixing wages for adult women who are legally as capable of contracting for themselves as men, and cannot be sustained unless upon principles apart from those involved in cases already decided by the court.

Two cases were involved in the Adkins decision. In one of them it appeared that a woman twenty-one years of age, who brought the suit, was employed as an elevator operator at a fixed salary. Her services were satisfactory, and she was anxious to retain her position, and her employer, while willing to retain her, was obliged to dispense with her services on account of the penalties prescribed by the act. The wages received by her were the best she was able to obtain for any work she was capable of performing; and the enforcement of the order deprived her, as she alleged, not only of that employment, but left her unable to secure any position at which she could make a living with as good physical and moral surroundings and as good wages as she was receiving and was willing to take. The Washington statute, of course, admits of the same situation and result, and, for aught that appears to the contrary the situation in the present case may have been the same as that just described. Certainly, to the extent that the statute applies to such cases, it cannot be justified as a reasonable restraint upon the freedom of contract. On the contrary, it is essentially arbitrary.

Neither the statute involved in the Adkins Case nor the Washington statute, so far as it is involved here, has the slightest relation to the capacity or earning power of the employee, to the number of hours which constitute the day's work, the character of the place where the work is to be done, or the circumstances or surroundings of the employment. The sole basis upon which the question of validity rests is the assumption that the employee is entitled to receive a sum of money sufficient to provide a living for her, keep her in health and preserve her morals. [T]he question thus presented for the determination of the board can not be solved by any general formula prescribed by a statutory bureau, since it is not a composite but an individual question to be answered for each individual, considered by herself. What we said further in that case 261 U.S. 525, at pages 557-559), is equally applicable here:

> ‘The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. Within the limits of the minimum sum, he is precluded, under penalty of fine and imprisonment, from adjusting compensation to the differing merits of his employees. It compels him to pay at least the

> sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee. It therefore undertakes to solve but one-half of the problem. The other half is the establishment of a corresponding standard of efficiency, and this forms no part of the policy of the legislation, although in practice the former half without the latter must lead to ultimate failure, in accordance with the inexorable law that no one can continue indefinitely to take out more than he puts in without ultimately exhausting the supply. The law is not confined to the great and powerful employers but embraces those whose bargaining power may be as weak as that of the employee. It takes no account of periods of stress and business depression, of crippling losses, which may leave the employer himself without adequate means of livelihood. To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.

‘The feature of this statute, which perhaps more than any other, puts upon it the stamp of invalidity, is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do. The declared basis, as already pointed out, is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health, and morals. The ethical right of every worker, man or woman, to a living wage may be conceded. One of the declared and important purposes of trade organizations is to secure it. And with that principle and with every legitimate effort to realize it in fact, no one can quarrel; but the fallacy of the proposed method of attaining it is that it assumes that every employer is bound at all events to furnish it. The moral requirement implicit in every contract of employment, viz. that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. The necessities of the employee are alone considered, and these arise outside of the employment, are the same when there is no employment, and as great in one occupation as in another. Certainly the employer, by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. On the contrary, to the extent of what he pays, he has relieved it. In principle, there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker, or grocer to buy food, he is morally entitled to obtain the worth of his money; but he is not entitled to more. It what he gets is worth what he pays, he is not justified in demanding more, simply because he needs more; and the shopkeeper, having dealt fairly and honestly in that transaction, is not concerned in any peculiar sense with the question of his customer's necessities. Should a statute undertake to vest in a commission power to determine the quantity of food necessary for individual support, and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed. The argument in

support of that now being considered is equally fallacious, though the weakness of it may not be so plain. A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things, and solely with relation to circumstances apart from the contract of employment, the business affected by it, and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States.'

….

The Washington statute, like the one for the District of Columbia, fixes minimum wages for adult women. Adult men and their employers are left free to bargain as they please; and it is a significant and an important fact that all state statutes to which our attention has been called are of like character. The common-law rules restricting the power of women to make contracts have, under our system, long since practically disappeared. Women today stand upon a legal and political equality with men. There is no longer any reason why they should be put in different classes in respect of their legal right to make contracts; nor should they be denied, in effect, the right to compete with men for work paying lower wages which men may be willing to accept. And it is an arbitrary exercise of the legislative power to do so. ….

Finally, it may be said that a statute absolutely fixing wages in the various industries at definite sums and forbidding employers and employees from contracting for any other than those designated would probably not be thought to be constitutional. It is hard to see why the power to fix minimum wages does not connote a like power in respect of maximum wages. And yet, if both powers be exercised in such a way that the minimum and the maximum so nearly approach each other as to become substantially the same, the right to make any contract in respect of wages will have been completely abrogated.

3.A.2.1. Timeline

Date	Case Name	Decision	Notes
November 9, 1935	*West Coast Hotel v. Parrish* State Court (1935)	Found in favor of Respondent, West Coast Hotel Co.	**First filed in 1935** Elsie Parrish filed a complaint requesting damages to make up the difference between the wage she was paid and minimum wage
April 2, 1936	*West Coast Hotel v. Parrish* Washington Supreme Court,	Found in favor of Parrish	Ordered West Coast Hotel to pay Parrish's

	Department Two (1936)		damages, which was the difference between her weekly salary and the minimum wage • Link
Argued December 16-17, 1936 **Decided March 29, 1937**	*West Coast Hotel v. Parrish* Supreme Court of the United States (1937)	Affirmed, found in favor of Parrish.	The establishment of minimum wages for women is constitutional State may use its police power to restrict the individual freedom to contract • Link End of the Lochner era

3.A.3. Nw. Grocery Ass'n v. City of Seattle, 526 F. Supp. 3d 884 (W.D. Wash. 2021)

Full decision: (link); **Docket**: (link); **Oral argument**: ()

ORDER

This matter comes before the Court on Plaintiffs' motion for a preliminary injunction and Defendant's motion to dismiss. Having thoroughly considered the parties' briefing, oral arguments, and the relevant record, the Court hereby GRANTS Defendant's motion to dismiss and DENIES Plaintiffs' motion for a preliminary injunction for the reasons explained herein.

I. BACKGROUND

On January 25, 2021, in response to concerns for the health and welfare of grocery employees, the Seattle City Council unanimously passed the Hazard Pay for Grocery Employees Ordinance ("Ordinance"). The Ordinance "establish[es] labor standards requirements for additional compensation for grocery employees working in Seattle," Ordinance, Preamble, and mandates that covered grocery store employers in the City provide "additional compensation" of four dollars per hour to covered employees as "hazard pay." Ordinance §§ 100.010, 100.025. The Ordinance applies to "grocery businesses that employ 500 or more employees worldwide regardless of where those employees are employed." Ordinance § 100.020. "Grocery business" includes any retail store operating in Seattle that is either (1) "[o]ver 10,000 square feet in size and that is primarily engaged in retailing groceries for offsite consumption" or (2) "[o]ver 85,000 square feet and with 30 percent or more of its sales floor area dedicated to sale of groceries[.]" Ordinance § 100.010. The hazard pay requirements are structured as temporary measures which remain in effect "for the duration of the civil emergency proclaimed by the Mayor on March 3, 2020." Ordinance § 100.025(C). Finally, the Ordinance prohibits employers from circumventing

its effect by reducing wages to counteract the hazard pay increase, providing the following limitation:

> No employer shall, as a result of this ordinance going into effect, take steps to reduce employee compensation so as to prevent, in whole or in part, employees from receiving hazard pay at a rate of four dollars per hour for each hour worked in Seattle in addition to those employees' other compensation. Employers shall maintain records to establish the reason(s) for any reduction in employee compensation pursuant to Section 100.040.

.

On February 3, 2021, the day the Ordinance took effect, Plaintiffs Northwest Grocery Association ("NWGA") and Washington Food Industry Association ("WFIA") brought this action against Defendant City of Seattle ("City"), seeking declaratory and injunctive relief against enforcement of the Ordinance. (Dkt. No. 1 at 3.) Plaintiffs argue the Ordinance is invalid, alleging that it is preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169, and that it violates the Equal Protection and Contracts Clauses of the federal and state constitutions.

II. DISCUSSION

….

B. Defendant's Motion to Dismiss

Plaintiffs argue the Ordinance is unlawful and seek declaratory and injunctive relief preventing its enforcement, alleging violations based on (1) NLRA preemption, (2) the Equal Protection Clause of the U.S. Constitution, (3) the Equal Protection Clause of the Washington Constitution, (4) the Contracts Clause of the U.S. Constitution, and (5) the Contracts Clause of the Washington Constitution. For the reasons described below, the Court concludes that none of these arguments establish valid claims for relief and Plaintiff's complaint must be dismissed.

1. <u>Ordinance Is Not Preempted by the National Labor Relations Act</u>

….

2. <u>Equal Protection Claims are Subject to—and Survive—Rational Basis Review</u>

Plaintiffs next argue the Ordinance violates the Equal Protection Clauses of the U.S. and Washington constitutions because it irrationally singles out their largest members for discriminatory treatment. They further argue the Ordinance is subject to strict scrutiny analysis because it impinges on their "fundamental rights secured by the state and federal Contracts Clauses."

The Equal Protection clause mandates that similarly situated persons be treated alike. Laws challenged on Equal Protection grounds are subject to one of three levels of scrutiny. The highest level, strict scrutiny, is reserved for laws that discriminate on the basis of a "suspect class," such

as race, or that "impact a fundamental right." The second level—intermediate scrutiny—applies to laws discriminating on the basis of gender and is not at issue in this case. All other laws are subject to rational basis review. A law survives rational basis review "so long as it bears a rational relation to some legitimate end."
Turning first to the level scrutiny, Plaintiffs argue the Ordinance is subject to strict scrutiny because it burdens their right guaranteed by the Contracts Clause: "[t]here should be little question that the right guaranteed by federal Contract Clause is 'fundamental.'" Plaintiffs cite to cases from the 19th Century to support the proposition that "[f]or more than two centuries, the Supreme Court has applied this provision to strike down state laws that seek to alter the contractual rights held by private parties." But this argument is in conflict with more modern jurisprudence. *See, e.g., Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978) ("Although it was perhaps the strongest single constitutional check on state legislation during our early years as a Nation, the Contract Clause receded into comparative desuetude with the adoption of the Fourteenth Amendment."); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, (1934) ("Every contract is made in subordination to [the laws of the nation], and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. The Legislature cannot bargain away the public health or the public morals."). More importantly, Plaintiffs' precise argument—that laws which allegedly impinge on the Contracts Clause are subject to strict scrutiny—appears to be entirely novel: the Court is aware of no authority supporting such a proposition….

Plaintiffs clarify their position further, arguing that a challenged statute need not *violate* the Contracts Clause to trigger heightened review, but must merely *implicate* it. Given the difficulty of surviving strict scrutiny review, elevating the Contracts Clause to a "fundamental right" and subjecting any impingement thereupon to strict scrutiny would likely obliterate the ability of government to regulate *any* economic activity at all. To the contrary, courts have routinely applied rational basis review to regulations implicating economic relationships and, by extension, contracts. The Ordinance is subject to rational basis review.

Applying rational basis review, the Court must determine whether there is "any reasonably conceivable state of facts that could provide a rational basis for the classification … [w]here there are 'plausible reasons' for [legislative] action, 'our inquiry is at an end.'" *RUI One Corp.*, 371 F.3d at 1154 (9th Cir. 2004). Subject to such review, the law survives. Unquestionably, the Ordinance "singles out large retailers and grocery companies." As justification, the City finds that (1) "top retail companies, including grocery businesses, have earned record-breaking profits during the pandemic," Ordinance, Preamble, (2) that grocery store employees were at significantly heightened risk of contracting COVID-19, Ordinance § 1.J, and (3) compensating grocery employees for the "substantial risks of working during the COVID-19 emergency promotes retention of these vital workers," which is "fundamental to protecting the health of the community." Ordinance § 1.GG. The City also notes that the Ordinance promotes public health, because "[h]igher pay equips workers to purchase more effective personal protective equipment and reduce reliance on public transit." (Dkt. No. 25 at 20-21.)

[*895] Nor is the Court persuaded by Defendant's argument regarding the City's decision not to apply the law to smaller grocery stores or other frontline businesses.

As the Ninth Circuit observed when upholding an ordinance that impacted businesses in only one part of the City of Berkeley:

> Such legislative decisions are "virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 316, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993). "'[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.'" *Id.* ….

Analysis under the Privileges and Immunities Clause of the Washington Constitution, Wash. Const. art. I, § 12, commands a similar result. …..

Accordingly, the Court FINDS that a rational basis exists for the City's classifications and, as a result, the Ordinance does not violate the Equal Protection clauses in the federal or state constitutions.

3. <u>The Contracts Clauses of the Federal and Washington Constitutions Do Not Invalidate the Ordinance</u>

Finally, Plaintiffs contend that the Ordinance unconstitutionally impairs their contracts and, as a result, is invalid under the Contracts Clauses of the U.S. and Washington constitutions.

The Contracts Clause of the U.S. Constitution provides that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const., Art. I, § 10, cl. 1. "Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State to safeguard the vital interests of its people." *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983) (internal quotation omitted). *See also Home Bldg. & Loan Ass'n*, 290 U.S. at 428 ("[T]he prohibition [on impairment of obligation of contracts] is not an absolute one and is not to be read with literal exactness like a mathematical formula."). Instead, to assess whether a law "crosses the constitutional line", the court applies a two-step test. *Sveen v. Melin*, 138 S. Ct. 1815, 1821, 201 L. Ed. 2d 180 (2018). The court considers (1) "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship," and (2) "[i]f the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation." *Energy Reserves Grp., Inc.*, 459 U.S. at 411 (internal quotations and citations omitted). "Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the

legislation's] adoption." *U.S. Trust Co. v. New Jersey*, 431 U.S. 1 (1977). Unless the State is a contracting party, "[a]s is customary in reviewing economic and social regulation . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Id.* at 22-23.

Plaintiffs argue the Ordinance substantially interferes with its contracts without any significant or legitimate public purpose, and that even if the City demonstrates such a purpose, the means it chose are neither reasonable nor necessary. They argue (1) "a wage enhancement does not mitigate risks of exposure to a virus," (2) the Ordinance does not relate to any concerns of economic insecurity, and (3) it will not serve to improve worker retention.

First, the Court cannot properly assess whether the statute "substantially impairs" Plaintiffs' members' contracts, as Plaintiffs have provided no specific allegations of contracts or contractual terms which the Ordinance might impair. In addition, whether the employer has been subject to previous regulation in the affected area is a relevant consideration in determining whether a substantial impairment has occurred. *See In re Est. of Hambleton*, 181 Wn.2d 802, 335 P.3d 398, 413 (Wash. 2014) ("[A] party who enters into a contract regarding an activity 'already regulated in the particular [way] to which he now objects' is deemed to have contracted 'subject to further legislation upon the same topic.'"). While the Court agrees with Plaintiffs that the grocery industry is not so heavily regulated as the companies at issue in *Energy Reserves*, neither is it the case that City inserted itself into "a field it had never sought to regulate," as the Minnesota Legislature did in *Spannaus*. Further, the law in *Spannaus* created entirely new contractual obligations with retroactive effect. Neither is true here: the store employees were already subject to state and local minimum wage laws, and the Ordinance has no retroactive effect.

Even assuming, *arguendo*, that Ordinance does "substantially impair" Plaintiffs' contracts, the law would still survive. Plaintiffs do not seem to contest that the City has a legitimate interest in the health and safety of frontline workers, including grocery employees, and in particular, protecting them from coronavirus infection. The City argues that the Ordinance accomplishes that by "equip[ing] workers to purchase more effective personal protective equipment and reduce reliance on public transit." They further argue that compensating grocery employees for the "substantial risks of working during the COVID-19 emergency promotes retention of these vital workers," which is "fundamental to protecting the health of the community." Ordinance § 1.GG. These are the sorts of "significant and legitimate" public purposes required to survive a Contracts Clause analysis, and the Court will follow the directive of the Supreme Court to "defer to legislative judgment as to the necessity and reasonableness of a particular measure" in cases where the state is not a contracting party.

….
Plaintiffs fail to state a claim based upon a Contracts Clause violation.

III. CONCLUSION

For the reasons described above, the Court GRANTS Defendant's motion to dismiss. Plaintiffs' complaint is DISMISSED with prejudice and without leave to amend, as any amendment would be futile. ....

3.A.3.1. Timeline

Date	Case Name	Decision	Notes
March 18, 2021	*Nw. Grocery Association v. City of Seattle* US District Court for the Western District of Washington, Seattle Division (2021)	Plaintiff's motion to dismiss was granted. Motion for preliminary injunction denied.	**First filed in 2021** Ordinance did not violate the Equal Protection clauses in the federal or Washington constitutions • Link
September 7, 2021	*Nw. Grocery Association v. City of Seattle* Ninth Circuit Court of Appeals (2021)	Appeal was dismissed.	District court ruling is binding

3.A.4. Wash. Food Indus. Ass'n v. City of Seattle (Feb. 9, 2023)

No. 99771-3, 2023 Wash. LEXIS 88

Full decision: (link); **Docket**: (link); **Oral argument**: ()

EN BANC

Montoya-Lewis, J. —

In early 2020, life in the state of Washington changed dramatically due to the public health emergency caused by the novel coronavirus (COVID-19). Six months after United States and global health authorities declared COVID-19 a public health emergency, the city of Seattle (City) passed an ordinance authorizing hazard pay for certain workers who deliver food to consumers' homes. By that time, Governor Inslee had issued stay-at-home orders requiring Washingtonians to leave home only for the most essential of trips. Many businesses were closed, and many businesses and state offices that remained in operation were closed to the public, with many

employees working remotely. Those who could stayed home and stayed away from others as much as possible, compelled by the rapid spread of the deadly virus and the emergency it caused. But we had to eat. Given the rapid spread of COVID-19 and the risk of exposure, many were faced with a dilemma: How can we safely buy food?

Critically, some people were willing and able to perform the service of delivering food from restaurants and grocery stores. Deliveries skyrocketed—while some businesses operated their own delivery services, others contracted with third-party companies like Instacart that maintain networks of workers to complete on-demand shopping and delivery services. Using those delivery services, consumers were able to order food for delivery, from the safety of their own homes.

Concerned for the health, safety, and economic security of the delivery workers, the City passed Seattle Ordinance 126094, requiring hazard pay for gig workers for food delivery network companies. The ordinance requires food delivery network companies to pay their workers an extra dollar and a quarter for each work-related stop in Seattle. It also imposes constraints. Food delivery network companies may not reduce workers' compensation or otherwise limit their earning capacity as a result of the ordinance. They are also prohibited from reducing the areas of the City they serve or passing on the cost of the premium pay to customers' charges for groceries.

The Washington Food Industry Association and Maplebear Inc., d/b/a Instacart, challenge the ordinance. The plaintiffs seek declaratory judgment invalidating the ordinance on statutory as well as Washington and United States constitutional grounds. They also seek an award of damages for violations of federal law. The trial court dismissed the statutory claim under chapter 82.84 RCW but permitted all remaining claims to proceed. At this early stage in the proceedings, no discovery has occurred, and the record is limited to the pleadings.

This court unanimously holds that the chapter 82.84 RCW claim and equal protection claim should be dismissed and that the takings clause, contracts clause, and federal damages claims should not be dismissed. A majority of the court also holds that the privileges and immunities claim should be dismissed. Although I would conclude that the police powers claim should be dismissed, a majority of the court holds that it should not be dismissed, and we therefore affirm on that issue. For the reasons stated below, we affirm in part and reverse in part as follows:

> I. The chapter 82.84 RCW claim is dismissed; we affirm.
>
> II. The equal protection claim is dismissed; we reverse.
>
> III. The privileges and immunities claim is dismissed; we reverse.
>
> IV. The takings clause claim is not dismissed; we affirm.
>
> V. The contracts clause claim is not dismissed; we affirm.

VI. The 42 U.S.C. § 1983 damages claim is not dismissed; we affirm.

BACKGROUND

A. Factual Background

The COVID-19 pandemic first took hold in the winter of 2020. In January and February 2020, United States and global health authorities declared COVID-19 a public health emergency and began taking actions in response to the highly infectious virus. In Washington State, Governor Jay Inslee declared a state of emergency in February, and Seattle Mayor Jenny Durkan proclaimed a civil emergency in response to COVID-19 in March.

COVID-19 can cause serious illness or death, and the virus spreads easily from person to person; thus, government and public health authorities advised taking distancing measures in order to minimize exposure and infection. In March 2020, Governor Inslee issued a "Stay Home – Stay Healthy" proclamation closing all nonessential workplaces and banning large gatherings in an effort to reduce the spread of the virus. That proclamation directed all people in Washington State to stay at home unless engaging in essential activities or working in essential businesses. *Id.* at 3. "Essential activities" included obtaining necessary supplies like groceries and food for household consumption, and "essential business services" included grocery stores and restaurants with delivery and carry-out services.

During these early months of the pandemic, demand for delivery food services increased significantly. While some restaurants and grocery stores provided in-house delivery services, food delivery network companies also facilitated orders of groceries and food from restaurants as a third party. Some members of the Washington Food Industry Association, like independent grocery stores, markets, and convenience stores, do not employ delivery workers but instead depend on those third-party delivery services. In turn, food delivery network companies like Instacart offer smartphone applications that allow consumers to shop for groceries or restaurant food using the online platform and then have their orders delivered directly to the consumer's home. Instacart's platform facilitates only grocery shopping and delivery. Instacart does not employ workers to shop for and deliver groceries; people who perform that work do so as independent contractors and are paid with a combination of service fees and customer tips.

By Instacart's estimate, the number of delivery workers contracting with it tripled between March and May 2020, as demand for food delivery services increased significantly at the same time. The upsurge in the number of orders also meant that drivers made more paid deliveries. Instacart estimates that its Seattle delivery workers earned approximately $20 per hour in January and February 2020 and closer to $30 per hour by May 2020. Instacart does not provide any estimates on how many hours drivers worked or their total compensation. At this early stage in the litigation, the record does not include any evidence of the number of delivery workers

Instacart contracts with, the number of stops they make, the method by which they are compensated, or the details of any of Instacart's contracts with delivery workers or grocery stores.

B. The Ordinance

In June 2020, the Seattle City Council passed Seattle Ordinance 126094, "Premium Pay for Gig Workers." The ordinance recognizes that food delivery network companies and their workers provide essential services during the COVID-19 emergency. Seattle Ordinance 126094, at 2 (June 26, 2020),https://www.seattle.legistar.com/View.ashx?M=F&ID=8656949&GUID=450BE067-D41F-4C49-A3C9-7A7D67A2DB9D [https://perma.cc/EK2L-TWEX]. It also acknowledges that those workers "face magnified risks of catching or spreading disease because the nature of their work can involve close contact with the public" when they pick up food from eating and drinking establishments or grocery stores and deliver it to consumers' homes. Additionally, food delivery network companies rely on business models that hire independent contractors, or "gig workers," who do not have access to all of the workplace protections created by law for employees. The City determined that gig workers working for food delivery network companies should receive premium pay for work performed during the COVID-19 emergency. It concluded that premium pay protects public health, supports stable incomes, and promotes job retention by ensuring that gig workers are compensated now and for the duration of the public health emergency for the substantial risks, efforts, and expenses they are undertaking to provide essential services in a safe and reliable manner during the COVID-19 emergency.

Therefore, the ordinance requires food delivery network companies to provide each gig worker with premium pay for each online order that results in the worker making a work-related stop in Seattle: $2.50 for the first pickup or drop-off point in Seattle and $1.25 for each additional pickup or drop-off point in Seattle. It also includes "[g]ig worker and consumer protections" prohibiting food delivery network companies from taking any of the following actions "as a result of this ordinance going into effect":

1. Reduce or otherwise modify the areas of the City that are served by the [food delivery network company];
2. Reduce a gig worker's compensation; or
3. Limit a gig worker's earning capacity, including but not limited to restricting access to online orders.

4. Add customer charges to online orders for delivery of groceries.

The ordinance can be enforced with investigations by the Office of Labor Standards, a private right of action, and civil penalties.

Seattle Ordinance 126094 originally stated that it would be automatically repealed three years after the termination of the civil emergency proclaimed by the mayor on March 3, 2020. In August 2020, the city council passed Seattle Ordinance 126122, "Technical Amendments to Premium Pay for Gig Workers," which limits the premium pay requirement and worker and consumer protections to the duration of the civil emergency. Seattle Ordinance 126122, at 7 (August 21, 2020). We refer to Seattle Ordinance 126094, as modified by Seattle Ordinance 126122, as the ordinance.

C. Instacart's Complaint

Washington Food Industry Association and Maplebear Inc., d/b/a Instacart (collectively Instacart), filed suit against the City, seeking invalidation of the ordinance and damages. Instacart alleges the city council passed the ordinance in consultation with labor unions "intent on increasing pay to food delivery persons and used the COVID-19 emergency as a pretext to do so."

Instacart alleges seven causes of action in the complaint. First, Instacart alleges the ordinance violates Initiative 1634 (I-1634), codified at chapter 82.84 RCW, which states that local governments "may not impose or collect any tax, fee, or other assessment on groceries." RCW 82.84.040(1). Second, it alleges the ordinance exceeds the City's police powers. *See* Wash. Const. art XI, § 11. Third, it alleges the ordinance takes private property for public use without just compensation, in violation of the takings clause of the Washington and United States Constitutions. *See* U.S. Const. amend. V; Wash. Const. art. I, § 16. Fourth, it alleges the ordinance impairs existing contractual obligations in violation of the contracts clauses of the Washington and United States Constitutions. *See* U.S. Const. art. I, § 10, cl. 1; Wash. Const. art. I, § 23. Fifth, it alleges the ordinance violates the equal protection clause of the United States Constitution. *See* U.S. Const. amend. XIV, § 1. Sixth, Instacart alleges the ordinance violates the privileges and immunities clause of the Washington Constitution. *See* Wash. Const. art. I, § 12. Seventh, Instacart alleges the City has, under the color of law, violated Instacart's rights protected by the U.S. Constitution and federal law, and Instacart should be entitled to recover damages and attorney fees. 42 U.S.C. § 1983.

….

ANALYSIS

….

II. Equal Protection

Instacart alleges the ordinance violates the equal protection clause of the federal constitution. U.S. Const. amend. XIV, § 1 ("No state shall make or enforce any law which shall … deny to

any person within its jurisdiction the equal protection of the laws."). Instacart alleges there is no rational basis for differential treatment for food delivery workers because they face lower risks than people who work in grocery stores or restaurants, or who transport passengers in their vehicles.

"[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Fed. Commc'ns Comm'n v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993). Social and economic policies that do not involve suspect classifications, such as a race or nationality, or fundamental constitutional rights "must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.*; *see also Medina v. Pub. Util. Dist. No. 1 of Benton County*, 147 Wn.2d 303, 313, 53 P.3d 993 (2002). No suspect class exists here; therefore, the parties agree we review Instacart's equal protection claim under the rational basis standard. *Medina*, 147 Wn.2d at 313.

….

Instacart argues this ordinance treats food delivery network drivers differently from other workers in restaurants or grocery stores or other gig economy workers like ride-hail drivers for transportation network companies. But the equal protection clause does not require the City to treat all gig workers the same. Under the deferential standard of rational basis, courts should not scrutinize "the wisdom, fairness, or logic of legislative choices" and should therefore uphold an ordinance as long as "'plausible reasons'" exist for its enactment. *Beach Commc'ns*, 508 U.S. at 313-14 (quoting *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179, 101 S. Ct. 453, 66 L. Ed. 2d 368 (1980)). Further, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id.* at 315.

Rational bases exist for the ordinance to provide protections for food delivery network companies and their workers, aside from other kinds of workers. The City recognized that the "availability of food delivery services is fundamental to the health of the community" and that food delivery network drivers work on the front lines in potentially hazardous conditions to provide the essential service of allowing consumers to obtain sustenance without personally visiting stores and restaurants, thereby promoting social distancing and minimizing the spread of the virus. Seattle Ordinance 126094, at 6. Though workers in restaurants and grocery stores face risks while providing a similarly essential service of making food available to customers, it is reasonable for the City to view the work of food delivery network drivers as serving a *different*, *additional* purpose of minimizing person-to-person contact in otherwise highly trafficked areas; it is likewise reasonable for the City to choose to incentivize that work by requiring premium pay. *Aetna Life Ins.*, 83 Wn.2d at 528-29 (Equal protection "forbids all invidious discrimination but does not require identical treatment for all without recognition of difference in relevant circumstances."). Further, the ordinance is aimed at providing protections for gig workers who do not receive the same workplace protections as employees. The City could have rationally

concluded hazard pay was necessary for these gig workers because they work as independent contractors and are therefore more vulnerable than employees in the food and grocery industries.

While the parties may disagree *as a matter of policy* as to how the City should protect gig workers and workers in the food and grocery industry against COVID-19, this process of "line-drawing" is squarely within the ambit of the legislative branch. *Beach Commc'ns*, 508 U.S. at 315-16 ("These restraints on judicial review have added force 'where the legislature must necessarily engage in a process of line-drawing' … 'the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.'" (second alteration in original) (quoting *Fritz*., 449 U.S. at 179)). Instacart has failed to show that there is no conceivable basis for this classification. As there is a rational basis for the legislature to treat this class of workers differently, the judicial inquiry is done. *Id.* at 313-14 ("Where there are 'plausible reasons' for [the legislature's] action, 'our inquiry is at an end.'" (quoting *Fritz*, 449 U.S. at 179)); *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 108-09, 123 S. Ct. 2156, 156 L. Ed. 2d 97 (2003). Therefore, the equal protection claim should be dismissed, and we reverse the trial court on this issue.

III. Privileges and Immunities

….

IV. Takings Clauses

Instacart alleges the ordinance takes private property for public use without just compensation in violation of the takings clause of the United States and Washington Constitutions. U.S. Const. amend. V; Wash. Const. art. I, § 16. The trial court correctly declined to dismiss this claim, which requires factual development and assessment. We affirm.

Both the United States and the Washington Constitutions prohibit the taking of private property for public use without just compensation. U.S. Const. amend. V; Wash. Const. art. I, § 16; *see Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536-37, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) (characterizing the takings clause as placing a *condition* on the exercise of the power to take private property). Though "[t]he paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property," courts have also recognized regulatory takings that limit property owner's lawful uses without physically appropriating land. *Chevron*, 544 U.S. at 537; *Cedar Point Nursery v. Hassid*, 594 U.S. ___, 141 S. Ct. 2063, 2071-72, 210 L. Ed. 2d 369 (2021). We apply the same definition of a regulatory taking under the Washington and United States Constitutions. *Chong Yim v. City of Seattle*, 194 Wn.2d 651, 658-59, 451 P.3d 675 (2019) (*Chong Yim* I).

A regulation that is otherwise a valid exercise of police power may go "'too far'" in its impact on a property owner as to constitute a taking, requiring compensation. *Id.* at 660 (quoting *Pa. Coal*

Co. v. Mahon, 260 U.S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322 (1922)); *Chevron*, 544 U.S. at 543 (holding that an inquiry into a regulation's validity is "logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose"). Here, Instacart has alleged a regulatory taking in the complaint, and the inquiry as to whether a regulation goes "too far" depends on the circumstances of the case.

As a preliminary matter, it is necessary to identify what "property" Instacart alleges the City has taken. Instacart acknowledges that the ordinance does not appropriate real or tangible property. Instacart describes itself as a "technology-based platform" without a storefront, whose "business consists of contracts" with independent contractors who shop for and deliver groceries. Wash. Sup. Ct. oral argument, *Wash. Food Indus. Assoc. v. City of Seattle*, No. 99771-3 (Feb. 17, 2022), at 30 min., 47 sec. to 30 min., 54 sec., *video recording by* TVW, Washington State's Public Affairs Network, http://www.tvw.org. It argues the ordinance renders those contracts commercially impracticable and appropriates Instacart's property rights in its business for the private benefit of the food delivery network workers receiving premium pay.

Though takings claims most often involve physical invasions on real property or land use regulations, they are not limited to those forms of property. Intangible property rights, including valid contracts, are protected by the takings clause. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984) (holding that trade secrets were property for purposes of takings analysis); *see also Omnia Com. Co. v. United States*, 261 U.S. 502, 508, 43 S. Ct. 437, 67 L. Ed. 773, 58 Ct. Cl. 707 (1923) ("The contract in question was property within the meaning of the Fifth Amendment."); *Lynch v. United States*, 292 U.S. 571, 579, 54 S. Ct. 840, 78 L. Ed. 1434 (1934) (same). Thus, Instacart's contracts with food delivery network workers are property for purposes of our analysis.

"Regulatory takings cases involve a 'remedial question of how compensation is measured once a regulatory taking is established.'" *Chong Yim* I, 194 Wn.2d at 668 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 328, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002)). When the government regulates the use of property, the takings clause requires compensation "only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation" unfairly imposes on the property owner "a burden that should be borne by the public as a whole." *Yee v. City of Escondido*, 503 U.S. 519, 522-23, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992).

First, however, before reaching the question of compensation, it must be shown that the "'regulation at issue had in fact constituted a taking.'" *Chong Yim* I, 194 Wn.2d at 668 (quoting *Tahoe-Sierra Pres. Council*, 535 U.S. at 328). Though the government may impose some regulations on property, "'if regulation goes too far it will be recognized as a taking.'" *Id.* at 660 (quoting *Pa. Coal Co.*, 260 U.S. at 415). Regulatory takings may be characterized as "per se" or "partial." *Id.* A per se regulatory taking occurs only when regulations require an owner to tolerate a permanent physical invasion of their property or "'completely deprive an owner of *all*

economically beneficial us[e] of [their] property.'" *Id.* at 672 (first alteration in original) (internal quotation marks omitted) (quoting *Chevron*, 544 U.S. at 538). On the other hand, a partial taking is more nuanced and "must be analyzed on a case-by-case basis according to the *Penn Central* [*Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)] factors." *Id.* at 670; *Chevron*, 544 U.S. at 548.

There is no "set formula" to determine when the impact of a regulation becomes a taking and requires compensation because the inquiry "depends largely 'upon the particular circumstances [in each] case.'" *Penn Cent.*, 438 U.S. at 124 (quoting *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168, 78 S. Ct. 1097, 2 L. Ed. 2d 1228 (1958)). Nonetheless, in *Penn Central*, the United States Supreme Court announced a multifactor test for analyzing partial regulatory takings claims. *Id.* We consider the following factors on a case-by-case basis: (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." *Id.* In *Chevron*, the Court clarified that this inquiry "aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from [their] domain." 544 U.S. at 539.

This test involves "factual assessments" and "turns in large part, albeit not exclusively, upon the *magnitude* of a regulation's economic impact and the *degree* to which it interferes with legitimate property interests." *Yee*, 503 U.S. at 523; *Chevron*, 544 U.S. at 540 (emphasis added). "Consistent with this understanding, [courts] have described determinations of liability in regulatory takings cases as 'essentially ad hoc, factual inquiries,' requiring 'complex factual assessments of the purposes and economic effects of government actions.'" *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999) (citation omitted) (internal quotation marks omitted) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992); *Yee*, 503 U.S. at 523).

We conclude that Instacart's takings claim should not be dismissed. Instacart may be able to prove a set of facts that demonstrates the ordinance interferes with its economic interests to a degree that amounts to a taking under the *Penn Central* test. *See Berst v. Snohomish County*, 114 Wn. App. 245, 257-58, 57 P.3d 273 (2002) (reversing a dismissal under CR 12(b)(6) when the complaint alleged the challenged law prevented the plaintiffs from making reasonable use of their property). Specifically, Instacart has alleged that the ordinance has a significant economic impact because the premium pay requirement and the limitations on how food delivery network companies can defray those costs are "unsustainable" and render its contracts with drivers "commercially impracticable." 1 CP at 85-86; *see Pa. Coal Co.*, 260 U.S. at 414 (statute that made it "commercially impracticable to mine certain coal" amounted to a taking). However, the economic impact, extent of interference with investment-backed expectations, and character of the regulation are highly factual inquiries. *Monterey*, 526 U.S. at 720; *Chevron*, 544 U.S. at 540. Absent more factual development, it is impossible to ascertain the economic impact of the

ordinance on Instacart's business model—an inquiry that may require information about Instacart's contracts with the grocery stores and the pay structure with drivers. *See Penn Cent*., 438 U.S. at 124. This factual inquiry into the magnitude and degree to which the ordinance affects Instacart's contracts is appropriate for the trial court, not this court.

Dismissal upon a CR 12(b)(6) motion is proper only if the court concludes the plaintiff cannot prove any set of facts consistent with the complaint that would justify recovery. *Kinney*, 159 Wn.2d at 842. Instacart has sufficiently alleged that the ordinance amounts to a regulatory taking; Instacart may be able to show that the ordinance interferes with its investment-backed expectations to the degree that is "functionally equivalent to the classic taking." *Chevron*, 544 U.S. at 539; *Berst*, 114 Wn. App. 2d at 257-58. Therefore, the takings clause claim should not be dismissed, and we affirm the trial court on this issue.

[concurrence and dissent omitted]

3.A.4.1. Timeline

Date	Case Name	Decision	Notes
June 26, 2020	*Washington Food Industry Association v. City of Seattle* King County Superior Court (2021)	Did not dismiss claim under the privileges and immunities clause	**First filed in 2020.** ● Link
September 2, 2020	*Washington Food Industry Association v. City of Seattle* King County Superior Court (2021)	Amended complaint	● Link
Argued February 17, 2022 **Filed February 9, 2023**	*Washington Food Industry Association v. City of Seattle* Supreme Court of Washington (2023)	Affirmed in part and reversed in part; its claim under the privileges and immunities clause should have been dismissed	Hazard pay did not violate the Washington Code ● Link

3.1. First Amendment: Freedom of Speech and the Religious Clauses

3.1.a. Pickering v. Bd. of Educ., 391 U.S. 563 (1968)

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Appellant Marvin L. Pickering, a teacher in Township High School District 205, Will County, Illinois, was dismissed from his position by the appellee Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools. . . . .

. . . . For the reasons detailed below we agree that appellant's rights to freedom of speech were violated and we reverse.

I.

In February of 1961 the appellee Board of Education asked the voters of the school district to approve a bond issue to raise $ 4,875,000 to erect two new schools. The proposal was defeated. Then, in December of 1961, the Board submitted another bond proposal to the voters which called for the raising of $ 5,500,000 to build two new schools. This second proposal passed and the schools were built with the money raised by the bond sales. In May of 1964 a proposed increase in the tax rate to be used for educational purposes was submitted to the voters by the Board and was defeated. Finally, on September 19, 1964, a second proposal to increase the tax rate was submitted by the Board and was likewise defeated. It was in connection with this last proposal of the School Board that appellant wrote the letter to the editor (which we reproduce in an Appendix to this opinion) that resulted in his dismissal.

. . . .

The letter constituted, basically, an attack on the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources between the schools' educational and athletic programs. It also charged the superintendent of schools with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue.

The Board dismissed Pickering for writing and publishing the letter. Pursuant to Illinois law, the Board was then required to hold a hearing on the dismissal. At the hearing the Board charged that numerous statements in the letter were false and that the publication of the statements unjustifiably impugned the "motives, honesty, integrity, truthfulness, responsibility and competence" of both

the Board and the school administration. The Board also charged that the false statements damaged the professional reputations of its members and of the school administrators, would be disruptive of faculty discipline, and would tend to foment "controversy, conflict and dissension" among teachers, administrators, the Board of Education, and the residents of the district. Testimony was introduced from a variety of witnesses on the truth or falsity of the particular statements in the letter with which the Board took issue. The Board found the statements to be false as charged. No evidence was introduced at any point in the proceedings as to the effect of the publication of the letter on the community as a whole or on the administration of the school system in particular, and no specific findings along these lines were made.

. . . .

II.

To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. "The theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." Keyishian v. Board of Regents, supra, at 605-606. At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

III.

The Board contends that "the teacher by virtue of his public employment has a duty of loyalty to support his superiors in attaining the generally accepted goals of education and that, if he must speak out publicly, he should do so factually and accurately, commensurate with his education and experience." Appellant, on the other hand, argues that the test applicable to defamatory statements directed against public officials by persons having no occupational relationship with them, namely, that statements to be legally actionable must be made "with knowledge that [they were] . . . false or with reckless disregard of whether [they were] . . . false or not," New York Times Co. v.

Sullivan, 376 U.S. 254, 280 (1964), should also be applied to public statements made by teachers. Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. However, in the course of evaluating the conflicting claims of First Amendment protection and the need for orderly school administration in the context of this case, we shall indicate some of the general lines along which an analysis of the controlling interests should run.

An examination of the statements in appellant's letter objected to by the Board reveals that they, like the letter as a whole, consist essentially of criticism of the Board's allocation of school funds between educational and athletic programs, and of both the Board's and the superintendent's methods of informing, or preventing the informing of, the district's taxpayers of the real reasons why additional tax revenues were being sought for the schools. The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning. Accordingly, to the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct, such as statements (1)-(4) of appellant's letter, see Appendix, infra, may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it.

We next consider the statements in appellant's letter which we agree to be false. The Board's original charges included allegations that the publication of the letter damaged the professional reputations of the Board and the superintendent and would foment controversy and conflict among the Board, teachers, administrators, and the residents of the district. However, no evidence to support these allegations was introduced at the hearing. So far as the record reveals, Pickering's letter was greeted by everyone but its main target, the Board, with massive apathy and total disbelief. The Board must, therefore, [*571] have decided, perhaps by analogy with the law of libel, that the statements were per se harmful to the operation of the schools.

However, the only way in which the Board could conclude, absent any evidence of the actual effect of the letter, that the statements contained therein were per se detrimental to the interest of the schools was to equate the Board members' own interests with that of the schools. Certainly an accusation that too much money is being spent on athletics by the administrators of the school system (which is precisely the import of that portion of appellant's letter containing the statements that we have found to be false, see Appendix, infra) cannot reasonably be regarded as per se detrimental to the district's schools. Such an accusation reflects rather a difference of opinion between Pickering and the Board as to the preferable manner of operating the school system, a difference of opinion that clearly concerns an issue of general public interest.

In addition, the fact that particular illustrations of the Board's claimed undesirable emphasis on athletic programs are false would not normally have any necessary impact on the actual operation of the schools, beyond its tendency to anger the Board. For example, Pickering's letter was written after the defeat at the polls of the second proposed tax increase. It could, therefore, have had no effect on the ability of the school district to raise necessary revenue, since there was no showing that there was any proposal to increase taxes pending when the letter was written.

More importantly, the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

In addition, the amounts expended on athletics which Pickering reported erroneously were matters of public record on which his position as a teacher in the district did not qualify him to speak with any greater authority than any other taxpayer. The Board could easily have rebutted appellant's errors by publishing the accurate figures itself, either via a letter to the same newspaper or otherwise. We are thus not presented with a situation in which a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts. Accordingly, we have no occasion to consider at this time whether under such circumstances a school board could reasonably require that a teacher make substantial efforts to verify the accuracy of his charges before publishing them.

What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

. . . .

In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. Since no such showing has been made in this case regarding appellant's letter, see Appendix, infra, his dismissal for writing it cannot be upheld and the judgment of the Illinois Supreme Court must, accordingly, be reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

APPENDIX TO OPINION OF THE COURT.

A. Appellant's letter [omitted]

3.1.a.1. Timelines

Date	Case Name	Decision	Notes
Filed January 19, 1967	*Pickering v. Board of Education* Supreme Court of Illinois	Board's decision to uphold the teacher's dismissal was affirmed.	• Link
August 17, 1967	*Pickering v. Board of Education*	Statement as to jurisdiction and record filed.	

Argued March 27, 1968 Decided June 3, 1968	*Pickering v. Board of Education* Supreme Court of the United States	Judgment reversed and remanded.	• Link

3.1.1. Garcetti v. Ceballos, 547 U.S. 410 (2006)

Full decision: (link); **Docket**: (link); **Oral argument**: (link)

Justice Kennedy delivered the opinion of the Court.

It is well settled that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick* v. *Myers,* 461 U.S. 138, 142, (1983). The question presented by the instant case is whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties.

I

Respondent Richard Ceballos has been employed since 1989 as a deputy district attorney for the Los Angeles County District Attorney's Office. During the period relevant to this case, Ceballos was a calendar deputy in the office's Pomona branch, and in this capacity he exercised certain supervisory responsibilities over other lawyers. In February 2000, a defense attorney contacted Ceballos about a pending criminal case. The defense attorney said there were inaccuracies in an affidavit used to obtain a critical search warrant. The attorney informed Ceballos that he had filed a motion to traverse, or challenge, the warrant, but he also wanted Ceballos to review the case. According to Ceballos, it was not unusual for defense attorneys to ask calendar deputies to investigate aspects of pending cases.

After examining the affidavit and visiting the location it described, Ceballos determined the affidavit contained serious misrepresentations. The affidavit called a long driveway what Ceballos thought should have been referred to as a separate roadway. Ceballos also questioned the affidavit's statement that tire tracks led from a stripped-down truck to the premises covered by the warrant. His doubts arose from his conclusion that the roadway's composition in some places made it difficult or impossible to leave visible tire tracks.

Ceballos spoke on the telephone to the warrant affiant, a deputy sheriff from the Los Angeles County Sheriff's Department, but he did not receive a satisfactory explanation for the perceived

inaccuracies. He relayed his findings to his supervisors, petitioners Carol Najera and Frank Sundstedt, and followed up by preparing a disposition memorandum. The memo explained Ceballos' concerns and recommended dismissal of the case. On March 2, 2000, Ceballos submitted the memo to Sundstedt for his review. A few days later, Ceballos presented Sundstedt with another memo, this one describing a second telephone conversation between Ceballos and the warrant affiant.

Based on Ceballos' statements, a meeting was held to discuss the affidavit. Attendees included Ceballos, Sundstedt, and Najera, as well as the warrant affiant and other employees from the sheriff's department. The meeting allegedly became heated, with one lieutenant sharply criticizing Ceballos for his handling of the case.

Despite Ceballos' concerns, Sundstedt decided to proceed with the prosecution, pending disposition of the defense motion to traverse. The trial court held a hearing on the motion. Ceballos was called by the defense and recounted his observations about the affidavit, but the trial court rejected the challenge to the warrant.

Ceballos claims that in the aftermath of these events he was subjected to a series of retaliatory employment actions. The actions included reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion. Ceballos initiated an employment grievance, but the grievance was denied based on a finding that he had not suffered any retaliation. Unsatisfied, Ceballos sued in the United States District Court for the Central District of California, asserting, as relevant here, a claim under Rev. Stat. § 1979, 42 U.S.C. § 1983. He alleged petitioners violated the First and Fourteenth Amendments by retaliating against him based on his memo of March 2.

Petitioners responded that no retaliatory actions were taken against Ceballos and that all the actions of which he complained were explained by legitimate reasons such as staffing needs. They further contended that, in any event, Ceballos' memo was not protected speech under the First Amendment. Petitioners moved for summary judgment, and the District Court granted their motion. Noting that Ceballos wrote his memo pursuant to his employment duties, the court concluded he was not entitled to First Amendment protection for the memo's contents. . . . .

The Court of Appeals for the Ninth Circuit reversed, holding that "Ceballos's allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment." 361 F.3d 1168, 1173 (2004). In reaching its conclusion the court looked to the First Amendment analysis set forth in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), and *Connick*, supra. *Connick* instructs courts to begin by considering whether the expressions in question were made by the speaker "as a citizen upon matters of public concern." See *id.*, at 146-147. The Court of Appeals determined that Ceballos' memo, which recited what he thought to be governmental misconduct,

was "inherently a matter of public concern." 361 F.3d, at 1174. The court did not, however, consider whether the speech was made in Ceballos' capacity as a citizen. Rather, it relied on Circuit precedent rejecting the idea that "a public employee's speech is deprived of First Amendment protection whenever those views are expressed, to government workers or others, pursuant to an employment responsibility." *Id.*, at 1174-1175.

Having concluded that Ceballos' memo satisfied the public-concern requirement, the Court of Appeals proceeded to balance Ceballos' interest in his speech against his supervisors' interest in responding to it. See *Pickering, supra*, at 568. The court struck the balance in Ceballos' favor, noting that petitioners "failed even to suggest disruption or inefficiency in the workings of the District Attorney's Office" as a result of the memo. See 361 F.3d, at 1180. The court further concluded that Ceballos' First Amendment rights were clearly established and that petitioners' actions were not objectively reasonable.

Judge O'Scannlain concurred. Agreeing that the panel's decision was compelled by Circuit precedent, he nevertheless concluded Circuit law should be revisited and overruled. See *id.*, at 1185. Judge O'Scannlain emphasized the distinction "between speech offered by a public employee acting *as an employee* carrying out his or her ordinary job duties and that spoken by an employee acting *as a citizen* expressing his or her personal views on disputed matters of public import." *Id.*, at 1187. In his view, "when public employees speak in the course of carrying out their routine, required employment obligations, they have no *personal* interest in the content of that speech that gives rise to a First Amendment right." *Id.*, at 1189.

We granted certiorari, and we now reverse.

II

As the Court's decisions have noted, for many years "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment--including those which restricted the exercise of constitutional rights." *Connick,* 461 U.S., at 143. That dogma has been qualified in important respects. The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.

Pickering provides a useful starting point in explaining the Court's doctrine. There the relevant speech was a teacher's letter to a local newspaper addressing issues including the funding policies of his school board. "The problem in any case," the Court stated, "is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the

interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*, at 568. The Court found the teacher's speech "neither [was] shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." *Id.*, at 572-573. Thus, the Court concluded that "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.*, at 573.

Pickering and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. See *Connick, supra*, at 147. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

To be sure, conducting these inquiries sometimes has proved difficult. This is the necessary product of "the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors . . . to furnish grounds for dismissal." *Id.*, at 569. The Court's overarching objectives, though, are evident.

When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. See, *e.g., Waters* v. *Churchill,* 511 U.S. 661, 671 (1994) (plurality opinion) ("[T]he government as employer indeed has far broader powers than does the government as sovereign"). Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. Cf. *Connick, supra*, at 143 ("[G]overnment offices could not function if every employment decision became a constitutional matter"). Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.

At the same time, the Court has recognized that a citizen who works for the government is nonetheless a citizen. The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. So long as employees are speaking as citizens about matters of

public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.

The Court's employee-speech jurisprudence protects, of course, the constitutional rights of public employees. Yet the First Amendment interests at stake extend beyond the individual speaker. The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion. [In *Pickering*] [t]he Court characterized its holding as rejecting the attempt of school administrators to "limi[t] teachers' opportunities to contribute to public debate." It also noted that teachers are "the members of a community most likely to have informed and definite opinions" about school expenditures. *Id.*, at 572. The Court's approach acknowledged the necessity for informed, vibrant dialogue in a democratic society. It suggested, in addition, that widespread costs may arise when dialogue is repressed. The Court's more recent cases have expressed similar concerns. See, *e.g., San Diego* v. *Roe,* 543 U.S. 77, 82 (2004) ("Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it."

The Court's decisions, then, have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions. Underlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to "constitutionalize the employee grievance."

III

With these principles in mind we turn to the instant case. Respondent Ceballos believed the affidavit used to obtain a search warrant contained serious misrepresentations. He conveyed his opinion and recommendation in a memo to his supervisor. That Ceballos expressed his views inside his office, rather than publicly, is not dispositive. Employees in some cases may receive First Amendment protection for expressions made at work. Many citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like "any member of the general public," to hold that all speech within the office is automatically exposed to restriction.

The memo concerned the subject matter of Ceballos' employment, but this, too, is nondispositive. The First Amendment protects some expressions related to the speaker's job. . . . .

The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy. That consideration--the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case--distinguishes Ceballos' case from those in which the First Amendment provides protection against

discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do. It is immaterial whether he experienced some personal gratification from writing the memo; his First Amendment rights do not depend on his job satisfaction. The significant point is that the memo was written pursuant to Ceballos' official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. Contrast, for example, the expressions made by the speaker in *Pickering*, whose letter to the newspaper had no official significance and bore similarities to letters submitted by numerous citizens every day.

Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.

This result is consistent with our precedents' attention to the potential societal value of employee speech. Refusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate. The employees retain the prospect of constitutional protection for their contributions to the civic discourse. This prospect of protection, however, does not invest them with a right to perform their jobs however they see fit.

Our holding likewise is supported by the emphasis of our precedents on affording government employers sufficient discretion to manage their operations. Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission. Ceballos' memo is illustrative. It demanded the attention of his supervisors and led to a heated meeting with employees from the sheriff's department. If Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action.

Ceballos' proposed contrary rule, adopted by the Court of Appeals, would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business.

This displacement of managerial discretion by judicial supervision finds no support in our precedents. When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny. To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.

The Court of Appeals based its holding in part on what it perceived as a doctrinal anomaly. The court suggested it would be inconsistent to compel public employers to tolerate certain employee speech made publicly but not speech made pursuant to an employee's assigned duties. This objection misconceives the theoretical underpinnings of our decisions. Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper, or discussing politics with a co-worker. When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.

The Court of Appeals' concern also is unfounded as a practical matter. The perceived anomaly, it should be noted, is limited in scope: It relates only to the expressions an employee makes pursuant to his or her official responsibilities, not to statements or complaints (such as those at issue in cases like *Pickering* and *Connick*) that are made outside the duties of employment. If, moreover, a government employer is troubled by the perceived anomaly, it has the means at hand to avoid it. A public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism. Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public.

Proper application of our precedents thus leads to the conclusion that the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. Because Ceballos' memo falls into this category, his allegation of unconstitutional retaliation must fail.

. . . . Justice Souter suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

IV

. . . .

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

Dissent by: JUSTICE STEVENS; JUSTICE SOUTER; JUSTICE BREYER

Justice Stevens, dissenting.

The proper answer to the question "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties," is "Sometimes," not "Never." Of course a supervisor may take corrective action when such speech is "inflammatory or misguided," [b]ut what if it is just unwelcome speech because it reveals facts that the supervisor would rather not have anyone else discover?[*]

As Justice Souter explains, public employees are still citizens while they are in the office. The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong. Over a quarter of a century has passed since then-Justice Rehnquist, writing for a unanimous Court, rejected "the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly." *Givhan* v. *Western Line Consol. School Dist.,* 439 U.S. 410, 414. We had no difficulty recognizing that the First Amendment applied when Bessie Givhan, an English teacher, raised concerns about the school's racist employment practices to the principal. Our silence as to whether or not her speech was made pursuant to her job duties demonstrates that the point was immaterial. That is equally true today, for it is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description. Moreover, it seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors.

While today's novel conclusion to the contrary may not be "inflammatory," for the reasons stated in Justice Souter's dissenting opinion it is surely "misguided."

Justice Souter, with whom Justice Stevens and Justice Ginsburg join, dissenting.

The Court holds that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." I respectfully dissent. I agree with the majority that a government employer has substantial interests in effectuating its chosen policy and objectives, and in demanding competence, honesty, and judgment from employees who speak for it in doing their work. But I would hold that private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.

. . . .

[W]hy do the majority's concerns, which we all share, require categorical exclusion of First Amendment protection against any official retaliation for things said on the job? Is it not possible to respect the unchallenged individual and public interests in the speech through a *Pickering* balance without drawing the strange line I mentioned before? This is, to be sure, a matter of judgment, but the judgment has to account for the undoubted value of speech to those, and by those, whose specific public job responsibilities bring them face to face with wrongdoing and incompetence in government, who refuse to avert their eyes and shut their mouths. And it has to account for the need actually to disrupt government if its officials are corrupt or dangerously incompetent. It is thus no adequate justification for the suppression of potentially valuable information simply to recognize that the government has a huge interest in managing its employees and preventing the occasionally irresponsible one from turning his job into a bully pulpit. Even there, the lesson of *Pickering* (and the object of most constitutional adjudication) is still to the point: when constitutionally significant interests clash, resist the demand for winner-take-all; try to make adjustments that serve all of the values at stake.

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* See, *e.g., Branton* v. *Dallas*, 272 F.3d 730 (CA5 2001) (police internal investigator demoted by police chief after bringing the false testimony of a fellow officer to the attention of a city official); *Miller* v. *Jones*, 444 F.3d 929, 936 (CA7 2006) (police officer demoted after opposing the police chief's attempt to "us[e] his official position to coerce a financially independent organization into a potentially ruinous merger"); *Delgado* v. *Jones,* 282 F.3d 511 (CA7 2002) (police officer sanctioned for reporting criminal activity that implicated a local political figure who was a good friend of the police chief); *Herts* v. *Smith*, 345 F.3d 581 (CA8 2003) (school district official's contract was not renewed after she gave frank testimony about the district's desegregation efforts); *Kincade* v. *Blue Springs*, 64 F.3d 389 (CA8 1995) (engineer fired after reporting to his supervisors that contractors were failing to complete dam-related projects and that the resulting dam might be structurally unstable); *Fox* v. *District of Columbia*, 83 F.3d 1491, 1494 (CADC 1996) (D. C. Lottery Board security officer fired after informing the police about a theft made possible by "rather drastic managerial ineptitude").

3.1.1.a. Timeline

Date	Case Name	Decision	Notes
First filed and docketed on March 14, 2002	*Ceballos v. Garcetti* US Court of Appeals for the Ninth Circuit	Plaintiff filed 42 U. S. C. §1983 suit.	Claimed petitioners retaliated against the plaintiff, in violation of the First and Fourteenth Amendments
	Ceballos v. Garcetti US District Court for the Central District of California	Granted petitioners summary judgment ruling, *inter alia,* the memo was not protected speech because Ceballos wrote it pursuant to his employment duties.	
Argued and submitted June 2, 2003 **Filed March 22, 2004**	*Ceballos v. Garcetti* US Court of Appeals for the Ninth Circuit (2004)	Reversed district court decision, case remanded for further proceedings.	Qualified immunity not available to individual defendants Neither County nor DA were entitled to Eleventh Amendment immunity. • Link
October 1, 2004	*Garcetti v. Ceballos* United States Supreme Court (2004)	Petition for writ of certiorari filed.	
February 28, 2005	*Garcetti v. Ceballos* United States Supreme Court (2005)	Petition for writ of certiorari granted.	• Link
Argued October 12, 2005 **Reargued March 21, 2006**	*Garcetti v. Ceballos* United States Supreme Court (2006)	Reversed judgment of appellate court and remanded case for further proceedings.	Employee did not speak as a citizen First Amendment did not prohibit managerial discipline based on employee's expressions made pursuant to official

Decided May 30. 2006			responsibilities. ● Link
June 30, 2006		Judgment issued.	

3.1.2. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022)

Full decision: (link); **Docket**: (link); **Oral argument**: (link)

JUSTICE GORSUCH delivered the opinion of the Court.

Joseph Kennedy lost his job as a high school football coach because he knelt at midfield after games to offer a quiet prayer of thanks. Mr. Kennedy prayed during a period when school employees were free to speak with a friend, call for a reservation at a restaurant, check email, or attend to other personal matters. He offered his prayers quietly while his students were otherwise occupied. Still, the Bremerton School District disciplined him anyway. It did so because it thought anything less could lead a reasonable observer to conclude (mistakenly) that it endorsed Mr. Kennedy's religious beliefs. That reasoning was misguided. Both the Free Exercise and Free Speech Clauses of the First Amendment protect expressions like Mr. Kennedy's. Nor does a proper understanding of the Amendment's Establishment Clause require the government to single out private religious speech for special disfavor. The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike.

I

A

Joseph Kennedy began working as a football coach at Bremerton High School in 2008 after nearly two decades of service in the Marine Corps. Like many other football players and coaches across the country, Mr. Kennedy made it a practice to give "thanks through prayer on the playing field" at the conclusion of each game. In his prayers, Mr. Kennedy sought to express gratitude for "what the players had accomplished and for the opportunity to be part of their lives through the game of football." Mr. Kennedy offered his prayers after the players and coaches had shaken hands, by taking a knee at the 50-yard line and praying "quiet[ly]" for "approximately 30 seconds."

Initially, Mr. Kennedy prayed on his own. But over time, some players asked whether they could pray alongside him. Mr. Kennedy responded by saying, "'This is a free country. You can do what you want.'" The number of players who joined Mr. Kennedy eventually grew to include most of the team, at least after some games. Sometimes team members invited opposing players to join. Other times Mr. Kennedy still prayed alone. Eventually, Mr. Kennedy began

incorporating short motivational speeches with his prayer when others were present. Separately, the team at times engaged in pregame or postgame prayers in the locker room. It seems this practice was a "school tradition" that predated Mr. Kennedy's tenure. Mr. Kennedy explained that he "never told any student that it was important they participate in any religious activity." In particular, he "never pressured or encouraged any student to join" his postgame midfield prayers.

For over seven years, no one complained to the Bremerton School District (District) about these practices. It seems the District's superintendent first learned of them only in September 2015, after an employee from another school commented positively on the school's practices to Bremerton's principal. At that point, the District reacted quickly. On September 17, the superintendent sent Mr. Kennedy a letter. In it, the superintendent identified "two problematic practices" in which Mr. Kennedy had engaged. First, Mr. Kennedy had provided "inspirational talk[s]" that included "overtly religious references" likely constituting "prayer" with the students "at midfield following the completion of . . . game[s]." Second, he had led "students and coaching staff in a prayer" in the locker-room tradition that "predated [his] involvement with the program."

The District explained that it sought to establish "clear parameters" "going forward." It instructed Mr. Kennedy to avoid any motivational "talks with students" that "include[d] religious expression, including prayer," and to avoid "suggest[ing], encourag[ing] (or discourag[ing]), or supervis[ing]" any prayers of students, which students remained free to "engage in." The District also explained that any religious activity on Mr. Kennedy's part must be "nondemonstrative (i.e., not outwardly discernible as religious activity)" if "students are also engaged in religious conduct" in order to "avoid the perception of endorsement." In offering these directives, the District appealed to what it called a "direct tension between" the "Establishment Clause" and "a school employee's [right to] free[ly] exercise" his religion. To resolve that "tension," the District explained, an employee's free exercise rights "must yield so far as necessary to avoid school endorsement of religious activities."

After receiving the District's September 17 letter, Mr. Kennedy ended the tradition, predating him, of offering locker-room prayers. He also ended his practice of incorporating religious references or prayer into his postgame motivational talks to his team on the field. See ibid. Mr. Kennedy further felt pressured to abandon his practice of saying his own quiet, on-field postgame prayer. Driving home after a game, however, Mr. Kennedy felt upset that he had "broken [his] commitment to God" by not offering his own prayer, so he turned his car around and returned to the field. By that point, everyone had left the stadium, and he walked to the 50-yard line and knelt to say a brief prayer of thanks.

On October 14, through counsel, Mr. Kennedy sent a letter to school officials informing them that, because of his "sincerely-held religious beliefs," he felt "compelled" to offer a "post-game personal prayer" of thanks at midfield. He asked the District to allow him to continue that "private religious expression" alone. Consistent with the District's policy, Mr. Kennedy explained that he "neither requests, encourages, nor discourages students from participating in"

these prayers. Mr. Kennedy emphasized that he sought only the opportunity to "wai[t] until the game is over and the players have left the field and then wal[k] to mid-field to say a short, private, personal prayer." He "told everybody" that it would be acceptable to him to pray "when the kids went away from [him]." He later clarified that this meant he was even willing to say his "prayer while the players were walking to the locker room" or "bus," and then catch up with his team. However, Mr. Kennedy objected to the logical implication of the District's September 17 letter, which he understood as banning him "from bowing his head" in the vicinity of students, and as requiring him to "flee the scene if students voluntarily [came] to the same area" where he was praying. After all, District policy prohibited him from "discourag[ing]" independent student decisions to pray.

On October 16, shortly before the game that day, the District responded with another letter. The District acknowledged that Mr. Kennedy "ha[d] complied" with the "directives" in its September 17 letter. Yet instead of accommodating Mr. Kennedy's request to offer a brief prayer on the field while students were busy with other activities—whether heading to the locker room, boarding the bus, or perhaps singing the school fight song—the District issued an ultimatum. It forbade Mr. Kennedy from engaging in "any overt actions" that could "appea[r] to a reasonable observer to endorse . . . prayer . . . while he is on duty as a District-paid coach." The District did so because it judged that anything less would lead it to violate the Establishment Clause.

B

On October 23, shortly before that evening's game, the District wrote Mr. Kennedy again. It expressed "appreciation" for his "efforts to comply" with the District's directives, including avoiding "on-the-job prayer with players in the . . . football program, both in the locker room prior to games as [*519] well as on the field immediately following games." Id., at 90. The letter also admitted that, during Mr. Kennedy's recent October 16 postgame prayer, his students were otherwise engaged and not praying with him, and that his prayer was "fleeting." Id., at 90, 93. Still, the District explained that a "reasonable observer" could think [****18] government endorsement of religion had occurred when a "District employee, on the field only by virtue of his employment with the District, still on duty" engaged in "overtly religious conduct." Id., at 91, 93. The District thus made clear that the only option it would offer Mr. Kennedy was to allow him to pray after a game in a "private location" behind closed doors and "not observable to students or the public." Id., at 93-94.

After receiving this letter, Mr. Kennedy offered a brief prayer following the October 16 game. When he bowed his head at midfield after the game, "most [Bremerton] players were . . . engaged in the traditional singing of the school fight song to the audience." Though Mr. Kennedy was alone when he began to pray, players from the other team and members of the community joined him before he finished his prayer. This event spurred media coverage of Mr. Kennedy's dilemma and a public response from the District. The District placed robocalls to parents to inform them that public access to the field is forbidden; it posted signs and made announcements at games saying the same thing; and it had the Bremerton Police secure the field in future games. Subsequently, the District superintendent explained in an October 20 email to the leader of a state association of school administrators that "the coach moved on from leading

prayer with kids, to taking a silent prayer at the 50 yard line." The official with whom the superintendent corresponded acknowledged that the "use of a silent prayer changes the equation a bit." On October 21, the superintendent further observed to a state official that "[t]he issue is quickly changing as it has shifted from leading prayer with student athletes, to a coaches [sic] right to conduct" his own prayer "on the 50 yard line."

After the October 23 game ended, Mr. Kennedy knelt at the 50-yard line, where "no one joined him," and bowed his head for a "brief, quiet prayer." The superintendent informed the District's board that this prayer "moved closer to what we want," but nevertheless remained "unconstitutional." After the final relevant football game on October 26, Mr. Kennedy again knelt alone to offer a brief prayer as the players engaged in postgame traditions. While he was praying, other adults gathered around him on the field. Later, Mr. Kennedy rejoined his players for a postgame talk, after they had finished singing the school fight song.

C

Shortly after the October 26 game, the District placed Mr. Kennedy on paid administrative leave and prohibited him from "participat[ing], in any capacity, in . . . football program activities." In a letter explaining the reasons for this disciplinary action, the superintendent criticized Mr. Kennedy for engaging in "public and demonstrative religious conduct while still on duty as an assistant coach" . . . .

. . . .

While Mr. Kennedy received "uniformly positive evaluations" every other year of his coaching career, after the 2015 season ended in November, the District gave him a poor performance evaluation. The evaluation advised against rehiring Mr. Kennedy on the grounds that he "'failed to follow district policy'" regarding religious expression and "'failed to supervise student-athletes after games.'" Mr. Kennedy did not return for the next season.

. . . .

III

Now before us, Mr. Kennedy renews his argument that the District's conduct violated both the Free Exercise and Free Speech Clauses of the First Amendment. These Clauses work in tandem. Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities. That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent.

Under this Court's precedents, a plaintiff bears certain burdens to demonstrate an infringement of his rights under the Free Exercise and Free Speech Clauses. If the plaintiff carries these burdens, the focus then shifts to the defendant to show that its actions were nonetheless justified and tailored consistent with the demands of our case law. We begin by examining whether Mr. Kennedy has discharged his burdens, first under the Free Exercise Clause, then under the Free Speech Clause.

A

The Free Exercise Clause provides that “Congress shall make no law . . . prohibiting the free exercise” of religion. Amdt. 1. This Court has held the Clause applicable to the States under the terms of the Fourteenth Amendment. The Clause protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life.

Under this Court’s precedents, a plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not “neutral” or “generally applicable.” Should a plaintiff make a showing like that, this Court will find a First Amendment violation unless the government can satisfy “strict scrutiny” by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest.

That Mr. Kennedy has discharged his burdens is effectively undisputed. No one questions that he seeks to engage in a sincerely motivated religious exercise. The exercise in question involves, as Mr. Kennedy has put it, giving “thanks through prayer” briefly and by himself “on the playing field” at the conclusion of each game he coaches. Mr. Kennedy has indicated repeatedly that he is willing to “wai[t] until the game is over and the players have left the field” to “wal[k] to mid-field to say [his] short, private, personal prayer.” The contested exercise before us does not involve leading prayers with the team or before any other captive audience. . . .

Nor does anyone question that, in forbidding Mr. Kennedy’s brief prayer, the District failed to act pursuant to a neutral and generally applicable rule. A government policy will not qualify as neutral if it is “specifically directed at . . . religious practice.” A policy can fail this test if it “discriminate[s] on its face,” or if a religious exercise is otherwise its “object.” . . . .

In this case, the District’s challenged policies were neither neutral nor generally applicable. By its own admission, the District sought to restrict Mr. Kennedy’s actions at least in part because of their religious character. As it put it in its September 17 letter, the District prohibited “any overt actions on Mr. Kennedy’s part, appearing to a reasonable observer to endorse even voluntary, student-initiated prayer.” . . . .

B

When it comes to Mr. Kennedy’s free speech claim, our precedents remind us that the First Amendment’s protections extend to “teachers and students,” neither of whom “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” Of course, none of this means the speech rights of public school employees are so boundless that they may deliver any message to anyone anytime they wish. In addition to being private citizens, teachers and coaches are also government employees paid in part to speak on the government’s behalf and convey its intended messages.

To account for the complexity associated with the interplay between free speech rights and government employment, this Court's decisions in Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., 391 U. S. 563, (1968), Garcetti, 547 U. S. 410, 126 S. Ct. 1951, and related cases suggest proceeding in two steps. The first step involves a threshold inquiry into the nature of the speech at issue. If a public employee speaks "pursuant to [his or her] official duties," this Court has said the Free Speech Clause generally will not shield the individual from an employer's control and discipline because that kind of speech is—for constitutional purposes at least—the government's own speech.

At the same time and at the other end of the spectrum, when an employee "speaks as a citizen addressing a matter of public concern," our cases indicate that the First Amendment may be implicated and courts should proceed to a second step. At this second step, our cases suggest that courts should attempt to engage in "a delicate balancing of the competing interests surrounding the speech and its consequences." Among other things, courts at this second step have sometimes considered whether an employee's speech interests are outweighed by "'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"

Both sides ask us to employ at least certain aspects of this Pickering-Garcetti framework to resolve Mr. Kennedy's free speech claim. They share additional common ground too. They agree that Mr. Kennedy's speech implicates a matter of public concern. They also appear to accept, at least for argument's sake, that Mr. Kennedy's speech does not raise questions of academic freedom that may or may not involve "additional" First Amendment "interests" beyond those captured by this framework. At the first step of the Pickering-Garcetti inquiry, the parties' disagreement thus turns out to center on one question alone: Did Mr. Kennedy offer his prayers in his capacity as a private citizen, or did they amount to government speech attributable to the District?

Our cases offer some helpful guidance for resolving this question. In Garcetti, the Court concluded that a prosecutor's internal memorandum to a supervisor was made "pursuant to [his] official duties," and thus ineligible for First Amendment protection. In reaching this conclusion, the Court relied on the fact that the prosecutor's speech "fulfill[ed] a responsibility to advise his supervisor about how best to proceed with a pending case." In other words, the prosecutor's memorandum was government speech because it was speech the government "itself ha[d] commissioned or created" and speech the employee was expected to deliver in the course of carrying out his job.

By contrast, in Lane a public employer sought to terminate an employee after he testified at a criminal trial about matters involving his government employment. 573 U. S., at 233. The Court held that the employee's speech was protected by the First Amendment. In doing so, the Court held that the fact the speech touched on matters related to public employment was not enough to render it government speech. Instead, the Court explained, the "critical question . . . is whether the speech at issue is itself ordinarily within the scope of an employee's duties." It is an inquiry

this Court has said should be undertaken "practical[ly]," rather than with a blinkered focus on the terms of some formal and capacious written job description. To proceed otherwise would be to allow public employers to use "excessively broad job descriptions" to subvert the Constitution's protections.

Applying these lessons here, it seems clear to us that Mr. Kennedy has demonstrated that his speech was private speech, not government speech. When Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech "ordinarily within the scope" of his duties as a coach. He did not speak pursuant to government policy. He was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach. Simply put: Mr. Kennedy's prayers did not "ow[e their] existence" to Mr. Kennedy's responsibilities as a public employee.

The timing and circumstances of Mr. Kennedy's prayers confirm the point. During the postgame period when these prayers occurred, coaches were free to attend briefly to personal matters—everything from checking sports scores on their phones to greeting friends and family in the stands. We find it unlikely that Mr. Kennedy was fulfilling a responsibility imposed by his employment by praying during a period in which the District has acknowledged that its coaching staff was free to engage in all manner of private speech. That Mr. Kennedy offered his prayers when students were engaged in other activities like singing the school fight song further suggests that those prayers were not delivered as an address to the team, but instead in his capacity as a private citizen. Nor is it dispositive that Mr. Kennedy's prayers took place "within the office" environment—here, on the field of play. Instead, what matters is whether Mr. Kennedy offered his prayers while acting within the scope of his duties as a coach. And taken together, both the substance of Mr. Kennedy's speech and the circumstances surrounding it point to the conclusion that he did not.

In reaching its contrary conclusion, the Ninth Circuit stressed that, as a coach, Mr. Kennedy served as a role model "clothed with the mantle of one who imparts knowledge and wisdom." The court emphasized that Mr. Kennedy remained on duty after games. Before us, the District presses the same arguments. And no doubt they have a point. Teachers and coaches often serve as vital role models. But this argument commits the error of positing an "excessively broad job descriptio[n]" by treating everything teachers and coaches say in the workplace as government speech subject to government control. On this understanding, a school could fire a Muslim teacher for wearing a headscarf in the classroom or prohibit a Christian aide from praying quietly over her lunch in the cafeteria. Likewise, this argument ignores the District Court's conclusion (and the District's concession) that Mr. Kennedy's actual job description left time for a private moment after the game to call home, check a text, socialize, or engage in any manner of secular activities. Others working for the District were free to engage briefly in personal speech and activity. That Mr. Kennedy chose to use the same time to pray does not transform his speech into government speech. To hold differently would be to treat religious expression as second-class speech and eviscerate this Court's repeated promise that teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

Of course, acknowledging that Mr. Kennedy's prayers represented his own private speech does not end the matter. So far, we have recognized only that Mr. Kennedy has carried his threshold burden. Under the Pickering-Garcetti framework, a second step remains where the government may seek to prove that its interests as employer outweigh even an employee's private speech on a matter of public concern.

IV

Whether one views the case through the lens of the Free Exercise or Free Speech Clause, at this point the burden shifts to the District. Under the Free Exercise Clause, a government entity normally must satisfy at least "strict scrutiny," showing that its restrictions on the plaintiff 's protected rights serve a compelling interest and are narrowly tailored to that end. A similar standard generally obtains under the Free Speech Clause. . . .

A

As we have seen, the District argues that its suspension of Mr. Kennedy was essential to avoid a violation of the Establishment Clause. On its account, Mr. Kennedy's prayers might have been protected by the Free Exercise and Free Speech Clauses. But his rights were in "direct tension" with the competing demands of the Establishment Clause. To resolve that clash, the District reasoned, Mr. Kennedy's rights had to "yield." The Ninth Circuit pursued this same line of thinking, insisting that the District's interest in avoiding an Establishment Clause violation "'trump[ed]'" Mr. Kennedy's rights to religious exercise and free speech.
But how could that be? It is true that this Court and others often refer to the "Establishment Clause," the "Free Exercise Clause," and the "Free Speech Clause" as separate units. But the three Clauses appear in the same sentence of the same Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." Amdt. 1. A natural reading of that sentence would seem to suggest the Clauses have "complementary" purposes, not warring ones where one Clause is always sure to prevail over the others.

The District arrived at a different understanding this way. It began with the premise that the Establishment Clause is offended whenever a "reasonable observer" could conclude that the government has "endorse[d]" religion. The District then took the view that a "reasonable observer" could think it "endorsed Kennedy's religious activity by not stopping the practice." On the District's account, it did not matter whether the Free Exercise Clause protected Mr. Kennedy's prayer. It did not matter if his expression was private speech protected by the Free Speech Clause. It did not matter that the District never actually endorsed Mr. Kennedy's prayer, no one complained that it had, and a strong public reaction only followed after the District sought to ban Mr. Kennedy's prayer. Because a reasonable observer could (mistakenly) infer that by allowing the prayer the District endorsed Mr. Kennedy's message, the District felt it had to act, even if that meant suppressing otherwise protected First Amendment activities. In this way, the District effectively created its own "vise between the Establishment Clause on one side and

the Free Speech and Free Exercise Clauses on the other," placed itself in the middle, and then chose its preferred way out of its self-imposed trap.
. . . .
. . . .This Court has [] made plain, [] that the Establishment Clause does not include anything like a "modified heckler's veto, in which . . . religious activity can be proscribed" based on "'perceptions'" or "'discomfort.'" Good News Club v. Milford Central School, 533 U. S. 98, 119 (2001). An Establishment Clause violation does not automatically follow whenever a public school or other government entity "fail[s] to censor" private religious speech. Nor does the Clause "compel the government to purge from the public sphere" anything an objective observer could reasonably infer endorses or "partakes of the religious."
In place of [] the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by "'reference to historical practices and understandings.'" Town of Greece, 572 U. S., at 576. "'[T]he line'" that courts and governments "must draw between the permissible and the impermissible" has to "'accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.'" Town of Greece, 572 U. S., at 577. An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some "'exception'" within the "Court's Establishment Clause jurisprudence." . . . .

B

Perhaps sensing that the primary theory it pursued below rests on a mistaken understanding of the Establishment Clause, the District offers a backup argument in this Court. It still contends that its Establishment Clause concerns trump Mr. Kennedy's free exercise and free speech rights. But the District now seeks to supply different reasoning for that result. Now, it says, it was justified in suppressing Mr. Kennedy's religious activity because otherwise it would have been guilty of coercing students to pray. And, the District says, coercing worship amounts to an Establishment Clause violation on anyone's account of the Clause's original meaning.
As it turns out, however, there is a pretty obvious reason why the Ninth Circuit did not adopt this theory in proceedings below: The evidence cannot sustain it. To be sure, this Court has long held that government may not, consistent with a historically sensitive understanding of the Establishment Clause, "make a religious observance compulsory." Government "may not coerce anyone to attend church," ibid., nor may it force citizens to engage in "a formal religious exercise," No doubt, too, coercion along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment. Members of this Court have sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause. But in this case Mr. Kennedy's private religious exercise did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion.

Begin with the District's own contemporaneous description of the facts. In its correspondence with Mr. Kennedy, the District never raised coercion concerns. To the contrary, the District conceded in a public 2015 document that there was "no evidence that students [were] directly coerced to pray with Kennedy." This is consistent with Mr. Kennedy's account too. He has repeatedly stated that he "never coerced, required, or asked any student to pray," and that he never "told any student that it was important that they participate in any religious activity."

Consider, too, the actual requests Mr. Kennedy made. The District did not discipline Mr. Kennedy for engaging in prayer while presenting locker-room speeches to students. That tradition predated Mr. Kennedy at the school. And he willingly ended it, as the District has acknowledged. He also willingly ended his practice of postgame religious talks with his team. The only prayer Mr. Kennedy sought to continue was the kind he had "started out doing" at the beginning of his tenure—the prayer he gave alone. . . . In short, Mr. Kennedy did not seek to direct any prayers to students or require anyone else to participate. His plan was to wait to pray until athletes were occupied, and he "told everybody" that's what he wished "to do." It was for three prayers of this sort alone in October 2015 that the District suspended him.

Naturally, Mr. Kennedy's proposal to pray quietly by himself on the field would have meant some people would have seen his religious exercise. Those close at hand might have heard him too. But learning how to tolerate speech or prayer of all kinds is "part of learning how to live in a pluralistic society," a trait of character essential to "a tolerant citizenry." This Court has long recognized as well that "secondary school students are mature enough . . . to understand that a school does not endorse," let alone coerce them to participate in, "speech that it merely permits on a nondiscriminatory basis." Of course, some will take offense to certain forms of speech or prayer they are sure to encounter in a society where those activities enjoy such robust constitutional protection. But "[o]ffense . . . does not equate to coercion." Town of Greece, 572 U. S., at 589.

The District responds that, as a coach, Mr. Kennedy "wielded enormous authority and influence over the students," and students might have felt compelled to pray alongside him. To support this argument, the District submits that, after Mr. Kennedy's suspension, a few parents told District employees that their sons had "participated in the team prayers only because they did not wish to separate themselves from the team."

This reply fails too. Not only does the District rely on hearsay to advance it. For all we can tell, the concerns the District says it heard from parents were occasioned by the locker-room prayers that predated Mr. Kennedy's tenure or his postgame religious talks, all of which he discontinued at the District's request. There is no indication in the record that anyone expressed any coercion concerns to the District about the quiet, postgame prayers that Mr. Kennedy asked to continue and that led to his suspension. Nor is there any record evidence that students felt pressured to participate in these prayers. To the contrary, and as we have seen, not a single Bremerton student joined Mr. Kennedy's quiet prayers following the three October 2015 games for which he was disciplined. On October 16, those students who joined Mr. Kennedy were "'from the opposing team,'" and thus could not have "reasonably fear[ed]" that he would decrease their "playing time" or destroy their "opportunities" if they did not "participate," As for the other two relevant games, "no one joined" Mr. Kennedy on October 23. And only a few members of the public participated on October 26.

. . . .

Meanwhile, this case looks very different from those in which this Court has found prayer involving public school students to be problematically coercive. In Lee, this Court held that school officials violated the Establishment Clause by "including [a] clerical membe[r]" who publicly recited prayers "as part of [an] official school graduation ceremony" because the school had "in every practical sense compelled attendance and participation in" a "religious exercise." 505 U. S., at 580, 598. In Santa Fe Independent School Dist. v. Doe, the Court held that a school district violated the Establishment Clause by broadcasting a prayer "over the public address system" before each football game. 530 U. S. 290, 294, (2000). The Court observed that, while students generally were not required to attend games, attendance was required for "cheerleaders, members of the band, and, of course, the team members themselves." None of that is true here. The prayers for which Mr. Kennedy was disciplined were not publicly broadcast or recited to a captive audience. Students were not required or expected to participate. And, in fact, none of Mr. Kennedy's students did participate in any of the three October 2015 prayers that resulted in Mr. Kennedy's discipline.

C

In the end, the District's case hinges on the need to generate conflict between an individual's rights under the Free Exercise and Free Speech Clauses and its own Establishment Clause duties—and then develop some explanation why one of these Clauses in the First Amendment should "'trum[p]'" the other two. But the project falters badly. Not only does the District fail to offer a sound reason to prefer one constitutional guarantee over another. It cannot even show that they are at odds. In truth, there is no conflict between the constitutional commands before us. There is only the "mere shadow" of a conflict, a false choice premised on a misconstruction of the Establishment Clause. And in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights.

V

Respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head. Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination. Mr. Kennedy is entitled to summary judgment on his First Amendment claims. The judgment of the Court of Appeals is
Reversed.

. . . .

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER and JUSTICE KAGAN join, dissenting.

This case is about whether a public school must permit a school official to kneel, bow his head, and say a prayer at the center of a school event. The Constitution does not authorize, let alone require, public schools to embrace this conduct. Since Engel v. Vitale, 370 U. S. 421 (1962), this Court consistently has recognized that school officials leading prayer is constitutionally impermissible. Official-led prayer strikes at the core of our constitutional protections for the religious liberty of students and their parents, as embodied in both the Establishment Clause and the Free Exercise Clause of the First Amendment.

The Court now charts a different path, yet again paying almost exclusive attention to the Free Exercise Clause's protection for individual religious exercise while giving short shrift to the Establishment Clause's prohibition on state establishment of religion. To the degree the Court portrays petitioner Joseph Kennedy's prayers as private and quiet, it misconstrues the facts. The record reveals that Kennedy had a longstanding practice of conducting demonstrative prayers on the 50-yard line of the football field. Kennedy consistently invited others to join his prayers and for years led student athletes in prayer at the same time and location. The Court ignores this history. The Court also ignores the severe disruption to school events caused by Kennedy's conduct, viewing it as irrelevant because the Bremerton School District (District) stated that it was suspending Kennedy to avoid it being viewed as endorsing religion. Under the Court's analysis, presumably this would be a different case if the District had cited Kennedy's repeated disruptions of school programming and violations of school policy regarding public access to the field as grounds for suspending him. As the District did not articulate those grounds, the Court assesses only the District's Establishment Clause concerns. It errs by assessing them divorced from the context and history of Kennedy's prayer practice.
. . . .
I

As the majority tells it, Kennedy, a coach for the District's football program, "lost his job" for "pray[ing] quietly while his students were otherwise occupied." The record before us, however, tells a different story.

A

The District serves approximately 5,057 students and employs 332 teachers and 400 nonteaching personnel in Kitsap County, Washington. The county is home to Bahá'ís, Buddhists, Hindus, Jews, Muslims, Sikhs, Zoroastrians, and many denominations of Christians, as well as numerous residents who are religiously unaffiliated.

The District first hired Kennedy in 2008, on a renewable annual contract, to serve as a part-time assistant coach for the varsity football team and head coach for the junior varsity team at Bremerton High School (BHS). Kennedy's job description required him to "[a]ccompany and direct" all home and out-of-town games to which he was assigned, overseeing preparation and transportation before games, being "[r]esponsible for player behavior both on and off the field," supervising dressing rooms, and "secur[ing] all facilities at the close of each practice." His duties

encompassed [*548] “supervising student activities immediately following the completion of the game” until the students were released to their parents or otherwise allowed to leave.

The District also set requirements for Kennedy’s interactions with players, obliging him, like all coaches, to “exhibit sportsmanlike conduct at all times,” “utilize positive motivational strategies to encourage athletic performance,” and serve as a “mentor and role model for the student athletes.” In addition, Kennedy’s position made him responsible for interacting with members of the community. In this capacity, the District required Kennedy and other coaches to “maintain positive media relations,” “always approach officials with composure” with the expectation that they were “constantly being observed by others,” and “communicate effectively” with parents.

Finally, District coaches had to “[a]dhere to [District] policies and administrative regulations” more generally. As relevant here, the District’s policy on “Religious-Related Activities and Practices” provided that “[s]chool staff shall neither encourage nor discourage a student from engaging in non-disruptive oral or silent prayer or any other form of devotional activity” and that “[r]eligious services, programs or assemblies shall not be conducted in school facilities during school hours or in connection with any school sponsored or school related activity.”

B

In September 2015, a coach from another school’s football team informed BHS’ principal that Kennedy had asked him and his team to join Kennedy in prayer. The other team’s coach told the principal that he thought it was “‘cool’” that the District “‘would allow [its] coaches to go ahead and invite other teams’ coaches and players to pray after a game.’”

The District initiated an inquiry into whether its policy on Religious-Related Activities and Practices had been violated. It learned that, since his hiring in 2008, Kennedy had been kneeling on the 50-yard line to pray immediately after shaking hands with the opposing team. Kennedy recounted that he initially prayed alone and that he never asked any student to join him. Over time, however, a majority of the team came to join him, with the numbers varying from game to game. Kennedy’s practice evolved into postgame talks in which Kennedy would hold aloft student helmets and deliver speeches with “overtly religious references,” which Kennedy described as prayers, while the players kneeled around him. The District also learned that students had prayed in the past in the locker room prior to games, before Kennedy was hired, but that Kennedy subsequently began leading those prayers too.

While the District’s inquiry was pending, its athletic director attended BHS’ September 11, 2015, football game and told Kennedy that he should not be conducting prayers with players. After the game, while the athletic director watched, Kennedy led a prayer out loud, holding up a player’s helmet as the players kneeled around him. While riding the bus home with the team, Kennedy posted on Facebook that he thought he might have just been fired for praying.

On September 17, the District’s superintendent sent Kennedy a letter informing him that leading prayers with students on the field and in the locker room would likely be found to violate the Establishment Clause, exposing the District to legal liability. The District acknowledged that

Kennedy had "not actively encouraged, or required, participation" but emphasized that "school staff may not indirectly encourage students to engage in religious activity" or "endors[e]" religious activity; rather, the District explained, staff "must remain neutral" "while performing their job duties." The District instructed Kennedy that any motivational talks to students must remain secular, "so as to avoid alienation of any team member."

. . . .

The District stated that it had no objection to Kennedy returning to the stadium when he was off duty to pray at the 50-yard line, nor with Kennedy praying while on duty if it did not interfere with his job duties or suggest the District's endorsement of religion. The District explained that its establishment concerns were motivated by the specific facts at issue, because engaging in prayer on the 50-yard line immediately after the game finished would appear to be an extension of Kennedy's "prior, long-standing and well-known history of leading students in prayer" on the 50-yard line after games.

On October 16, after playing of the game had concluded, Kennedy shook hands with the opposing team, and as advertised, knelt to pray while most BHS players were singing the school's fight song. He quickly was joined by coaches and players from the opposing team. Television news cameras surrounded the group. Members of the public rushed the field to join Kennedy, jumping fences to access the field and knocking over student band members. After the game, the District received calls from Satanists who "'intended to conduct ceremonies on the field after football games if others were allowed to.'" To secure the field and enable subsequent games to continue safely, the District was forced to make security arrangements with the local police and to post signs near the field and place robocalls to parents reiterating that the field was not open to the public.

. . . .

Again, the District emphasized that it was happy to accommodate Kennedy's desire to pray on the job in a way that did not interfere with his duties or risk perceptions of endorsement. Stressing that "[d]evelopment of accommodations is an interactive process," it invited Kennedy to reach out to discuss accommodations that might be mutually satisfactory, offering proposed accommodations and inviting Kennedy to raise others. . . ..

Kennedy did not directly respond or suggest a satisfactory accommodation. Instead, his attorneys told the media that he would accept only demonstrative prayer on the 50-yard line immediately after games. During the October 23 and October 26 games, Kennedy again prayed at the 50-yard line immediately following the game, while postgame activities were still ongoing. At the October 23 game, Kennedy kneeled on the field alone with players standing nearby. At the October 26 game, Kennedy prayed surrounded by members of the public, including state representatives who attended the game to support Kennedy. The BHS players, after singing the fight song, joined Kennedy at midfield after he stood up from praying.

. . . .

After the issues with Kennedy arose, several parents reached out to the District saying that their children had participated in Kennedy's prayers solely to avoid separating themselves from the rest of the team. No BHS students appeared to pray on the field after Kennedy's suspension. In Kennedy's annual review, the head coach of the varsity team recommended Kennedy not be rehired because he "failed to follow district policy," "demonstrated a lack of cooperation with administration," "contributed to negative relations between parents, students, community members, coaches, and the school district," and "failed to supervise student-athletes after games due to his interactions with media and community" members. The head coach himself also resigned after 11 years in that position, expressing fears that he or his staff would be shot from the crowd or otherwise attacked because of the turmoil created by Kennedy's media appearances. Three of five other assistant coaches did not reapply.

C

Kennedy then filed suit. . . . .

II

Properly understood, this case is not about the limits on an individual's ability to engage in private prayer at work. This case is about whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event, where that display is recognizable as part of a longstanding practice of the employee ministering religion to students as the public watched. A school district is not required to permit such conduct; in fact, the Establishment Clause prohibits it from doing so.

A

The Establishment Clause prohibits States from adopting laws "respecting an establishment of religion." Amdt. 1; The First Amendment's next Clause prohibits the government from making any law "prohibiting the free exercise thereof." Taken together, these two Clauses (the Religion Clauses) express the view, foundational to our constitutional system, "that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." Lee v. Weisman, 505 U. S. 577, 589 (1992). Instead, "preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere," which has the "freedom to pursue that mission."

The Establishment Clause protects this freedom by "command[ing] a separation of church and state." At its core, this means forbidding "sponsorship, financial support, and active involvement of the sovereign in religious activity." Walz v. Tax Comm'n of City of New York, 397 U. S. 664, 668 (1970). In the context of public schools, it means that a State cannot use "its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals."

Indeed, "[t]he Court has been particularly [***794] vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. The reasons motivating this

vigilance inhere in the nature of schools themselves and the young people they serve. Two are relevant here.

First, government neutrality toward religion is particularly important in the public school context given the role public schools play in our society. "'The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny,'" meaning that "'[i]n no activity of the State is it more vital to keep out divisive forces than in its schools.'" . . .

Second, schools face a higher risk of unconstitutionally "coerc[ing] . . . support or participat[ion] in religion or its exercise" than other government entities. The State "exerts great authority and coercive power" in schools as a general matter "through mandatory attendance requirements." Moreover, the State exercises that great authority over children, who are uniquely susceptible to "subtle coercive pressure." Children are particularly vulnerable to coercion because of their "emulation of teachers as role models" and "susceptibility to peer pressure." Edwards, 482 U. S., at 584. Accordingly, this Court has emphasized that "the State may not, consistent with the Establishment Clause, place primary and secondary school children" in the dilemma of choosing between "participating, with all that implies, or protesting" a religious exercise in a public school.

Given the twin Establishment Clause concerns of endorsement and coercion, it is unsurprising that the Court has consistently held integrating prayer into public school activities to be unconstitutional, including when student participation is not a formal requirement or prayer is silent. . . . .

B

Under these precedents, the Establishment Clause violation at hand is clear. . . . Kennedy was on the job as a school official "on government property" when he incorporated a public, demonstrative prayer into "government-sponsored school-related events" as a regularly scheduled feature of those events.

Kennedy's tradition of a 50-yard line prayer thus strikes at the heart of the Establishment Clause's concerns about endorsement. For students and community members at the game, Coach Kennedy was the face and the voice of the District during football games. The timing and location Kennedy selected for his prayers were "clothed in the traditional indicia of school sporting events." Kennedy spoke from the playing field, which was accessible only to students and school employees, not to the general public. Although the football game itself had ended, the football game events had not; Kennedy himself acknowledged that his responsibilities continued until the players went home. Kennedy's postgame responsibilities were what placed Kennedy on the 50-yard line in the first place; that was, after all, where he met the opposing team to shake hands after the game. Permitting a school coach to lead students and others he invited onto the field in prayer at a predictable time after each game could only be viewed as a postgame tradition occurring "with the approval of the school administration."

. . . .

The District Court found, in the evidentiary record, that some students reported joining Kennedy's prayer because they felt social pressure to follow their coach and teammates. Kennedy told the District that he began his prayers alone and that players followed each other over time until a majority of the team joined him, an evolution showing coercive pressure at work.

Kennedy does not defend his longstanding practice of leading the team in prayer out loud on the field as they kneeled around him. Instead, he responds, and the Court accepts, that his highly visible and demonstrative prayer at the last three games before his suspension did not violate the Establishment Clause because these prayers were quiet and thus private. This Court's precedents, however, do not permit isolating government actions from their context in determining whether they violate the Establishment Clause. To the contrary, this Court has repeatedly stated that Establishment Clause inquiries are fact specific and require careful consideration of the origins and practical reality of the specific practice at issue. . . . .

Finally, Kennedy stresses that he never formally required students to join him in his prayers. But existing precedents do not require coercion to be explicit, particularly when children are involved. To the contrary, this Court's Establishment Clause jurisprudence establishes that "'the government [*564] may no more use social pressure to enforce orthodoxy than it may use more direct means.'" Santa Fe, 530 U. S., at 312. Thus, the Court has held that the Establishment Clause "will not permit" a school "'to exact religious conformity from a student as the price' of joining her classmates at a varsity football game." To uphold a coach's integration of prayer into the ceremony of a football game, in the context of an established history of the coach inviting student involvement in prayer, is to exact precisely this price from students.

C

As the Court explains, see ante, at 15, Kennedy did not "shed [his] constitutional rights . . . at the schoolhouse gate" while on duty as a coach. Constitutional rights, however, are not absolutes. Rights often conflict and balancing of interests is often required to protect the separate rights at issue. See Dobbs v. JACKSON WOMEN'S HEALTH ORGANIZATION, 597 U. S. ___, ___, 2022 U.S. LEXIS 3057 (2022) (slip op., at 12) (BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting) (noting that "the presence of countervailing interests . . . is what ma[kes]" a constitutional question "hard, and what necessitate[s] balancing").

The particular tensions at issue in this case, between the speech interests of the government and its employees and between public institutions' religious neutrality and private individuals' religious exercise, are far from novel. This Court's settled precedents offer guidance to assist courts, governments, and the public in navigating these tensions. Under these precedents, the District's interest in avoiding an Establishment Clause violation justified both its time and place restrictions on Kennedy's speech and his exercise of religion.

First, as to Kennedy's free speech claim, Kennedy "accept[ed] certain limitations" on his freedom of speech when he accepted government employment. Garcetti v. Ceballos, 547 U. S. 410, 418 (2006). The Court has recognized that "[g]overnment employers, like private

employers, need a significant degree of control over their employees' words and actions" to ensure "the efficient provision of public services." Case law instructs balancing "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" to determine whose interests should prevail.

As the Court of Appeals below outlined, the District has a strong argument that Kennedy's speech, formally integrated into the center of a District event, was speech in his official capacity as an employee that is not entitled to First Amendment protections at all. 11 It is unnecessary to resolve this question, however, because, even assuming that Kennedy's speech was in his capacity as a private citizen, the District's responsibilities under the Establishment Clause provided "adequate justification" for restricting it. Garcetti, 547 U. S., at 418.

Similarly, Kennedy's free exercise claim must be considered in light of the fact that he is a school official and, as such, his participation in religious exercise can create Establishment Clause conflicts. Accordingly, his right to pray at any time and in any manner he wishes while exercising his professional duties is not absolute. . . . .

Here, the District's directive prohibiting Kennedy's demonstrative speech at the 50-yard line was narrowly tailored to avoid an Establishment Clause violation. The District's suspension of Kennedy followed a long history. The last three games proved that Kennedy did not intend to pray silently, but to thrust the District into incorporating a religious ceremony into its events, as he invited others to join his prayer and anticipated in his communications with the District that students would want to join as well. Notably, the District repeatedly sought to work with Kennedy to develop an accommodation to permit him to engage in religious exercise during or after his game-related responsibilities. Kennedy, however, ultimately refused to respond to the District's suggestions and declined to communicate with the District, except through media appearances. Because the District's valid Establishment Clause concerns satisfy strict scrutiny, Kennedy's free exercise claim fails as well.

III

Despite the overwhelming precedents establishing that school officials leading prayer violates the Establishment Clause, the Court today holds that Kennedy's midfield prayer practice did not violate the Establishment Clause. This decision rests on an erroneous understanding of the Religion Clauses. It also disregards the balance this Court's cases strike among the rights conferred by the Clauses. The Court relies on an assortment of pluralities, concurrences, and dissents by Members of the current majority to effect fundamental changes in this Court's Religion Clauses jurisprudence, all the while proclaiming that nothing has changed at all.
. . . .
Upon overruling one "grand unified theory," the Court introduces another: It holds that courts must interpret whether an Establishment Clause violation has occurred mainly "by 'reference to historical practices and understandings.'" (quoting Town of Greece, 572 U. S., at 576). Here

again, the Court professes that nothing has changed. In fact, while the Court has long referred to historical practice as one element of the analysis in specific Establishment Clause cases, the Court has never announced this as a general test or exclusive focus.

The Court reserves any meaningful explanation of its history-and-tradition test for another day, content for now to disguise it as established law and move on. It should not escape notice, however, that the effects of the majority's new rule could be profound. The problems with elevating history and tradition over purpose and precedent are well documented. See Dobbs, 597 U. S., at ___ (BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting) (explaining that the Framers "defined rights in general terms to permit future evolution in their scope and meaning"); New York State Rifle & Pistol Assn., Inc. v. Bruen, 597 U. S. ___, ___-___, 2022 U.S. LEXIS 3055 (2022) (BREYER, J., dissenting) (explaining the pitfalls of a "near-exclusive reliance on history" and offering examples of when this Court has "misread" history in the past); Brown v. Davenport, 596 U. S. ___, ___-___, 142 S. Ct. 1510 (2022) (KAGAN, J., dissenting) (slip op., at 7-8) (noting the inaccuracies risked when courts "play amateur historian").

For now, it suffices to say that the Court's history-and-tradition test offers essentially no guidance for school administrators. If even judges and Justices, with full adversarial briefing and argument tailored to precise legal issues, regularly disagree (and err) in their amateur efforts at history, how are school administrators, faculty, and staff supposed to adapt? How will school administrators exercise their responsibilities to manage school curriculum and events when the Court appears to elevate individuals' rights to religious exercise above all else? Today's opinion provides little in the way of answers; the Court simply sets the stage for future legal changes that will inevitably follow the Court's choice today to upset longstanding rules.

. . .

Today, the Court once again weakens the backstop. It elevates one individual's interest in personal religious exercise, in the exact time and place of that individual's choosing, over society's interest in protecting the separation between church and state, eroding the protections for religious liberty for all. Today's decision is particularly misguided because it elevates the religious rights of a school official, who voluntarily accepted public employment and the limits that public employment entails, over those of his students, who are required to attend school and who this Court has long recognized are particularly vulnerable and deserving of protection. In doing so, the Court sets us further down a perilous path in forcing States to entangle themselves with religion, with all of our rights hanging in the balance. As much as the Court protests otherwise, today's decision is no victory for religious liberty. I respectfully dissent.

3.1.2.a. Timeline

Date	Case Name	Decision	Notes
2016	*Kennedy v. Bremerton School District*	The District Court denied Plaintiff's	**First filed in 2016** • Link

	US District Court Western District of Washington at Tacoma (2016)	motion to require the District to reinstate him. Granted summary judgment to the District	
Argued and Submitted June 12, 2017 **Filed August 23, 2017**	*Kennedy v. Bremerton School District* US Court of Appeals for the Ninth Circuit (2017)	Ninth Circuit affirmed the District Court decision.	• Link
January 22, 2019	*Kennedy v. Bremerton School District* Supreme Court of the United States (2019)	Petition for writ of certiorari denied.	In concurring statement by Alito, the question posed is whether the SCOTUS should grant discretionary review, and generally they do not do so to decide such highly fact-specific decisions. • Link
Decided and Filed March 5, 2020	*Kennedy v. Bremerton School District* US District Court Western District of Washington (2020)	Motion for summary judgment granted.	• Link
Argued and Submitted January 25, 2021 **Filed March 18, 2021**	*Kennedy v. Bremerton School District* US Court of Appeals for the Ninth Circuit (2021)	Affirmed.	Free speech claim failed because he spoke as public employee (unprotected), and even as private citizen, speech could've objectively been observed as the district's endorsement of a particular faith. Free exercise claim failed because district had compelling state

			interest to avoid violating the Establishment Clause and tried repeatedly to work with Coach for an accommodation • Link
January 14, 2022	*Kennedy v. Bremerton School District* Supreme Court of the United States (2022)	Petition for writ of certiorari to the US Court of Appeals for the Ninth Circuit granted.	
Argued April 25, 2022 **Decided June 27, 2022**	*Kennedy v. Bremerton School District* Supreme Court of the United States (2022)	Judgment reversed.	No evidence of student coercion, speech was private, not government, speech because it was not ordinarily within the scope of his duties as coach, district did not show that its actions were essential to avoid a violation of the Establishment Clause. • Link
August 8, 2022	*Kennedy v. Bremerton School District* US Court of Appeals for the Ninth Circuit (2022)	Vacate the district our's grant of summary judgment in favor of defendant and remand for further proceedings consistent with SCOTUS decision.	• Link

3.14. Equal Protection and Due Process

3.14.1. Board of Regents v. Roth, 408 U.S. 564 (1972)

Full decision: (link); **Docket**: (link); **Oral argument**: (link)

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1968 the respondent, David Roth, was hired for his first teaching job as assistant professor of political science at Wisconsin State University-Oshkosh. He was hired for a fixed term of one

academic year. The notice of his faculty appointment specified that his employment would begin on September 1, 1968, and would end on June 30, 1969. The respondent completed that term. But he was informed that he would not be rehired for the next academic year.

The respondent had no tenure rights to continued employment. Under Wisconsin statutory law a state university teacher can acquire tenure as a "permanent" employee only after four years of year-to-year employment. Having acquired tenure, a teacher is entitled to continued employment "during efficiency and good behavior." A relatively new teacher without tenure, however, is under Wisconsin law entitled to nothing beyond his one-year appointment. There are no statutory or administrative standards defining eligibility for re-employment. State law thus clearly leaves the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of university officials.

The procedural protection afforded a Wisconsin State University teacher before he is separated from the University corresponds to his job security. As a matter of statutory law, a tenured teacher cannot be "discharged except for cause upon written charges" and pursuant to certain procedures. A nontenured teacher, similarly, is protected to some extent *during* his one-year term. Rules promulgated by the Board of Regents provide that a nontenured teacher "dismissed" before the end of the year may have some opportunity for review of the "dismissal." But the Rules provide no real protection for a nontenured teacher who simply is not re-employed for the next year. He must be informed by February 1 "concerning retention or nonretention for the ensuing year." But "no reason for non-retention need be given. No review or appeal is provided in such case."

In conformance with these Rules, the President of Wisconsin State University-Oshkosh informed the respondent before February 1, 1969, that he would not be rehired for the 1969-1970 academic year. He gave the respondent no reason for the decision and no opportunity to challenge it at any sort of hearing.

The respondent then brought this action in Federal District Court alleging that the decision not to rehire him for the next year infringed his Fourteenth Amendment rights. He attacked the decision both in substance and procedure. First, he alleged that the true reason for the decision was to punish him for certain statements critical of the University administration, and that it therefore violated his right to freedom of speech. Second, he alleged that the failure of University officials to give him notice of any reason for nonretention and an opportunity for a hearing violated his right to procedural due process of law.

The District Court granted summary judgment for the respondent on the procedural issue, ordering the University officials to provide him with reasons and a hearing. The only question presented to us at this stage in the case is whether the respondent had a constitutional right to a statement of

reasons and a hearing on the University's decision not to rehire him for another year. We hold that he did not.

I

The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.

The District Court decided that procedural due process guarantees apply in this case by assessing and balancing the weights of the particular interests involved. It concluded that the respondent's interest in re-employment at Wisconsin State University-Oshkosh outweighed the University's interest in denying him re-employment summarily. Undeniably, the respondent's re-employment prospects were of major concern to him -- concern that we surely cannot say was insignificant. And a weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process. But, to determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

"Liberty" and "property" are broad and majestic terms. They are among the "great [constitutional] concepts . . . purposely left to gather meaning from experience. . . . They relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." *National Ins. Co*. v. *Tidewater Co*., 337 U.S. 582, 646 (Frankfurter, J., dissenting). …. The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.

Yet, while the Court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For the words "liberty" and "property" in the Due Process Clause of the Fourteenth Amendment must be given some meaning.

….

[discussion of the harm to liberty interests omitted, G.R.]

III

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests -- property interests -- may take many forms.

Thus, the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. Similarly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, *Slochower* v. *Board of Education*, 350 U.S. 551, and college professors and staff members dismissed during the terms of their contracts, *Wieman* v. *Updegraff*, 344 U.S. 183, have interests in continued employment that are safeguarded by due process. Only last year, the Court held that this principle "proscribing summary dismissal from public employment without hearing or inquiry required by due process" also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment. *Connell* v. *Higginbotham*, 403 U.S. 207, 208.

Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg* v. *Kelly, supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

Just as the welfare recipients' "property" interest in welfare payments was created and defined by statutory terms, so the respondent's "property" interest in employment at Wisconsin State University-Oshkosh was created and defined by the terms of his appointment. Those terms secured his interest in employment up to June 30, 1969. But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent "sufficient cause." Indeed, they made no provision for renewal whatsoever.

Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent

surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

IV

Our analysis of the respondent's constitutional rights in this case in no way indicates a view that an opportunity for a hearing or a statement of reasons for nonretention would, or would not, be appropriate or wise in public colleges and universities. For it is a written Constitution that we apply. Our role is confined to interpretation of that Constitution.

We must conclude that the summary judgment for the respondent should not have been granted, since the respondent has not shown that he was deprived of liberty or property protected by the Fourteenth Amendment. The judgment of the Court of Appeals, accordingly, is reversed and the case is remanded for further proceedings consistent with this opinion.

MR. JUSTICE DOUGLAS, dissenting.

Respondent Roth …. had no tenure under Wisconsin law and, unlike Sindermann, he had had only one year of teaching at Wisconsin State University-Oshkosh -- where during 1968-1969 he had been Assistant Professor of Political Science and International Studies. Though Roth was rated by the faculty as an excellent teacher, he had publicly criticized the administration for suspending an entire group of 94 black students without determining individual guilt. He also criticized the university's regime as being authoritarian and autocratic. He used his classroom to discuss what was being done about the black episode; and one day, instead of meeting his class, he went to the meeting of the Board of Regents.

In this case, as in *Sindermann*, an action was started in Federal District Court under 42 U.S.C. § 1983 claiming in part that the decision of the school authorities not to rehire was in retaliation for his expression of opinion. The District Court, in partially granting Roth's motion for summary judgment, held that the Fourteenth Amendment required the university to give a hearing to teachers whose contracts were not to be renewed and to give reasons for its action.

Professor Will Herberg, of Drew University, in writing of "academic freedom" recently said:

> It is sometimes conceived as a basic constitutional right guaranteed and protected under the First Amendment. But, of course, this is not the case. Whereas a man's right to speak out on this or that may be guaranteed and protected, he can have no imaginable human or constitutional right to remain a member of a university faculty. Clearly, the right to academic freedom is an acquired one, yet an acquired right of such value to society that in the minds of many it has verged upon the constitutional.

> Washington Sunday Star, Jan. 23, 1972, B-3, col. 1.

There may not be a constitutional right to continued employment if private schools and colleges are involved. But Prof. Herberg's view is not correct when public schools move against faculty members. For the First Amendment, applicable to the States by reason of the Fourteenth Amendment, protects the individual against state action when it comes to freedom of speech and of press and the related freedoms guaranteed by the First Amendment; and the Fourteenth protects "liberty" and "property" as stated by the Court in *Sindermann*.

No more direct assault on academic freedom can be imagined than for the school authorities to be allowed to discharge a teacher because of his or her philosophical, political, or ideological beliefs. The same may well be true of private schools, if through the device of financing or other umbilical cords they become instrumentalities of the State.

….

When a violation of First Amendment rights is alleged, the reasons for dismissal or for nonrenewal of an employment contract must be examined to see if the reasons given are only a cloak for activity or attitudes protected by the Constitution. A statutory analogy is present under the National Labor Relations Act, 29 U. S. C. § 151 *et seq*. While discharges of employees for "cause" are permissible (*Fibreboard Corp*. v. *NLRB*, 379 U.S. 203, 217), discharges because of an employee's union activities are banned by § 8 (a)(3), 29 U. S. C. § 158 (a)(3). So the search is to ascertain whether the stated ground was the real one or only a pretext.

….

If this nonrenewal implicated the First Amendment, then Roth was deprived of constitutional rights because his employment was conditioned on a surrender of First Amendment rights; and, apart from the First Amendment, he was denied due process when he received no notice and hearing of the adverse action contemplated against him. Without a statement of the reasons for the discharge and an opportunity to rebut those reasons -- both of which were refused by petitioners -- there is no means short of a lawsuit to safeguard the right not to be discharged for the exercise of First Amendment guarantees.

The District Court held, 310 F.Supp., at 979-980:

> Substantive constitutional protection for a university professor against non-retention in violation of his First Amendment rights or arbitrary non-retention is useless without procedural safeguards. I hold that minimal procedural due process includes a statement of the reasons why the university intends not to retain the professor, notice of a hearing at which he may respond to the stated reasons, and a hearing if the professor appears at the

> appointed time and place. At such a hearing the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons. The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are wholly inappropriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact.

….

That is a permissible course for district courts to take, though it does not relieve them of the final determination whether nonrenewal of the teacher's contract was in retaliation for the exercise of First Amendment rights or a denial of due process.

Accordingly I would affirm the judgment of the Court of Appeals.

MR. JUSTICE MARSHALL, dissenting.

Respondent was hired as an assistant professor of political science at Wisconsin State University-Oshkosh for the 1968-1969 academic year. During the course of that year he was told that he would not be rehired for the next academic term, but he was never told why. In this case, he asserts that the Due Process Clause of the Fourteenth Amendment to the United States Constitution entitled him to a statement of reasons and a hearing on the University's decision not to rehire him for another year. This claim was sustained by the District Court, which granted respondent summary judgment, and by the Court of Appeals which affirmed the judgment of the District Court. This Court today reverses the judgment of the Court of Appeals and rejects respondent's claim. I dissent.

While I agree with Part I of the Court's opinion, setting forth the proper framework for consideration of the issue presented, and also with those portions of Parts II and III of the Court's opinion that assert that a public employee is entitled to procedural due process whenever a State stigmatizes him by denying employment, or injures his future employment prospects severely, or whenever the State deprives him of a property interest, I would go further than the Court does in defining the terms "liberty" and "property."

The prior decisions of this Court, discussed at length in the opinion of the Court, establish a principle that is as obvious as it is compelling -- *i.e.*, federal and state governments and governmental agencies are restrained by the Constitution from acting arbitrarily with respect to employment opportunities that they either offer or control. Hence, it is now firmly established that whether or not a private employer is free to act capriciously or unreasonably with respect to employment practices, at least absent statutory or contractual controls, a government employer is different. The government may only act fairly and reasonably.

This Court has long maintained that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax* v. *Raich*, 239 U.S. 33, 41 (1915) (Hughes, J.). It has also established that the fact that an employee has no contract guaranteeing work for a specific future period does not mean that as the result of action by the government he may be "discharged at any time for any reason or for no reason." *Truax* v. *Raich, supra*, at 38.

In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment. This is the "property" right that I believe is protected by the Fourteenth Amendment and that cannot be denied "without due process of law." And it is also liberty liberty to work -- which is the "very essence of the personal freedom and opportunity" secured by the Fourteenth Amendment.

This Court has often had occasion to note that the denial of public employment is a serious blow to any citizen. See, *e. g., Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 185 (1951) (Jackson, J., concurring); *United States* v. *Lovett*, 328 U.S. 303, 316-317 (1946). Thus, when an application for public employment is denied or the contract of a government employee is not renewed, the government must say why, for it is only when the reasons underlying government action are known that citizens feel secure and protected against arbitrary government action.

Employment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life. When something as valuable as the opportunity to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable. And it is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action.

….

Where there are numerous applicants for jobs, it is likely that few will choose to demand reasons for not being hired. But, if the demand for reasons is exceptionally great, summary procedures can be devised that would provide fair and adequate information to all persons. As long as the government has a good reason for its actions it need not fear disclosure. It is only where the government acts improperly that procedural due process is truly burdensome. And that is precisely when it is most necessary.

It might also be argued that to require a hearing and a statement of reasons is to require a useless act, because a government bent on denying employment to one or more persons will do so regardless of the procedural hurdles that are placed in its path. Perhaps this is so, but a requirement of procedural regularity at least renders arbitrary action more difficult. Moreover, proper procedures will surely eliminate some of the arbitrariness that results, not from malice, but from

innocent error. "Experience teaches . . . that the affording of procedural safeguards, which by their nature serve to illuminate the underlying facts, in itself often operates to prevent erroneous decisions on the merits from occurring." *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 366 (1963). When the government knows it may have to justify its decisions with sound reasons, its conduct is likely to be more cautious, careful, and correct.

3.14.1.1. Timeline

Date	Case Name	Decision	Notes
March 12, 1970	*Board of Regents v. Roth* United States District Court for the Western District of Wisconsin (1970)	Granted summary judgment for Roth on the procedural due process issue	**First filed in 1969** • Link
July 1, 1971	*Board of Regents v. Roth* Seventh Circuit Court of Appeals (1971)	Affirmed district court ruling	• Link
Argued January 18, 1972 **Decided June 29, 1972**	*Board of Regents v. Roth* Supreme Court of the United States (1972)	Found that summary judgment for the respondent should not have been granted. Judgment reversed and remanded.	Procedural due process protections apply when a person has a legitimate claim of entitlement to the benefit and not merely an abstract need or desire for the benefit." • Link
July 26, 1972		Judgment Issued.	Roth did not have the right to procedural due process under Fourteenth Amendment.

3.14.1.2. Notes

i. *Roth* - A Compromise

Roth stands for the proposition that public sector employees with a reasonable expectation of continued employment have a recognized property interest for the purposes of the due process clause. True, downers will argue that Roth did not win in this case, but those downers miss the

bigger picture: a recognized constitutional interest in continued employment, a conditional one, but a Constitutional property interest on the job nonetheless.

Of note are the dissenting opinions, taking the constitutional obligations of the state one (or even two) steps forward: one with some combination of due process and freedom of speech protections, and the other with recognizing a right of *all* public employees and *all* candidates for public employment for a non-arbitrary treatment. *Roth*'s rule, in this regard, is a compromise.

ii. *Roth* and the Ambiguities

The background facts of *Roth* seem more important to some justices than others. Roth's term was not extended following certain political actions and provocations he engaged in. The majority opinion sidesteps those facts almost entirely, cleaning the legal rule of any hint of First Amendment and Free Speech concerns. One dissent, however, thinks that this background really matters, and it really matters specifically because of the nature of the right Roth was deprived of– a hearing. The first *Roth* ambiguity is this: what is the connection between Roth's (property-based) claim and his political actions/choices?

The second ambiguity is about jobs as property. In what way or sense is a job like other forms of property (consider houses, shoes, laptops)? Usually, I can sell my property, but my job (even a tenured job) is not mine to sell. Can I own property I cannot sell? The Court seems to think so and brings the example of welfare payments. Here, the welfare-state benefit is like property in the sense that people *really* need it and *really* need it to be consistent. But that is a fairly broad, unintuitive, and ambiguous definition of what property is. Some portions of the opinion hint that courts rely on the source of the property right (state law) to determine what property is, but that is also unclear. States obviously cannot simply call things "property" or "not property" and that it would be so; or could they? This interaction between substantive and source property theories is *Roth*'s second ambiguity.

iii. *Roth* - a Hollow Hope

Roth's revolutionary push to bring constitutional rights deeper into the public-sector workplace is almost completely dead. The idea that public sector management might be significantly constrained by the Constitution regarding traditional bread-and-butter workplace decisions like

terminations and hiring is now (almost) obsolete. One significant nail in the coffin of constitutional protections against arbitrary actions is *Engquist*, as seen below. But it is also mostly true regarding public sector employees' First Amendment rights (mostly speech). What is left of *Roth* is exactly what it originally stood for– some limited due process protections for workers with a legitimate expectation for continued employment.

If *Roth* was indeed a compromise, it is a sticky one.

iv. Property rights on the job - What about the Private Sector?

On occasions when the *Roth* Court states that Roth had property interests in continued employment, they place the word property in quotes. What does having a property interest in continued employment even mean?

In *Roth*, and following the welfare-as-property analogy, the definition of property is close to "stuff the government promised me." Here, to prevail, perhaps Roth was supposed to demonstrate a promise by the government of continued employment.

In other contexts, we don't treat property as limited to government promises and actions. My property is mine with respect to other private actors (people, corporations, etc.) and against the government (local, state, federal, etc.). Is there a particular reason property in cases like *Roth* would be limited to property as "stuff the government promised and cannot take away" and not "stuff that no one can take away?"

In other words, can I have a property stake on the job vis-a-vis a private employer? Would that make sense under *Roth*? Try and think about arguments both ways. I wrote about some legal possibilities here.

v. The State as Employer, Legislature, Court

In *Roth* we find the state as an employer, not as the promulgator (and defender) of statutes and regulations. The legal hook for the plaintiffs in cases like *Lochner* and *Roth* is the same– the U.S. Constitution. However, the state's role in those cases is not the same. In *Lochner*, the state created a maximum hours law, which Lochner (the employer) violated. In *Roth*, the state terminated (or refused to re-hire) Roth. In both instances, we have an additional state actor– the Court– adjudicating between the parties. A strange disposition.

Traditional work law and labor relations accounts often treat the state not just as the bearer of constitutional obligations towards their workers but as a model employer. The state is often the largest (or at least one of the largest) employers in a labor market (national, local), and terms and conditions of employment in the public sector and its branches (public works contractors, e.g.) can have significant economic consequences on the labor market as a whole. Public sector employment can also offer a venue for other societal goals like inclusion of excluded demographics, adult education, monetary policy, and more. Consider how those different functions might impact the constitutional analysis and obligations of the state as an employer.

vi. Roth *in the Board - A Missed Opportunity*

Roth had small influence on the interpretation of the NLRA. The radical implication of *Roth*, suggesting workers can have property interest in their jobs was completely lost on the diligent officers of the NLRB.

Instead, *Roth* is used as a way of assessing *employer* property in an area which is not clearly theirs. For example, in the seminal case of *Bristol Farms*, the Board assess the property claims of an employer to a sidewalk using Roth's framing of the origin of Constitutional property. The employer wanted to kick union organizers off the sidewalk, and for some convoluted doctrinal reason we really care about the property status of sidewalks when we try and gauge whether or not an employer can kick union organizers off of them. FWIW my take is that this form of analysis is wrong, but my take is not the law (yet!).

So, in order to asses the property-status of sidewalks the Board utilized *Roth*. While the employees won in the case – after the Board Roth-reasoned its way to determining property status of the sidewalk – workers qua workers lost as Roth was applied only to 1) employers; regarding 2) sidewalks as property. A mellow (mid as you youngsters might say) outcome.

The NLRB successfully apply Roth to find employers' property rights, an illustration

3.14.2 Engquist v. Or. Dep't of Agric., 553 U.S. 591 (2008)
Full decision: (link); **Docket**: (link); **Oral argument**: (link)

Chief Justice Roberts delivered the opinion of the Court.

The question in this case is whether a public employee can state a claim under the Equal Protection Clause by alleging that she was arbitrarily treated differently from other similarly situated employees, with no assertion that the different treatment was based on the employee's membership in any particular class. We hold that such a "class-of-one" theory of equal protection has no place in the public employment context.

I

Anup Engquist, the petitioner in this case, was hired in 1992 by Norma Corristan to be an international food standard specialist for the Export Service Center (ESC), a laboratory within the Oregon Department of Agriculture (ODA). During the course of her employment, Engquist experienced repeated problems with Joseph Hyatt, another ODA employee, complaining to Corristan that he had made false statements about her and otherwise made her life difficult. Corristan responded by directing Hyatt to attend diversity and anger management training.

In 2001, John Szczepanski, an assistant director of ODA, assumed responsibility over ESC, supervising Corristan, Hyatt, and Engquist. Szczepanski told a client that he could not "control" Engquist, and that Engquist and Corristan "would be gotten rid of." When Engquist and Hyatt both applied for a vacant managerial post within ESC, Szczepanski chose Hyatt despite Engquist's greater experience in the relevant field. Later that year, during a round of across-the-board budget cuts in Oregon, Szczepanski eliminated Corristan's position. Finally, on January 31, 2002, Engquist was informed that her position was being eliminated because of reorganization. Engquist's collective-bargaining agreement gave her the opportunity either to "bump" to another position at her level, or to take a demotion. She was found unqualified for the only other position at her level and declined a demotion, and was therefore effectively laid off.

Engquist subsequently brought suit in the United States District Court for the District of Oregon against ODA, Szczepanski, and Hyatt, all respondents here, alleging violations of federal antidiscrimination statutes, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and state law. As to Engquist's equal protection claim, she alleged that the defendants discriminated against her on the basis of her race, sex, and national origin. She also brought what is known as a "class-of-one" equal protection claim, alleging that she was fired not because she was a member of an identified class (unlike her race, sex, and national origin claims), but simply for "arbitrary, vindictive, and malicious reasons."

The District Court granted the respondents' motion for summary judgment as to some of Engquist's claims, but allowed others to go forward, including each of the equal protection claims. As relevant to this case, the District Court found Engquist's class-of-one equal protection claim legally viable, deciding that the class-of-one theory was fully applicable in the employment context. The court held that Engquist could succeed on that theory if she could prove "that she was singled out as a result of animosity on the part of Hyatt and Szczepanski"—*i.e.*, "that their actions were spiteful efforts to punish her for reasons unrelated to any legitimate state objective"—and if she could demonstrate, on the basis of that animosity, that "she was treated differently than others who were similarly situated."

The jury rejected Engquist's claims of discrimination for membership in a suspect class—her race, sex, and national origin claims—but found in her favor on the class-of-one claim. Specifically, the jury found that Hyatt and Szczepanski "intentionally treat[ed] [Engquist] differently than others similarly situated with respect to the denial of her promotion, termination of her employment, or denial of bumping rights without any rational basis and solely for arbitrary, vindictive or malicious reasons." The jury also found for Engquist on several of her other claims, and awarded her $175,000 in compensatory damages and $250,000 in punitive damages.

The Court of Appeals reversed in relevant part. It recognized that this Court had upheld a class-of-one equal protection challenge to state legislative and regulatory action in *Village of Willowbrook* v. *Olech,* 528 U.S. 562, (2000) (*per curiam*). The court below also acknowledged that other Circuits had applied *Olech* in the public employment context, but it disagreed with those courts on the ground that our cases have routinely afforded government greater leeway when it acts as employer rather than regulator. The court concluded that extending the class-of-one theory of equal protection to the public employment context would lead to undue judicial interference in state employment practices and "completely invalidate the practice of public at-will employment." The court accordingly held that the class-of-one theory is "inapplicable to decisions made by public employers with regard to their employees."

Judge Reinhardt dissented, "agree[ing] with the other circuits that the class-of-one theory of equal protection is applicable to public employment decisions." We granted certiorari to resolve this disagreement in the lower courts, and now affirm.

II

Engquist argues that the Equal Protection Clause forbids public employers from irrationally treating one employee differently from others similarly situated, regardless of whether the different treatment is based on the employee's membership in a particular class. She reasons that in *Olech, supra*, we recognized in the regulatory context a similar class-of-one theory of equal protection, that the Equal Protection Clause protects individuals, not classes; that the Clause proscribes "discrimination arising not only from a legislative act but also from the conduct of an administrative official," and that the Constitution applies to the State not only when it acts as regulator, but also when it acts as employer. Thus, Engquist concludes that class-of-one claims can be brought against public employers just as against any other state actors, and that differential treatment of government employees—even when not based on membership in a class or group—violates the Equal Protection Clause unless supported by a rational basis.

We do not quarrel with the premises of Engquist's argument. It is well settled that the Equal Protection Clause "protect[s] persons, not groups," *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995), and that the Clause's protections apply to administrative as well as legislative acts. It is equally well settled that States do not escape the strictures of the Equal Protection Clause in their role as employers. We do not, however, agree that Engquist's conclusion follows from these

premises. Our traditional view of the core concern of the Equal Protection Clause as a shield against arbitrary classifications, combined with unique considerations applicable when the government acts as employer as opposed to sovereign, lead us to conclude that the class-of-one theory of equal protection does not apply in the public employment context.

A

We have long held the view that there is a crucial difference, with respect to constitutional analysis, between the government exercising "the power to regulate or license, as lawmaker," and the government acting "as proprietor, to manage [its] internal operation." *Cafeteria & Restaurant Workers* v. *McElroy,* 367 U.S. 886, 896 (1961). This distinction has been particularly clear in our review of state action in the context of public employment. Thus, "the government as employer indeed has far broader powers than does the government as sovereign." *Waters* v. *Churchill,* 511 U.S. 661, 671 (1994) (plurality opinion). "[T]he extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible." *Id.,* at 674-675. "The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Waters, supra,* at 675. Given the "common-sense realization that government offices could not function if every employment decision became a constitutional matter," *Connick, supra,* at 143.

In light of these basic principles, we have often recognized that government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large. Thus, for example, we have held that the Fourth Amendment does not require public employers to obtain warrants before conducting a search of an employee's office. *O'Connor* v. *Ortega,* 480 U.S. 709, 721-722 (1987). Although we recognized that the "legitimate privacy interests of public employees in the private objects they bring to the workplace may be substantial," we found that "[a]gainst these privacy interests . . . must be balanced the realities of the workplace, which strongly suggest that a warrant requirement would be unworkable." *Id.,* at 721. We have also found that the Due Process Clause does not protect a public employee from discharge, even when such discharge was mistaken or unreasonable. See *Bishop* v. *Wood,* 426 U.S. 341, 350 (1976) ("The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions").

Our public-employee speech cases are particularly instructive. In *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U.S. 563, 568 (1968), we explained that, in analyzing a claim that a public employee was deprived of First Amendment rights by her employer, we must seek "a balance between the interests of the [employee], as a citizen, in commenting upon

matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

…. [expanding on freedom of speech protections]

Our precedent in the public-employee context therefore establishes two main principles: First, although government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment context. Second, in striking the appropriate balance, we consider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer. With these principles in mind, we come to the question whether a class-of-one theory of equal protection is cognizable in the public employment context.

B

Our equal protection jurisprudence has typically been concerned with governmental classifications that "affect some groups of citizens differently than others….” Engquist correctly argues, however, that we recognized in *Olech* that an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims that she has been irrationally singled out as a so-called "class of one." In *Olech*, a property owner had asked the village of Willowbrook to connect her property to the municipal water supply. Although the village had required only a 15-foot easement from other property owners seeking access to the water supply, the village conditioned Olech's connection on a grant of a 33-foot easement. Olech sued the village, claiming that the village's requirement of an easement 18 feet longer than the norm violated the Equal Protection Clause. Although Olech had not alleged that the village had discriminated against her based on membership in an identifiable class, we held that her complaint stated a valid claim under the Equal Protection Clause because it alleged that she had "been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."

Recognition of the class-of-one theory of equal protection on the facts in *Olech* was not so much a departure from the principle that the Equal Protection Clause is concerned with arbitrary government classification, as it was an application of that principle. That case involved the government's regulation of property. Similarly, the cases upon which the Court in *Olech* relied concerned property assessment and taxation schemes. We expect such legislative or regulatory classifications to apply "without respect to persons," to borrow a phrase from the judicial oath. See 28 U.S.C. § 453. As we explained long ago, the Fourteenth Amendment "requires that all persons subjected to . . . legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Hayes* v. *Missouri,* 120 U.S. 68, 71-72 (1887). When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to ensure that all persons

subject to legislation or regulation are indeed being "treated alike, under like circumstances and conditions." Thus, when it appears that an individual is being singled out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a "rational basis for the difference in treatment." *Olech,* 528 U.S., at 564.

What seems to have been significant in *Olech* and the cases on which it relied was the existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed. There was no indication in *Olech* that the zoning board was exercising discretionary authority based on subjective, individualized determinations—at least not with regard to easement length, however typical such determinations may be as a general zoning matter. Rather, the complaint alleged that the board consistently required only a 15-foot easement, but subjected Olech to a 33-foot easement. This differential treatment raised a concern of arbitrary classification, and we therefore required that the State provide a rational basis for it.

….

There are some forms of state action, however, which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases the rule that people should be "treated alike, under like circumstances and conditions" is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.

Suppose, for example, that a traffic officer is stationed on a busy highway where people often drive above the speed limit, and there is no basis upon which to distinguish them. If the officer gives only one of those people a ticket, it may be good English to say that the officer has created a class of people that did not get speeding tickets, and a "class of one" that did. But assuming that it is in the nature of the particular government activity that not all speeders can be stopped and ticketed, complaining that one has been singled out for no reason does not invoke the fear of improper government classification. Such a complaint, rather, challenges the legitimacy of the underlying action itself—the decision to ticket speeders under such circumstances. Of course, an allegation that speeding tickets are given out on the basis of race or sex would state an equal protection claim, because such discriminatory classifications implicate basic equal protection concerns. But allowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action. It is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized.

This principle applies most clearly in the employment context, for employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify. As Engquist herself points out, "[u]nlike the zoning official, the public employer often must take into account the individual personalities and interpersonal relationships of employees in the workplace. The close relationship between the employer and employee, and the varied needs and interests involved in the employment context, mean that considerations such as concerns over personality conflicts that would be unreasonable as grounds for 'arm's-length' government decisions (*e.g.*, zoning, licensing) may well justify different treatment of a public employee". Unlike the context of arm's-length regulation, such as in *Olech,* treating seemingly similarly situated individuals differently in the employment context is par for the course.

Thus, the class-of-one theory of equal protection—which presupposes that like individuals should be treated alike, and that to treat them differently is to classify them in a way that must survive at least rationality review—is simply a poor fit in the public employment context. To treat employees differently is not to classify them in a way that raises equal protection concerns. Rather, it is simply to exercise the broad discretion that typically characterizes the employer-employee relationship. A challenge that one has been treated individually in this context, instead of like everyone else, is a challenge to the underlying nature of the government action.

Of course, that is not to say that the Equal Protection Clause, like other constitutional provisions, does not apply to public employers. Indeed, our cases make clear that the Equal Protection Clause is implicated when the government makes class-based decisions in the employment context, treating distinct groups of individuals categorically differently. The dissent's broad statement that we "excep[t] state employees from the Fourteenth Amendment's protection against unequal and irrational treatment at the hands of the State," is thus plainly not correct. But we have never found the Equal Protection Clause implicated in the specific circumstance where, as here, government employers are alleged to have made an individualized, subjective personnel decision in a seemingly arbitrary or irrational manner.

This is not surprising, given the historical understanding of the nature of government employment. We long ago recognized the "settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer." *McElroy,* 367 U.S., at 896. The basic principle of at-will employment is that an employee may be terminated for a "'good reason, bad reason, or no reason at all.'" See *Andrews* v. *Louisville & Nashville R. Co.,* 406 U.S. 320, 324 (1972) ("[T]he very concept of 'wrongful discharge' implies some sort of statutory or contractual standard that modifies the traditional common-law rule that a contract of employment is terminable by either party at will"). Thus, "[w]e have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information." *Waters,* 511 U.S., at 679. See also *Connick,* 461 U.S., at 146-147 ("[O]rdinary dismissals from government service . . . are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable." "[] an at-will government employee . . . generally has no claim based on the Constitution at all." *Waters, supra,* at 679.

State employers cannot, of course, take personnel actions that would independently violate the Constitution. But recognition of a class-of-one theory of equal protection in the public employment context—that is, a claim that the State treated an employee differently from others for a bad reason, or for no reason at all—is simply contrary to the concept of at-will employment. The Constitution does not require repudiating that familiar doctrine.

To be sure, Congress and all the States have, for the most part, replaced at-will employment with various statutory schemes protecting public employees from discharge for impermissible reasons. See, *e.g.,* 5 U.S.C. § 2302(b)(10) (2006 ed.) (supervisor of covered federal employee may not "discriminate . . . on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others"). But a government's decision to limit the ability of public employers to fire at will is an act of legislative grace, not constitutional mandate.

Indeed, recognizing the sort of claim Engquist presses could jeopardize the delicate balance governments have struck between the rights of public employees and "the government's legitimate purpose in 'promot[ing] efficiency and integrity in the discharge of official duties, and [in] maintain[ing] proper discipline in the public service.'" *Connick, supra,* at 151. Thus, for example, although most federal employees are covered by the Civil Service Reform Act of 1978, 92 Stat. 1111, Congress has specifically excluded some groups of employees from its protection, see, *e.g.,* 5 U.S.C. § 2302(a)(2)(C) (excluding from coverage, *inter alia*, the Federal Bureau of Investigation, the Central Intelligence Agency, and the Defense Intelligence Agency). Were we to find that the Equal Protection subjects the government to equal protection review for every allegedly arbitrary employment action, we will have undone Congress's (and the States') careful work.

In concluding that the class-of-one theory of equal protection has no application in the public employment context—and that is all we decide—we are guided, as in the past, by the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick, supra,* at 143. If, as Engquist suggests, plaintiffs need not claim discrimination on the basis of membership in some class or group, but rather may argue only that they were treated by their employers worse than other employees similarly situated, any personnel action in which a wronged employee can conjure up a claim of differential treatment will suddenly become the basis for a federal constitutional claim. Indeed, an allegation of arbitrary differential treatment could be made in nearly every instance of an assertedly wrongful employment action—not only hiring and firing decisions, but any personnel action, such as promotion, salary, or work assignments—on the theory that other employees were not treated wrongfully. On Engquist's view, every one of these employment decisions by a government employer would become the basis for an equal protection complaint.

Engquist assures us that accepting her view would not pose too much of a practical problem. Specifically, Engquist argues that a plaintiff in a class-of-one employment case would have to

prove that the government's differential treatment was intentional, that the plaintiff was treated differently from other similarly situated persons, and that the unequal treatment was not rationally related to a legitimate government purpose. And because a "governmental employment decision is . . . rational whenever the discrimination relates to a legitimate government interest," it is in practice "difficult for plaintiffs to show that the government has failed to meet this standard." Justice Stevens makes a similar argument, stating "that all but a handful [of class-of-one complaints] are dismissed well in advance of trial."

We agree that, even if we accepted Engquist's claim, it would be difficult for a plaintiff to show that an employment decision is arbitrary. But this submission is beside the point. The practical problem with allowing class-of-one claims to go forward in this context is not that it will be too easy for plaintiffs to prevail, but that governments will be forced to defend a multitude of such claims in the first place, and courts will be obliged to sort through them in a search for the proverbial needle in a haystack. The Equal Protection Clause does not require "[t]his displacement of managerial discretion by judicial supervision." *Garcetti* v. *Ceballos,* 547 U.S. 410, 423 (2006).

In short, ratifying a class-of-one theory of equal protection in the context of public employment would impermissibly "constitutionalize the employee grievance." *Connick,* 461 U.S., at 154, "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Bishop,* 426 U.S., at 349. Public employees typically have a variety of protections from just the sort of personnel actions about which Engquist complains, but the Equal Protection Clause is not one of them.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice Stevens, with whom Justice Souter and Justice Ginsburg join, dissenting.

Congress has provided a judicial remedy for individuals whose federal constitutional rights are violated by state action, 42 U.S.C. § 1983. In prior cases, we have refused to craft *new* remedies for the violation of constitutional rights of federal employees, *Bush* v. *Lucas,* 462 U.S. 367 (1983), or for the nonconstitutional claims of state employees, *Bishop* v. *Wood,* 426 U.S. 341 (1976). But refusal to give effect to the congressionally mandated remedy embodied in § 1983 would be impermissible. To avoid this result, the Court today concludes that Engquist suffered no constitutional violation at all, and that there was thus no harm to be remedied. In so holding, the Court—as it did in *Garcetti* v. *Ceballos,* 547 U.S. 410 (2006)—carves a novel exception out of state employees' constitutional rights. In *Garcetti*, the Court created a new substantive rule excepting a category of speech by state employees from the protection of the First Amendment. Today, the Court creates a new substantive rule excepting state employees from the Fourteenth Amendment's protection against unequal and irrational treatment at the hands of the State. Even if

some surgery were truly necessary to prevent governments from being forced to defend a multitude of equal protection "class of one" claims, the Court should use a scalpel rather than a meat-axe.

I

Our decision in *Village of Willowbrook* v. *Olech,* 528 U.S. 562 (2000) *(per curiam)*, applied a rule that had been an accepted part of our equal protection jurisprudence for decades: Unless state action that intentionally singles out an individual, or a class of individuals, for adverse treatment is supported by some rational justification, it violates the Fourteenth Amendment's command that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

…. [T]he outcome of *Olech* was dictated solely by the absence of a rational basis for the discrimination. [citation omitted]

Here, as in *Olech*, Engquist alleged that the State's actions were arbitrary and irrational. In response, the State offered no explanation whatsoever for its decisions; it did not claim that Engquist was a subpar worker, or even that her personality made her a poor fit in the workplace or that her colleagues simply did not enjoy working with her. In fact, the State explicitly *disclaimed* the existence of any workplace or performance-based rationale. The jury proceeded to find that the respondents intentionally treated Engquist "differently than others similarly situated with respect to the . . . termination of her employment . . . without any rational basis and solely for arbitrary, vindictive or malicious reasons." The jury's verdict thus established that there was no rational basis for either treating Engquist differently from other employees or for the termination of her employment. The State does not dispute this finding. Under our reasoning in *Olech*, the absence of any justification for the discrimination sufficed to establish the constitutional violation.

The majority nonetheless concludes, based on "unique considerations applicable when the government acts as employer," that the "class-of-one" theory of equal protection is not applicable in the public employment context. Its conclusion is based upon speculation about inapt hypothetical cases, and an incorrect evaluation of the importance of the government's interest in preserving a regime of "at will" employment. Its reasoning is flawed on both counts.

II

The majority asserts that public-employment decisions should be carved out of our equal protection jurisprudence because employment decisions (as opposed to, for example, zoning decisions) are inherently discretionary. I agree that employers must be free to exercise discretionary authority. But there is a clear distinction between an exercise of discretion and an arbitrary decision. A discretionary decision represents a choice of one among two or more rational alternatives. See H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 162 (Tent. ed. 1958) (defining discretion as "the power to choose between two

or more courses of action each of which is thought of as permissible"). The choice may be mistaken or unwise without being irrational. If the arguments favoring each alternative are closely balanced, the need to make a choice may justify using a coin toss as a tie breaker. Moreover, the Equal Protection Clause proscribes arbitrary decisions—decisions unsupported by any rational basis—not unwise ones. Accordingly, a discretionary decision with any "reasonably conceivable" rational justification will not support an equal protection claim; only a truly arbitrary one will. There is therefore no need to create an exception for the public-employment context in order to prevent these discretionary decisions from giving rise equal protection claims.

The hypothetical situations posited by the majority do not prove otherwise. The hypothetical traffic officer described in the Court's opinion, had a rational basis for giving a ticket to *every* speeder passing him on the highway. His inability to arrest every driver in sight provides an adequate justification for making a random choice from a group of equally guilty and equally accessible violators. As such, the Court is quite correct in stating that "allowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action." If there were no justification for the arrest, there would be no need to invoke the Equal Protection Clause because the officer's conduct would violate the Fourth Amendment. But as noted, a random choice among rational alternatives does not violate the Equal Protection Clause.

A comparable hypothetical decision in the employment context (*e.g.,* a supervisor who is required to eliminate one position due to an involuntary reduction-in-force and who chooses to terminate one of several equally culpable employees) also differs from the instant case insofar as it assumes the existence of a rational basis for the individual decision. The fact that a supervisor might not be able to explain why he terminated one employee rather than another will not give rise to an equal protection claim so long as there was a rational basis for the termination itself and for the decision to terminate just one, rather than all, of the culpable employees.

Instead of using a scalpel to confine so-called "class of one" claims to cases involving a complete absence of any conceivable rational basis for the adverse action and the differential treatment of the plaintiff, the Court adopts an unnecessarily broad rule that tolerates arbitrary and irrational decisions in the employment context.

III

The majority's decision also rests on the premise that "[t]he Constitution does not require repudiating th[e] familiar doctrine" of at-will employment. In the 1890's that doctrine applied broadly to government employment, see *McAuliffe* v. *Mayor of New Bedford,* 155 Mass. 216, 29 N.E. 517 (1892), but for many years now "'the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.'" *Keyishian* v. *Board of Regents of Univ. of State of N. Y.,* 385 U.S. 589, 605-606 (1967). Indeed, recent constitutional decisions and statutory enactments have all but nullified the

significance of the doctrine. Accordingly, preserving the remnants of "at-will" employment provides a feeble justification for creating a broad exception to a well-established category of constitutional protections.

IV

[arguments rejecting the floodgate argument of recognizing a class-of-one claim]

In sum, there is no compelling reason to carve arbitrary public-employment decisions out of the well-established category of equal protection violations when the familiar rational review standard can sufficiently limit these claims to only wholly unjustified employment actions. Accordingly, I respectfully dissent.

3.14.2.1. Timeline

Date	Case Name	Decision	Notes
April 8, 2004	*Engquist v. Oregon Department of Agriculture* United States District Court for the District of Oregon (2004)	Defendant's motion for summary judgment granted in part as to plaintiff's sexual harassment claims and denied in part as to plaintiff's failure to promote and discriminatory termination claims.	**First filed in 2004** • Link
September 14, 2004	*Engquist v. Oregon Department of Agriculture* United States District Court for the District of Oregon (2004)	Found in favor of the respondent based on invalid claims of equal protection and substantive due process. Defendant's motion for partial summary judgment denied.	Invalid because the class-of-one theory was inapplicable to public employers Lacked sufficient evidence • Link
February 8, 2007	*Engquist v. Oregon Department of Agriculture* United States Court of Appeals for the Ninth Circuit (2007)	Reversed the judgment in favor of the plaintiff on her equal protection and substantive due process claims	• Link

January 11, 2008	*Engquist v. Oregon Department of Agriculture* Supreme Court of the United States (2008)	Petition for writ of certiorari granted in part limited to Question 1 of the petition.	• Link
Argued April 21, 2008 **Decided June 9, 2008**	*Engquist v. Oregon Department of Agriculture* Supreme Court of the United States (2008)	Affirmed the decision of the Court of Appeals.	The class-of-one theory of equal protection does not apply in the public-employment context. • Link
Decided March 9, 2009 **Filed March 10, 2009**	*Engquist v. Oregon Department of Agriculture* United States District Court for the District of Oregon (2004)	Amended amount of damages and costs awarded to Engquist.	• Link

3.14.2.2. Notes

i. *The Supreme Court of H.R.*

Note the relatively obscure and minute stakes of *Engquist*. In comparison, the Supreme Court as an institution is the supreme policy maker about who gets to have access to abortions, who gets to marry whom, whether or not states can ban assault weapons, whether the whole apparatus of federal agencies is constitutional, and, in this case, can a supervisor in Oregon's agriculture department bully an employee uninterrupted.

What is the worth of this case compared to all of those broad, big, consequential policy issues? Are the Supreme Court justices the supreme HR department for the entire public sector? Why, oh why, the opinion suggests, should justices trouble themselves with such minuscule, inconsequential personal issues?

ii. *Engquist's Rule - a bit off Structurally and Normatively*

Engquist stands for the proposition that equal protection "class of one" claims are not applicable in the public sector regarding at-will employees.

Why? Well, here it gets tricky. It seems like the Court is saying that in cases where a decision maker is assigned significant deference, posing constitutional limitations on this deference is

somehow inappropriate. But this poses a set of problems about the role of the Constitution and the ability of public actors to circumvent it.

If equal protection "class of one" claims are recognized constitutional claims in cases where the law structures narrow decision-making powers, why would it disappear in cases where the law structures a broad decision-making authority? Can public actors dodge equal protection scrutiny by defining their prerogative in broad terms?

Structurally, this seems a bit off unless the source of authority of the public actor is somehow superior to the equal protection clause.

Normatively, it is unclear why sub-constitutional broad deference begets less judicial scrutiny. So, unchecked power remains unchecked and already-checked power is checked-even-more?

iii - Termination as Inherently Discretionary - a view from torts against the state

One of the repeating themes in *Engquist* is that termination is somehow "inherently" a discretionary act by the government. This line of reasoning, while bizarre as applied to constitutional scrutiny, is often used in a different context– that of sovereign immunity.

The Federal Torts Claims Act (FTCA) (link), and its states' siblings, determine when and under what conditions can the federal government (or states in the states' versions) be held liable in a torts suit. One of the exceptions to this Act, meaning cases where the government *cannot* be held liable for a tort, is in cases of "discretionary functions." Here in federal courts, and in most state courts regarding the states' equivalents, we find routine assertions about the basic workplace functions that are "inherently discretionary"– decisions to investigate, hire, training, supervising, retaining, are repeatedly evoked as inherently discretionary and thus cannot form state tort liability.

Both the FTCA jurisprudence and *Engquist* point to the same direction: discretionary acts are immune from legal claimaking, termination is inherently discretionary and thus immune from claimaking.

See:

- Simpson v. LPSA 316 Neb. 246 (2024) (no state actor liability for wrongful termination against public policy due to inherent discretion involved in termination) (link).

iv. A bit of nature

In deciding Engquist is not entitled to equal protection "class of one" claims, the Court distinguishes between decisions where the decisionmaker has limited discretion and decisions "which by their nature involve discretionary decision making."

Nature does a lot of work in *Engquist*, and in six(!) different parts, the Court suggests that the "nature" of public sector work involves broad discretion. Considering that in the sentence after the Court describes how multiple states, localities, and the federal government changed the "nature" of workplace decision-making, the importance of a perhaps original nature is questioned.

Perhaps the Court implies that at-will rules are not man-made laws, doctrines, and regulations. Perhaps, per the Court, when man discovered work, he found it already with the at-will doctrine embedded in it.

This naturalization of the at-will rule and the make-belief-game as if it is more (or less) natural than any other law or regulation determining termination is a questionable legal choice. Appeal to nature is a known logical fallacy. In the common form, the fallacy equates what is "natural" with what is "good" or "desirable." Here, the natural fallacy takes a legal turn - equating what is "natural" with what is constitutional. Buying into the natural fallacy is just as wrong in both the moral and the legal cases.

v. Bu.. b.. b.. but Engquist is not an At-Will employee!

Engquist killed the option for at-will public sector employees to claim "class of one" equal protection claims. But, Engquist, the plaintiff, is not *exactly* at-will. Traditionally we read "at will" to mean "can be terminated" for "good reason, bad reason, or no reason at all." However, that was not the termination status of Engquist, which was protected under a collective bargaining agreement stating all kinds of procedures and maneuvers an employer must make before terminating someone. If the Court opinion is based on the broad "natural" prerogative to terminate people, this nature was clearly circumvented in this case.

So, hmm, what is going on here?

There are three main options, none of which are convincing.

First, it is possible that the Court considers those kinds of limitations on terminations to still be at-will employment. That is an unlikely option.

Second, it is more likely that the Court calls "at-will employment" not a particular set of rules concerning termination, but the whole set of employment decisions employers can make unilaterally. So in this example, while terminating Engquist was not at-will, the decision about

promotions was indeed “at will.” Here the Court calls “at will” what in other places scholars and courts call the “employer prerogative.” And the upshot of *Engquist* is that all places of employer prerogative are excluded from class-of-one claims.

The third option is that the Court did rule about “at will status” and meant by it “at will termination status” but the decision simply does not match the facts of the case.
All those options are bad in their own sad little ways.

vi. *Public Sector Exceptionalism*

In many public sector constitutional decisions, we find the following tension: First, the Court recognizes that public sector employees do not “leave their constitutional rights at the door,” or on the flip side, that the state is not free from constitutional limitations in its actions simply because the subject of its actions are now public sector employees. But, following this concession, the Court is then quick to state that applying such constitutional constraints must be done in accordance with the state’s needs and functions as an employer and as a fiduciary of public trust and funds.

This dual structure of legal commitments– first to the application of constitutional scrutiny, and second, to the recognition of unique affordances of the state as an employer, is the structure that works (almost inherently) to limit and dilute public sector workers' constitutional rights. At its best, the rights of public sector employees will be less diluted. At its worst, the Court would find such rights irrelevant or too troublesome to actualize, like the case of *Engquist*.

vii. Flood-Gates and Slippery Slopes as Reactionary Rhetoric

In multiple cases here, *Engquist* and *Garcetti* for example, a court tells us that if we accept plaintiffs’ position A, while perhaps a good thing, situation B will arise which is a bad thing. In both Garcetti and in *Engquist* this came as both a slippery slope variant and a flood-gate argument.

A slippery slope argument suggests that once you accept a certain position, for example the application of the first amendment to public employees’ speech as employees, there is no logical stopping point for that and thus you would have to apply the first amendment to all speech done in the course of one’s work. Because there is no logical stopping point to the application of the first amendment, and because its application is so aggressive, consequences of falling down the slippery slope are dangerous and ought to be avoided at this point.

A floodgates argument suggests that once you accepted the petition of plaintiff A, plaintiffs B through- N would rush to the court hampering its efficacy. For example, if we accept *Engquist*'s claim of one claim, any workplace dispute will now arrive at the doorsteps of federal courts dressed in Constitutional garb. This will block the path of worthier/more important/critical plaintiffs' path to justice.

Albert O. Hirschman called those kinds of arguments "reactionary" rhetoric because those arguments react to new ideas and aim conserve the status quo, and prevent change. Those arguments come in three major forms: perversity (the position will backfire), futility (the position will do nothing), and jeopardy (the position harms others). We can map variants of the flood-gates and slippery slope arguments into those buckets.

See:

- Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (February 2003).
- Hirschman, Albert O. *The rhetoric of reaction: Perversity, futility, jeopardy*. Harvard University Press, 1991.

viii. Is bullying less harmful than sex/race discrimination?

In the next Part of the book, we discuss in depth the legal implications of treating some employees worse because of some protected characteristics like race and sex. Engquist had some of those claims in the lower courts, which were irrelevant to the Supreme Court's dispute.

How much of a problem is race/sex-neutral workplace bullying really? Judging by the policy response– not so much at all. Discrimination over some identifiable attribute is a big "no-no" in law, but treating someone poorly simply because they are who they are is "meh." We do not have significant policy interventions aimed at curbing bullying on the job. Some states and localities might offer such legislation, but overall, non-class-based discrimination is treated as a non-issue in most policy arenas.

Consider whether or not you agree with the following statement: "*Engquist* was a case about bullying, but the harms of non-class-based bullying (i.e. not because of race, sex, etc) are lesser than traditional discriminatory harms, which made the Court tilt towards the defendants."

An office bully, an illustration (and see here)

4. ANTIDISCRIMINATION

Note: this part includes descriptions and analysis of severe sex, race, and gender-based harassment and discrimination. Harris v. Forklift *is the most direct discussion of sexual harassment;* Dothard v. Rawlinson *includes a description of potential sexual harassment (bizarre, I know).*

Title VII of the Civil Rights Act of 1964 is the most extensive Federal regulation of workplace discrimination. The following is an excerpt of relevant parts of the legislation.

4.1. 42 U.S.C.S. § 2000e-2. Unlawful employment practices

(link)

(a) Employer practices. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

….

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion. Notwithstanding any other provision of this title

(1) it shall not be an unlawful employment practice for an employer to hire and employ employees …. on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and

(2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, …. is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, …., or if the curriculum of such school, …. is directed toward the propagation of a particular religion.

. . . .

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions. Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended.

….

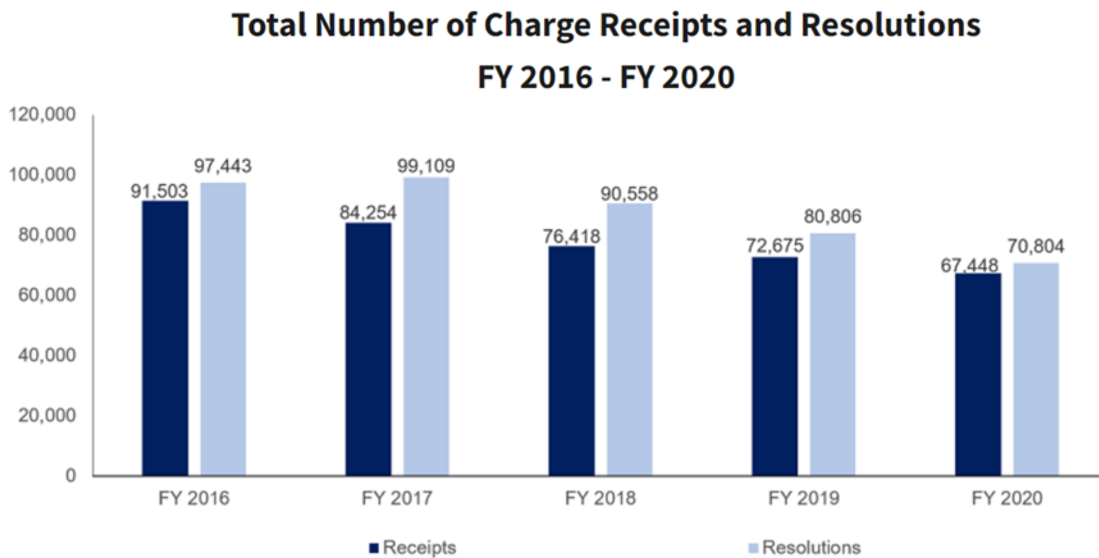
(j) Preferential treatment not to be granted on account of existing number or percentage imbalance. Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed

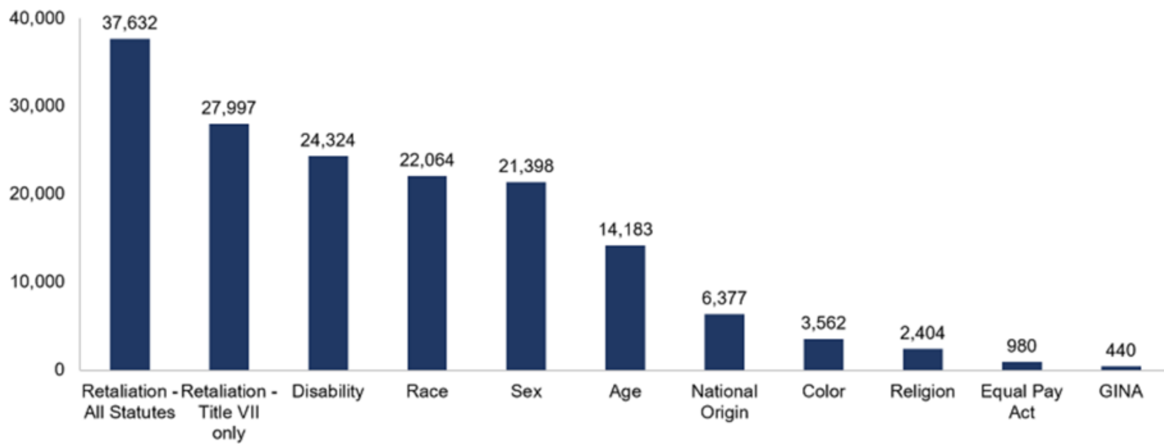
> in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

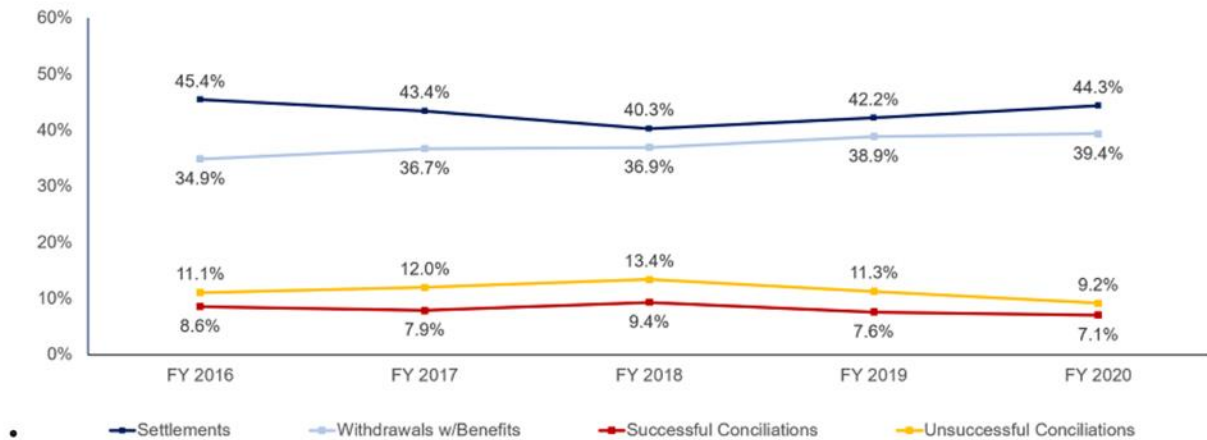
4.2. Equal Employment Opportunity Commission Data

The Equal Employment Opportunity Commission (EEOC), or an equivalent state agency, are the mandatory first step in filing Title VII claims. An explanation on the process can be found here. This centralization may have some significant disadvantages; but one of its advantages is the centralized collection of data about discrimination charges.

Below are some graphs that might be of interest from the EEOC website:







4.3. McDonnell Douglas v. Green, 411 U.S. 792 (1973)
Full decision: (link); **Docket**: (link); **Oral argument**: (link)
Opinion

Mr. Justice POWELL delivered the opinion for a unanimous Court.

The case before us raises significant questions as to the proper order and nature of proof in actions under Title VII of the Civil Rights Act of 1964.

Petitioner, McDonnell Douglas Corp., is an aerospace and aircraft manufacturer headquartered in St. Louis, Missouri, where it employs over 30,000 people. Respondent, a black citizen of St.

Louis, worked for petitioner as a mechanic and laboratory technician from 1956 until August 28, 1964 when he was laid off in the course of a general reduction in petitioner's work force.

Respondent, a long-time activist in the civil rights movement, protested vigorously that his discharge and the general hiring practices of petitioner were racially motivated. As part of this protest, respondent and other members of the Congress on Racial Equality illegally stalled their cars on the main roads leading to petitioner's plant for the purpose of blocking access to it at the time of the morning shift change. The District Judge described the plan for, and respondent's participation in, the 'stall-in' as follows:

> (F)ive teams, each consisting of four cars would 'tie up' five main access roads into McDonnell at the time of the morning rush hour. The drivers of the cars were instructed to line up next to each other completely blocking the intersections or roads. The drivers were also instructed to stop their cars, turn off the engines, pull the emergency brake, raise all windows, lock the doors, and remain in their cars until the police arrived. The plan was to have the cars remain in position for one hour.

Acting under the 'stall in' plan, [Green] drove his car onto Brown Road, a McDonnell access road, at approximately 7:00 a.m., at the start of the morning rush hour. Plaintiff was aware of the traffic problems that would result. He stopped his car with the intent to block traffic. The police arrived shortly and requested plaintiff to move his car. He refused to move his car voluntarily. Plaintiff's car was towed away by the police, and he was arrested for obstructing traffic. Plaintiff pleaded guilty to the charge of obstructing traffic and was fined.'

On July 2, 1965, a 'lock-in' took place wherein a chain and padlock were placed on the front door of a building to prevent the occupants, certain of petitioner's employees, from leaving. Though respondent apparently knew beforehand of the 'lock-in,' the full extent of his involvement remains uncertain.

Some three weeks following the 'lock-in,' on July 25, 1965, petitioner publicly advertised for qualified mechanics, respondent's trade, and respondent promptly applied for re-employment. Petitioner turned down respondent, basing its rejection on respondent's participation in the 'stall-in' and 'lock-in.' Shortly thereafter, respondent filed a formal complaint with the Equal Employment Opportunity Commission, claiming that petitioner had refused to rehire him because of his race and persistent involvement in the civil rights movement, in violation of ss 703(a)(1) and 704(a) of the Civil Rights Act of 1964, 42 U.S.C. ss 2000e — 2(a)(1) and 2000e—3(a). The former section generally prohibits racial discrimination in any employment decision while the latter forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory conditions of employment.
….

On April 15, 1968, respondent brought the present action, claiming initially a violation of s 704(a) and, in an amended complaint, a violation of s 703(a)(1) as well. The District Court dismissed the latter claim of racial discrimination in petitioner's hiring procedures on the ground that the Commission had failed to make a determination of reasonable cause to believe that a violation of that section had been committed. The District Court also found that petitioner's refusal to rehire respondent was based solely on his participation in the illegal demonstrations and not on his legitimate civil rights activities. The court concluded that nothing in Title VII or s 704 protected 'such activity as employed by the plaintiff in the 'stall in' and 'lock in' demonstrations.'

On appeal, the Eighth Circuit affirmed that unlawful protests were not protected activities under s 704(a), but reversed the dismissal of respondent's s 703(a)(1) claim relating to racially discriminatory hiring practices…. The court ordered the case remanded for trial of respondent's claim under s 703(a)(1).

…. In order to clarify the standards governing the disposition of an action challenging employment discrimination, we granted certiorari.

….

The critical issue before us concerns the order and allocation of proof in a private, non-class action challenging employment discrimination. The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens. Griggs v. Duke Power Co., 401 U.S. 424.

As noted in Griggs:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.' Id., 401 U.S., at 430—431.

There are societal as well as personal interests on both sides of this equation. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.

In this case respondent, the complainant below, charges that he was denied employment 'because of his involvement in civil rights activities' and 'because of his race and color.' Petitioner denied discrimination of any kind, asserting that its failure to re-employ respondent was based upon and justified by his participation in the unlawful conduct against it. Thus, the issue at the trial on remand is framed by those opposing factual contentions. The two opinions of the Court of Appeals and the several opinions of the three judges of that court attempted, with a notable lack of harmony, to state the applicable rules as to burden of proof and how this shifts upon the making of a prima facie case. We now address this problem.

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. In the instant case, we agree with the Court of Appeals that respondent proved a prima facie case. 463 F.2d 337, 353. Petitioner sought mechanics, respondent's trade, and continued to do so after respondent's rejection. Petitioner, moreover, does not dispute respondent's qualifications and acknowledges that his past work performance in petitioner's employ was 'satisfactory.'

The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire. Here petitioner has assigned respondent's participation in unlawful conduct against it as the cause for his rejection. We think that this suffices to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination.

The Court of Appeals intimated, however, that petitioner's stated reason for refusing to rehire respondent was a 'subjective' rather than objective criterion which 'carr[ies] little weight in rebutting charges of discrimination,' 463 F.2d, at 343. This was among the statements which caused the dissenting judge to read the opinion as taking 'the position that such unlawful acts as Green committed against McDonnell would not legally entitle McDonnell to refuse to hire him, even though no racial motivation was involved . . . .' Id., at 355. Regardless of whether this was the intended import of the opinion, we think the court below seriously underestimated the rebuttal weight to which petitioner's reasons were entitled. Respondent admittedly had taken part in a carefully planned 'stall-in,' designed to tie up access to and egress from petitioner's plant at a peak traffic hour. Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it. In upholding, under the National Labor Relations Act, the discharge of employees who had seized and forcibly retained an employer's factory buildings in an illegal sit-down strike, the Court noted pertinently:

> We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property . . . Apart from the question of the constitutional validity of an enactment of that sort, it is enough to say that such a legislative intention should be found in some definite and unmistakable expression. NLRB v. Fansteel Corp., 306 U.S. 240 (1939).

Petitioner's reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by s 703(a)(1). On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the 'stall-in' were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.

Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks. Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (CA10 1970). In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.

….

III

In sum, respondent should have been allowed to pursue his claim under s 703(a)(1). ….

The cause is hereby remanded to the District Court for reconsideration in accordance with this opinion.

So ordered.

4.3.1. Timeline

Date	Case Name	Decision	Notes
May 13, 1969	*Green v. McDonnell-Douglas Corp.*	Court granted the employer's motion to	**First filed in 1969** Found that

	US District Court for the Northern District of Missouri, Eastern Division (1969)	strike and dismissed that portion of Green's complaint that alleged race discrimination	McDonnell Douglas did not discriminate against Green based on race • Link
March 30, 1972 Petition for rehearing **May 12, 1972,** denied **June 28, 1972**	*McDonnell Douglas v. Green* US Court of Appeals for the Eighth Circuit (1972)	Reversed the district court order that denied relief to Green and remanded for further proceedings	Found that McDonnell Douglas did discriminate against Green based on race • Link
Argued March 28, 1973 **Decided May 14, 1973**	*McDonnell Douglas v. Green* Supreme Court of the United States (1973)	The Court vacated the judgment reversing the dismissal and remanded the matter for trial.	The employee was entitled to prove that the employer used his unlawful protests against it as a pretext to racial discrimination. • Link
February 26, 1975	*Green v. McDonnell Douglas Corp* US District Court for the Eastern District of Missouri, Eastern Division (1975)	Court ruled in favor of the defendant, its stated reasons for termination were not mere pretext, but real, adequate reasons under the law.	Reasons for employer to not rehire Green were adequate under the law. • Link

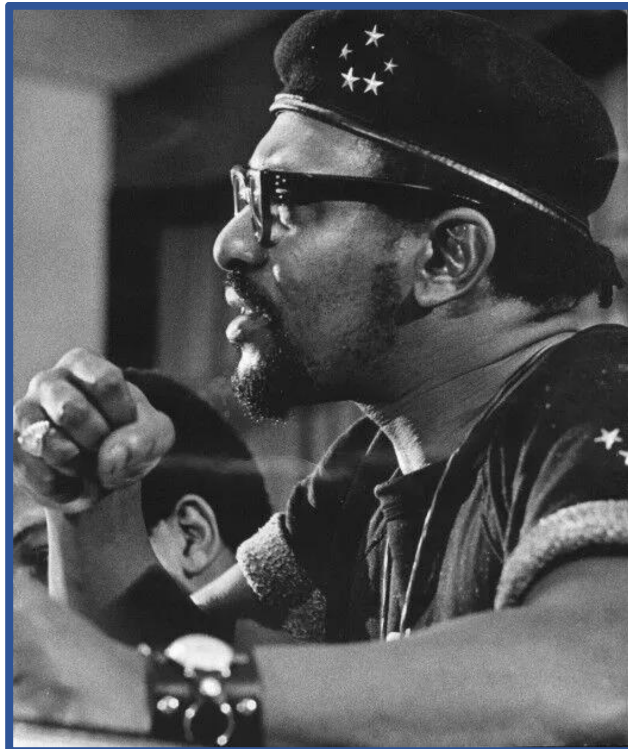
4.3.2. Notes

i. Welcome to the Modern Supreme Court

Of note are the scope, effect, and visibility of Supreme Court decisions about sex and race. The decisions we'll read from now on are at the heart of US legal, policy, and political struggles. For better or for worse, in those kinds of debates, all eyes are on the Supreme Court.

This exposure is in stark contrast to the run-of-the-mill work law cases we read in the common law section; most of them are now decided under the closed doors of individual arbitrators, never known to anyone but the parties themselves. *McDonnell Douglas,* contra, has over 5 million Google-search results; *Asmus*, about contract alterations, has 300. Public attention to the Court's decisions is unparalleled by any other legal forum in the world. Discrimination cases, especially about sex and race, like the ones in this part, are at the pinnacle of that public and scholarly attention.

ii. Percy Green



Source: Link

Percy Green is a social worker and a longtime activist in St. Louis. His termination from MD came two months after he climbed St. Louis' Gateway Arch to protest the exclusion of African American workers from state and federal contracts.

More on Green and the context of the case can be found here. For further academic readings:

- Oppenheimer, David Benjamin. "McDonnell Douglas Corp. v. Green Revisited: Why Non-Violent Civil Disobedience Should Be Protected from Retaliation by Title VII." *Colum. Hum. Rts. L. Rev.* 34 (2002): 635.

iii. *What are the values underlying Title VII?*

Oftentimes, when new legislation arrives at the doorstep of the Court, judges find some value propositions to help them interpret the statutory text. Well, in the most important case interpreting Title VII, the crown jewel of the Civil Rights' movement policy-front– what was that value proposition? According to the Court, one interest is shared by all in cases like MD:

> There are societal as well as personal interests on both sides of this equation. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship…

Pause.

"[E]fficient and trustworthy workmanship" is, apparently, a main and central societal value safeguarded by Title VII. Hmmm. What a strange way to start interpreting the most extensive federal workplace equality policy. Sure, whatever the above statement means is important, to some people, I guess, but its placement here is not random. The Court is not in the business of creating lists of "stuff people care about" but instead creates the legal framework for analyzing workplace antidiscrimination claims.

Why should antidiscrimination laws be even mildly concerned about "trustworthy workmanship"?

iv. Pretext

What may count as evidence for pretext?

- Terminating two employees stating that they are "at will" while all other terminations had a cause. An NLRA case, here.

v. Supreme Court Resources - Oral Arguments

Supreme Court cases carry heavy baggage: dozens of lower court decisions and briefs by parties and experts, a myriad of law review articles, books, and public commentary in news sections, legal opinion pages, podcasts, and more.

One of the recommended first stops for students interested in a particular case is its oral arguments. An hour or so slot of time is allocated for the Justices to hear lawyers arguing their cases. Like many things in the Supreme Court's periphery, oral arguments are accompanied by a

toxic hyper-elitist combination of myth, procedure, and fanfare. Ignore those if you can, for now, and listen to Green's lawyer try to explain the case to the Court.

4.4. Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993)

Full decision: (link); **Docket**: (link); **Oral argument**: (link)

**** this case includes descriptions and analysis of sexual harassment ****

Justice O'CONNOR delivered the opinion of the Court.

In this case we consider the definition of a discriminatorily "abusive work environment" (also known as a "hostile work environment") under Title VII of the Civil Rights Act of 1964.

I

Teresa Harris worked as a manager at Forklift Systems, Inc., an equipment rental company, from April 1985 until October 1987. Charles Hardy was Forklift's president.

[T]hroughout Harris' time at Forklift, Hardy often insulted her because of her gender and often made her the target of unwanted sexual innuendos. Hardy told Harris on several occasions, in the presence of other employees, "You're a woman, what do you know" and "We need a man as the rental manager"; at least once, he told her she was "a dumb ass woman." Again in front of others, he suggested that the two of them "go to the Holiday Inn to negotiate [Harris'] raise. Hardy occasionally asked Harris and other female employees to get coins from his front pants pocket. He threw objects on the ground in front of Harris and other women, and asked them to pick the objects up. He made sexual innuendos about Harris' and other women's clothing.

In mid-August 1987, Harris complained to Hardy about his conduct. Hardy said he was surprised that Harris was offended, claimed he was only joking, and apologized. He also promised he would stop, and based on this assurance Harris stayed on the job. But in early September, Hardy began anew: While Harris was arranging a deal with one of Forklift's customers, he asked her, again in front of other employees, "What did you do, promise the guy ... some [sex] Saturday night?" On October 1, Harris collected her paycheck and quit.

Harris then sued Forklift, claiming that Hardy's conduct had created an abusive work environment for her because of her gender. The United States District Court for the Middle District of Tennessee, adopting the report and recommendation of the Magistrate, found this to be "a close case," but held that Hardy's conduct did not create an abusive environment. The court found that some of Hardy's comments "offended [Harris], and would offend the reasonable woman," but that they were not "so severe as to be expected to seriously affect [Harris'] psychological well-being. A reasonable woman manager under like circumstances would have

been offended by Hardy, but his conduct would not have risen to the level of interfering with that person's work performance.

"Neither do I believe that [Harris] was subjectively so offended that she suffered injury.... Although Hardy may at times have genuinely offended [Harris], I do not believe that he created a working environment so poisoned as to be intimidating or abusive to [Harris]."

….

We granted certiorari to resolve a conflict among the Circuits on whether conduct, to be actionable as "abusive work environment" harassment (no *quid pro quo* harassment issue is present here), must "seriously affect [an employee's] psychological well-being" or lead the plaintiff to "suffe[r] injury." ….

II

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a)(1). As we made clear in *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 106 (1986), this language "is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment," which includes requiring people to work in a discriminatorily hostile or abusive environment. When the workplace is permeated with "discriminatory intimidation, ridicule, and insult," 477 U.S., at 65, that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," *id.,* at 67.

This standard, which we reaffirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. As we pointed out in *Meritor,* "mere utterance of an ... epithet which engenders offensive feelings in a employee," does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

But Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.

Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality. ….

We therefore believe the District Court erred in relying on whether the conduct “seriously affect[ed] plaintiff's psychological well-being” or led her to “suffe[r] injury.” Such an inquiry may needlessly focus the factfinder's attention on concrete psychological harm, an element Title VII does not require. Certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious.

This is not, and by its nature cannot be, a mathematically precise test. We need not answer today all the potential questions it raises…. But we can say that whether an environment is “hostile” or “abusive” can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

III

Forklift, while conceding that a requirement that the conduct seriously affect psychological well-being is unfounded, argues that the District Court nonetheless correctly applied the *Meritor* standard. We disagree. Though the District Court did conclude that the work environment was not “intimidating or abusive to [Harris],” it did so only after finding that the conduct was not “so severe as to be expected to seriously affect plaintiff's psychological well-being,” and that Harris was not “subjectively so offended that she suffered injury.” The District Court's application of these incorrect standards may well have influenced its ultimate conclusion, especially given that the court found this to be a “close case.”

We therefore reverse the judgment of the Court of Appeals, and remand the case for further proceedings consistent with this opinion.

So ordered.

4.4.1. Timeline

Date	Case Name	Decision	Notes

Decided May 21, 1991 **Entered June 4, 1991**	*Harris v. Forklift* US District Court for the Middle District of Tennessee, Nashville Division (1991)	Court granted Harris' motion for costs and attorney's fees for the second part of the suit but not the first.	**First filed in 1991** • Link
Septembe r 17, 1992	*Harris v. Forklift* US Court of Appeals for the Sixth Circuit (1992)	Per curiam, orders of the District Court are affirmed.	• Link
Argued October 13, 1993 **Decided November 9, 1993**	*Harris v. Forklift* Supreme Court of the United States (1993)	Reversed the decision of the Court of Appeals, remands case for further proceedings.	Severe or pervasive Subjective perception Reasonable person • Link
December 16, 1993	*Harris v. Forklift* US Court of Appeals for the Sixth Circuit (1993)	Remanded the cause to the US District Court for the Middle District of Tennessee at Nashville for further proceedings consistent with the Supreme Court's opinion.	Plaintiff established violation of Title VII by proving that discrimination based on sex has created a hostile/abuse work environment. • Link
November 8, 1994 **November 9, 1994**	*Harris v. Forklift* United States District Court for the Middle District of Tennessee, Nashville Division (1994)	All objections by defendant and plaintiff are found to be without merit.	• Link

4.4.2. Notes

i. Harris *in the Context of* Meritor

Harris is not the first Supreme Court case recognizing a hostile workplace as sexual harassment under Title VII. Before *Harris,* the Court decided *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57 (1986) (link). In *Meritor*, the Court was facing a case of severe sexual abuse of a female worker by her manager, including rape. In deciding that sexual harassment was actionable under Title VII, the *Meritor* Court relied heavily on the psychological harm caused to the plaintiff. *Harris*' challenge was thus to prove actionable a hostile work environment that did not cause severe psychological harm.

This is *Harris*' big win, shifting Title VII sexual harassment doctrine away from the most extreme and harmful workplace contexts and bringing it closer to the mainstream of workplace harms. Sexual harassment thus moved from being a fringe doctrine to one of the core Title VII claims. But how far into the regular/normative/status quo does Title VII enter?

ii. *The Rule*

What is the rule that was set at *Harris*? Ok, so no proof of severe psychological harm is now needed to make a hostile work environment claim stick under Title VII, but what *does* a plaintiff need to prove?

For a relatively short opinion, *Harris* is surprisingly unclear about that point. Below are two possible theories of liability: direct and indirect theory. Both theories differ on how a hostile work environment affects the "terms and conditions" of an affected employee.

The **direct** theory is that hostile work environment liability is created when a reasonable person would consider a work environment as "severe or pervasive" enough to alter the terms and conditions of employment. In this theory, "terms and conditions of employment" can, and maybe always, include elements of workplace culture, atmosphere, and environment.

The **indirect theory** is dependent on the subjective perception of the person being harassed. If their subjective perception of the work environment is not "severe or pervasive" enough to be called a hostile workplace environment, then no liability is formed. This is so, because "terms and conditions of employment" are only affected in hostile workplace cases *indirectly*, through the plaintiff's psyche, their subjective perception of their work environment.

The Court seems to build *Harris*' doctrine on a rule-exception model. The rule is the direct theory, the exception is the indirect theory. Meaning, any workplace environment severe or pervasive enough to alter workplace conditions in the eyes of a reasonable person is actionable (the rule), unless the victims' subjective perception is different (the exception).

Confusing.

It is confusing both pragmatically and analytically. Pragmatically, most cases of hostile work environment would be brought by workers subjectively perceiving their workplace as hostile. So, what good does the exception do here?

Analytically, the Court is unwilling to commit to a theory of sexual harassment and how it relates to the statutory text. Are workers who are exposed to a hostile work environment discriminated against because of their perception? Or because being exposed to a hostile work environment is objectively discriminatory? This unclarity is a feature of the *Harris* opinion.

iii. *Extreme and Outrageous v. Severe or Pervasive*

In *Hoy*, the rule for identifying liability under intentional infliction of emotional distress (IIED) was that the conduct must be "extreme and outrageous." In *Harris*, we are told that the environment/conduct must be "severe or pervasive" to alter workplace terms and conditions.

The *Harris* court portrays this latter standard as a middle path between too much liability (all conduct that alters terms and conditions) and too little (conduct that results in severe psychological harm, or, perhaps, an IIED standard). The Court tries to walk somewhere between over-coverage and under-coverage.

Consider why the *Harris* court looks for this balance and whether or not it is achieved with this standard.

iv. *The Reasonable Person*

One of the ways the *Harris* court walks the line between over-coverage and under-coverage is by limiting the perception of "severe or pervasive" to the "Reasonable person." Who is this "reasonable person"? Are they a she? A he? They? How old are they? Are they a ninety-year-old white man from NY? Younger? Have they ever experienced sexual harassment? Have they worked in the service industry? Are they from the Midwest? Do they like Phoebe Bridgers? The latter is my test for reasonableness. But what is the judges' test?

The analytic problem here is that the answer to some of those questions might lead to a greater/lesser likelihood of describing certain work environments as hostile.

As a pragmatic matter, we know who the reasonable person is not– it is definitely not the plaintiff. It is someone else. But who are they? We can suspect that judges imagine someone, or perhaps a group of someones, to answer this question, but who they are imagining is a mystery.

Source: Link
The Greendale Human Being. A person with no identifiable ethnicity or sex. Is this the reasonable person? Do you trust them to decide whether a workplace environment is "severe or pervasive" enough to alter terms and conditions of employment?

v. Who is in and who is out

When examining a legal rule, it is essential to look at what is *in* the legal rule and what is *out*. As suggested above, Harris' big win is by neglecting the demand for significant psychological harm. The lack of this requirement is what allowed hostile work environment sexual harassment claims to filter into the mainstream workplace. Suddenly, plaintiffs suffering workplace sexual harassment can come forward even if they didn't mentally collapse.

The omission of the harm requirement does a lot.

Ok, so what else is missing from the *Harris v. Forklift* rule? Well, the rule deals with two main perspectives: the reasonable person and the subjective perception of the plaintiff. So, two people. The rule omits many other possible perspectives, for example, the supposed offender. Under *Harris*, the offender's perspective only matters as far as it can be used in an argument about 1) the reasonable person or 2) the subjective perception of the plaintiff.

Why should we care? Well, what if the offender was "just" hitting on the plaintiff in a sex-hostile work environment? What if he was joking? What if by calling a Black worker "boy" he didn't mean to suggest any racial bias (in a race-hostile work environment claim)? What if by chanting "From the River to the Sea" in the office she meant to describe a political utopia to her Israeli and Palestinian colleagues (in a national-origin hostile work environment claim)?

Under *Harris* we don't care. Or, more accurately, we care only so much as it helps us demonstrate: 1) a reasonable person's perspective and 2) the subjective perception of the workplace environment.

vi. *Abolishing Sexual Harassment*

Why not go all the way? If we agree that sexual harassment is bad, and if we agree that sexual harassment can alter the terms and conditions of work, how can we read *Harris* in that direction?

One option is to say that "severe or pervasive" is not a high bar at all. As long as conduct alters terms and conditions of work, defined broadly, the conduct must have been severe or pervasive enough. Here, the doctrine would simply examine if a hostile work environment happened. But which standard can we use? Well, why not use the subjective standard? Why not declare all workplace environments perceived as hostile as legally hostile? What are the downsides of that approach?

Note that there are more radical options on the table. We can, for example, suggest a rebuttable default rule that *all* work environments are hostile unless the employer manages to prove that no one perceived it that way *or* that a reasonable person wouldn't perceive it that way. Sounds preposterous, perhaps. It all depends, I suppose, on how serious we think the harm of sexual harassment is, and how urgent it is to stop it.

vii. *Is Sexual harassment about Sex, or is it about Sex?*

"Sex" can mean "sex assigned at birth" (let's call it Sex1) or "the stuff that turns us on sexually" (let's call it Sex2).[2] Sexual harassment can thus mean one of two things: first, harassing someone because of their sex assigned at birth (Sex1 harassment) OR harassing someone because it is somehow related to the activities that turn us (or the offender) on (Sex2 harassment). For many, the meaning of sexual harassment must be tied, somehow, to the second category. It must be, somehow, about Sex2 in the meaning of activities that turn (someone) on.

In contrast, some argue that sexual harassment is mostly about harassing someone because of their Sex1, even in non-Sex2-related ways. Some scholars thought that *Harris* was a good

[2] This is from Halley, Janet. *Split decisions: How and why to take a break from feminism* (2008).

opportunity for the Court to recognize sexual harassment as focused mainly on Sex1. Here is Vicki Schultz from Yale Law School:

> *Harris* provided a clear opportunity to transcend this unduly restrictive focus [on sex2, GR]. The case presented a chance to expand the concept of hostile work environment harassment to include all conduct that is rooted in gender-based expectations about work roles and to recognize that harassment functions as a way of undermining women's perceived competence as workers. From such a perspective, Charles Hardy's conduct looks like the central sex discrimination that Title VII was intended to dismantle. Taken together, Hardy's conduct--from the "sexual" conduct that reduced Harris to a sexual object as she struggled to fulfill her work role, to the nonsexual but gender-biased conduct that denigrated her capacity to serve as a manager, to the facially gender-neutral conduct that denied her the perks, privileges, and respect she needed to do her job well-had the purpose and effect of undermining Harris's status and authority as a manager on the basis of her sex. These actions fit a classic pattern of harassment often directed at women who try to claim male-dominated work as their own.

Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale LJ 1683, 1712 (1997) (link).
What would it mean to cleanse Sex2 from the definition of sexual harassment? Would it result in undercoverage or over-coverage?

Some more readings:

- Kanter, Rosabeth Moss. "Some effects of proportions on group life: Skewed sex ratios and responses to token women." American journal of Sociology 82.5 (1977): 965-990.

4.5. Price Waterhouse v. Hopkins (1989)

Full decision: (link); **Docket**: (link); **Oral argument**: (link)

Justice BRENNAN announced the judgment of the Court and delivered an opinion, in which Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS join.

Ann Hopkins was a senior manager in an office of Price Waterhouse when she was proposed for partnership in 1982. She was neither offered nor denied admission to the partnership; instead, her candidacy was held for reconsideration the following year. When the partners in her office later refused to repropose her for partnership, she sued Price Waterhouse under Title VII of the Civil Rights Act of 1964, charging that the firm had discriminated against her on the basis of sex in its decisions regarding partnership.

We granted certiorari to resolve a conflict among the Courts of Appeals concerning the respective burdens of proof of a defendant and plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives. 485 U.S. 933 (1988).

I

At Price Waterhouse, a nationwide professional accounting partnership, a senior manager becomes a candidate for partnership when the partners in her local office submit her name as a candidate. All of the other partners in the firm are then invited to submit written comments on each candidate—either on a "long" or a "short" form, depending on the partner's degree of exposure to the candidate. Not every partner in the firm submits comments on every candidate. After reviewing the comments and interviewing the partners who submitted them, the firm's Admissions Committee makes a recommendation to the Policy Board. This recommendation will be either that the firm accept the candidate for partnership, put her application on "hold," or deny her the promotion outright. The Policy Board then decides whether to submit the candidate's name to the entire partnership for a vote, to "hold" her candidacy, or to reject her. The recommendation of the Admissions Committee, and the decision of the Policy Board, are not controlled by fixed guidelines: a certain number of positive comments from partners will not guarantee a candidate's admission to the partnership, nor will a specific quantity of negative comments necessarily defeat her application. Price Waterhouse places no limit on the number of persons whom it will admit to the partnership in any given year.

Ann Hopkins had worked at Price Waterhouse's Office of Government Services in Washington, D.C., for five years when the partners in that office proposed her as a candidate for partnership. Of the 662 partners at the firm at that time, 7 were women. Of the 88 persons proposed for partnership that year, only 1—Hopkins—was a woman. Forty-seven of these candidates were admitted to the partnership, 21 were rejected, and 20—including Hopkins—were "held" for reconsideration the following year. Thirteen of the 32 partners who had submitted comments on Hopkins supported her bid for partnership. Three partners recommended that her candidacy be placed on hold, eight stated that they did not have an informed opinion about her, and eight recommended that she be denied partnership.

In a jointly prepared statement supporting her candidacy, the partners in Hopkins' office showcased her successful 2–year effort to secure a $25 million contract with the Department of State, labeling it "an outstanding performance" and one that Hopkins carried out "virtually at the partner level." Despite Price Waterhouse's attempt at trial to minimize her contribution to this project, Judge Gesell especifically found that Hopkins had "played a key role in Price Waterhouse's successful effort to win a multi-million dollar contract with the Department of State." Indeed, he went on, "[n]one of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership."

The partners in Hopkins' office praised her character as well as her accomplishments, describing her in their joint statement as "an outstanding professional" who had a "deft touch," a "strong

character, independence and integrity." Clients appear to have agreed with these assessments. At trial, one official from the State Department described her as "extremely competent, intelligent," "strong and forthright, very productive, energetic and creative." Another high-ranking official praised Hopkins' decisiveness, broadmindedness, and "intellectual clarity"; she was, in his words, "a stimulating conversationalist."

Evaluations such as these led Judge Gesell to conclude that Hopkins "had no difficulty dealing with clients and her clients appear to have been very pleased with her work" and that she "was generally viewed as a highly competent project leader who worked long hours, pushed vigorously to meet deadlines and demanded much from the multidisciplinary staffs with which she worked."

On too many occasions, however, Hopkins' aggressiveness apparently spilled over into abrasiveness. Staff members seem to have borne the brunt of Hopkins' brusqueness. Long before her bid for partnership, partners evaluating her work had counseled her to improve her relations with staff members. Although later evaluations indicate an improvement, Hopkins' perceived shortcomings in this important area eventually doomed her bid for partnership. Virtually all of the partners' negative remarks about Hopkins—even those of partners supporting her—had to do with her "interpersonal skills." Both "[s]upporters and opponents of her candidacy," stressed Judge Gesell, "indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff."

There were clear signs, though, that some of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as "macho"; another suggested that she "overcompensated for being a woman"; a third advised her to take "a course at charm school." Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only "because it's a lady using foul language." Another supporter explained that Hopkins "ha[d] matured from a tough-talking somewhat masculine hard-nosed manager to an authoritative, formidable, but much more appealing lady partner candidate." But it was the man who, as Judge Gesell found, bore responsibility for explaining to Hopkins the reasons for the Policy Board's decision to place her candidacy on hold who delivered the *coup de grace:* in order to improve her chances for partnership, Thomas Beyer advised, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."

Dr. Susan Fiske, a social psychologist and Associate Professor of Psychology at Carnegie–Mellon University, testified at trial that the partnership selection process at Price Waterhouse was likely influenced by sex stereotyping. Her testimony focused not only on the overtly sex-based comments of partners but also on gender-neutral remarks, made by partners who knew Hopkins only slightly, that were intensely critical of her. One partner, for example, baldly stated that Hopkins was "universally disliked" by staff, and another described her as "consistently annoying and irritating"; yet these were people who had had very little contact with Hopkins.

According to Fiske, Hopkins' uniqueness (as the only woman in the pool of candidates) and the subjectivity of the evaluations made it likely that sharply critical remarks such as these were the product of sex stereotyping….

In previous years, other female candidates for partnership also had been evaluated in sex-based terms. As a general matter, Judge Gesell concluded, "[c]andidates were viewed favorably if partners believed they maintained their femin[in]ity while becoming effective professional managers"; in this environment, "[t]o be identified as a 'women's lib[b]er' was regarded as [a] negative comment." In fact, the judge found that in previous years "[o]ne partner repeatedly commented that he could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers—yet the firm took no action to discourage his comments and recorded his vote in the overall summary of the evaluations."

Judge Gesell found that Price Waterhouse legitimately emphasized interpersonal skills in its partnership decisions, and also found that the firm had not fabricated its complaints about Hopkins' interpersonal skills as a pretext for discrimination. Moreover, he concluded, the firm did not give decisive emphasis to such traits only because Hopkins was a woman; although there were male candidates who lacked these skills but who were admitted to partnership, the judge found that these candidates possessed other, positive traits that Hopkins lacked.
The judge went on to decide, however, that some of the partners' remarks about Hopkins stemmed from an impermissibly cabined view of the proper behavior of women, and that Price Waterhouse had done nothing to disavow reliance on such comments. He held that Price Waterhouse had unlawfully discriminated against Hopkins on the basis of sex by consciously giving credence and effect to partners' comments that resulted from sex stereotyping. Noting that Price Waterhouse could avoid equitable relief by proving by clear and convincing evidence that it would have placed Hopkins' candidacy on hold even absent this discrimination, the judge decided that the firm had not carried this heavy burden.
The Court of Appeals affirmed the District Court's ultimate conclusion, but departed from its analysis ….

II

The specification of the standard of causation under Title VII is a decision about the kind of conduct that violates that statute. According to Price Waterhouse, an employer violates Title VII only if it gives decisive consideration to an employee's gender, race, national origin, or religion in making a decision that affects that employee. On Price Waterhouse's theory, even if a plaintiff shows that her gender played a part in an employment decision, it is still her burden to show that the decision would have been different if the employer had not discriminated. In Hopkins' view, on the other hand, an employer violates the statute whenever it allows one of these attributes to

play any part in an employment decision. Once a plaintiff shows that this occurred, according to Hopkins, the employer's proof that it would have made the same decision in the absence of discrimination can serve to limit equitable relief but not to avoid a finding of liability. We conclude that, as often happens, the truth lies somewhere in between.

A

In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees. Yet, the statute does not purport to limit the other qualities and characteristics that employers *may* take into account in making employment decisions. The converse, therefore, of "for cause" legislation, Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice. This balance between employee rights and employer prerogatives turns out to be decisive in the case before us.

Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute. In now-familiar language, the statute forbids an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's ... sex." 42 U.S.C. §§ 2000e–2(a)(1), (2) (emphasis added). We take these words to mean that gender must be irrelevant to employment decisions. To construe the words "because of" as colloquial shorthand for "but-for causation," as does Price Waterhouse, is to misunderstand them.

But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way. …. Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was "because of" sex and the other, legitimate considerations—even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account.

To attribute this meaning to the words "because of" does not, as the dissent asserts divest them of causal significance. A simple example illustrates the point. Suppose two physical forces act upon and move an object, and suppose that either force acting alone would have moved the object. As the dissent would have it, *neither* physical force was a "cause" of the motion unless we can show that but for one or both of them, the object would not have moved; apparently both forces were simply "in the air" unless we can identify at least one of them as a but-for cause of the object's

movement. Events that are causally overdetermined, in other words, may not have any "cause" at all. This cannot be so.

We need not leave our common sense at the doorstep when we interpret a statute. It is difficult for us to imagine that, in the simple words "because of," Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision.

Our interpretation of the words "because of" also is supported by the fact that Title VII does identify one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a "bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of th[e] particular business or enterprise." 42 U.S.C. § 2000e–2(e). The only plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her. Indeed, Title VII even forbids employers to make gender an indirect stumbling block to employment opportunities. An employer may not, we have held, condition employment opportunities on the satisfaction of facially neutral tests or qualifications that have a disproportionate, adverse impact on members of protected groups when those tests or qualifications are not required for performance of the job. See *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, (1988); *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971).

To say that an employer may not take gender into account is not, however, the end of the matter, for that describes only one aspect of Title VII. The other important aspect of the statute is its preservation of an employer's remaining freedom of choice. We conclude that the preservation of this freedom means that an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person. The statute's maintenance of employer prerogatives is evident from the statute itself and from its history, both in Congress and in this Court.

To begin with, the existence of the BFOQ exception shows Congress' unwillingness to require employers to change the very nature of their operations in response to the statute. And our emphasis on "business necessity" in disparate-impact cases, see *Watson* and *Griggs,* and on "legitimate, nondiscriminatory reason[s]" in disparate-treatment cases, see *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, (1981), results from our awareness of Title VII's balance between employee rights and employer prerogatives. ….

Price Waterhouse's claim that the employer does not bear any burden of proof (if it bears one at all) until the plaintiff has shown "substantial evidence that Price Waterhouse's explanation for

failing to promote Hopkins was not the 'true reason' for its action" (Brief for Petitioner 20) merely restates its argument that the plaintiff in a mixed-motives case must squeeze her proof into *Burdine's* framework. Where a decision was the product of a mixture of legitimate and illegitimate motives, however, it simply makes no sense to ask whether the legitimate reason was "*the* 'true reason'" …. It would require a plaintiff who challenges an adverse employment decision in which both legitimate and illegitimate considerations played a part to pretend that the decision, in fact, stemmed from a single source….
….

C

In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman. In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.

Although the parties do not overtly dispute this last proposition, the placement by Price Waterhouse of "sex stereotyping" in quotation marks throughout its brief seems to us an insinuation either that such stereotyping was not present in this case or that it lacks legal relevance. We reject both possibilities. As to the existence of sex stereotyping in this case, we are not inclined to quarrel with the District Court's conclusion that a number of the partners' comments showed sex stereotyping at work. As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for " '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" *Los Angeles Dept. of Water and Power v. Manhart,* 435 U.S. 702 (1978), quoting *Sprogis v. United Air Lines, Inc.,* 444 F.2d 1194, 1198 (CA7 1971). An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.

Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be *evidence* that gender played a part. In any event, the stereotyping in this case did not simply consist of stray remarks. On the contrary, Hopkins proved that Price Waterhouse invited partners to submit comments; that some of the comments stemmed from sex stereotypes; that an important part of the Policy Board's decision on Hopkins was an assessment of the submitted comments; and that Price Waterhouse in no way disclaimed reliance on the sex-linked evaluations. This is not, as Price Waterhouse suggests, "discrimination in the air"; rather, it is, as Hopkins puts it, "discrimination brought to ground and visited upon" an employee. ….

As to the employer's proof, in most cases, the employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive. Moreover, proving "'that the same decision would have been justified ... is not the same as proving that the same decision would have been made.'" *Givhan,* 439 U.S., at 416. An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Finally, an employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. The very premise of a mixed-motives case is that a legitimate reason was present, and indeed, in this case, Price Waterhouse already has made this showing by convincing Judge Gesell that Hopkins' interpersonal problems were a legitimate concern. The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.

…

IV

The District Court found that sex stereotyping "was permitted to play a part" in the evaluation of Hopkins as a candidate for partnership.. …. In the firm's view, in other words, the District Court's factual conclusions are clearly erroneous. We do not agree.

…. It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring "a course at charm school." Nor, turning to Thomas Beyer's memorable advice to Hopkins, does it require expertise in psychology to know that, if an employee's flawed "interpersonal skills" can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism.

Price Waterhouse also charges that Hopkins produced no evidence that sex stereotyping played a role in the decision to place her candidacy on hold. As we have stressed, however, Hopkins showed that the partnership solicited evaluations from all of the firm's partners; that it generally relied very heavily on such evaluations in making its decision; that some of the partners' comments were the product of stereotyping; and that the firm in no way disclaimed reliance on those particular comments, either in Hopkins' case or in the past. Certainly a plausible—and, one might say, inevitable—conclusion to draw from this set of circumstances is that the Policy Board in making its decision did in fact take into account all of the partners' comments, including the comments that were motivated by stereotypical notions about women's proper deportment.

….

Price Waterhouse appears to think that we cannot affirm the factual findings of the trial court without deciding that, instead of being overbearing and aggressive and curt, Hopkins is, in fact, kind and considerate and patient. If this is indeed its impression, petitioner misunderstands the

theory on which Hopkins prevailed. The District Judge acknowledged that Hopkins' conduct justified complaints about her behavior as a senior manager. But he also concluded that the reactions of at least some of the partners were reactions to her as a *woman* manager. Where an evaluation is based on a subjective assessment of a person's strengths and weaknesses, it is simply not true that each evaluator will focus on, or even mention, the same weaknesses. Thus, even if we knew that Hopkins had "personality problems," this would not tell us that the partners who cast their evaluations of Hopkins in sex-based terms would have criticized her as sharply (or criticized her at all) if she had been a man. It is not our job to review the evidence and decide that the negative reactions to Hopkins were based on reality; our perception of Hopkins' character is irrelevant. We sit not to determine whether Ms. Hopkins is nice, but to decide whether the partners reacted negatively to her personality because she is a woman.

V

We hold that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account…..

It is so ordered

4.5.1. Statutory Amendment Post Price Waterhouse (1991)
42 U.S. Code § 2000e–2 - Unlawful employment practices
(link)
….
(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

….
(g)(2)

> (B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title [section 703(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court-
>
> > (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title [section 703(m)];
> >
> > and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

4.5.2. Timeline

Date	Case Name	Decision	Notes
September 20, 1985	*Hopkins v. Price Waterhouse* United States District Court for the District of Columbia (1985)	Court dismissed the employee's sex discrimination suit but ordered agreement for reasonable attorney fees	**First filed in 1985** • Link
August 4, 1987	*Hopkins v. Price Waterhouse* District of Columbia Circuit, US Court of Appeals (1987)	Court affirmed District Court's liability determination but reversed and remanded case	Decided due to failure to find constructive discharge to the employee and to allow appropriate damages • Link
March 7, 1988	*Price Waterhouse v. Hopkins* Supreme Court of the United States (1988)	Petition for a writ of certiorari to the US Court of Appeals granted.	• Link
Argued October 31, 1988 **Decided May 1, 1989**	*Price Waterhouse v. Hopkins* Supreme Court of the U.S.	Court reversed the Court of Appeals decision and found that Price Waterhouse did discriminate on the basis of sex.	Mixed motive framework The defendant employer had to prove that the decision was not motivated by a discriminatory purpose. • Link
May 14, 1990	*Hopkins v. Price Waterhouse* US District Court for District of Columbia (1990)	Remanded decision.	Found that firm did not meet its burden of proof. • Link

December 4, 1990	*Hopkins v. Price Waterhouse* US Court of Appeals for the District of Columbia Circuit (1990)	Affirmed District Court's decision.	• Link

4.5.3. Notes

i. The Impossibility of Price Waterhouse *as Law*

Sex stereotyping is alive and well. We hold entrenched views about many groups' proper hairstyles, attires, leadership styles, and mannerisms, including groups protected by Title VII. Our minds, bosses' minds, and customers' minds work making shortcuts and predicting patterns. When an employee, colleague, or boss deviates from that prediction, something is troubling us. Deviating from sex stereotyping is bad business. So, how can you blame Price Waterhouse for considering it as a foul?

The upshot of *Price Waterhouse* is that you must blame them, and they are indeed at fault for considering it. Stepping outside of the sex-stereotyping lines is perhaps bad business, but enforcing sex-stereotypical conduct on your workers is discriminatory.

Unlike *Harris v. Forklift*, which brought sexual harassment claims to the mainstream workplace, it is hard to see the same social effect with *Price Waterhouse*. *Price Waterhouse*, in other words, didn't have its #MeToo movement.

ii. The three ways to read Sex Stereotyping as Discrimination

In *Price Waterhouse*, the court was faced with the novel question of whether sex stereotyping is sex discrimination under Title VII. In the opinion we can find three answers: 1) yes; 2) only when you have a catch 22; and 3) not when standing alone.

Let's review:
1. Yes, sex stereotyping is sex discrimination: the opinion is often read in this way because of its broad language, and the emphasis on the stereotypes and their input into the decision-making process. So, for example, the Court tells us that "As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group" *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

So, when the Court says that "we are beyond the day" an employer can do something, then there must be something that stop employers from doing that. That "something" is Title VII's prohibition of sex discrimination.
We can find support for that clear position in a recent Supreme Court opinion: *Bostock v. Clayton County*. In *Bostock*, Justice Gorsuch who writes for the majority uses sex stereotyping in-it-of-itself as discrimination. While Gorsuch gives such discrimination as an example, it is telling regarding the judicial perception of sex-stereotyping. So, per Justice Gorsuch:

> So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in *both* cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it.

By treating individuals according to sex stereotypes, with no other information provided, the employer is "exposed" to Title VII claims.

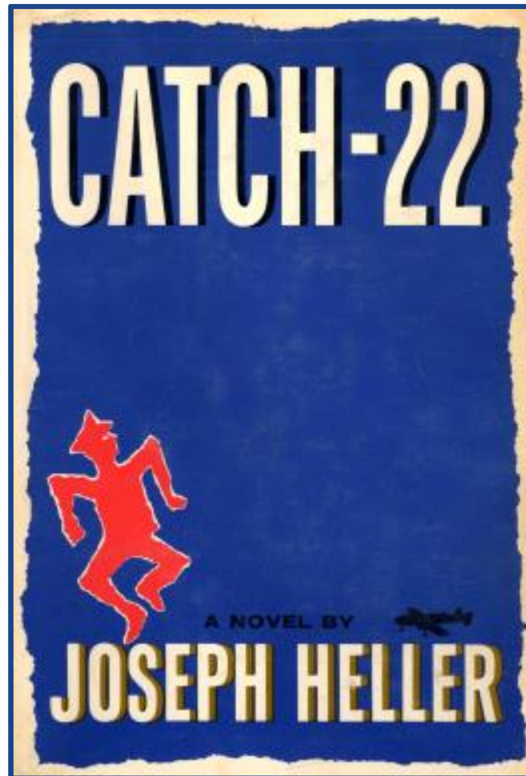
2. Or perhaps only Catch-22 stereotyping: Another read of *Price Waterhouse* might suggest that not all [class-based] stereotyping is discriminatory. Instead, only the subtype of stereotyping leading to "catch-22" type situations are discriminatory.

So, for example, if a promotion requires you to act assertive, but women are penalized for acting assertive– that is actionable under a catch-22 theory. But if your workplace demands you dress professionally and has a sex-based dress code (one set of expectations for women and another for men), and after reviewing the dress code you decide not to follow your sex-assigned-at-birth dress-code rubric, then, if your employer terminates you for that, it is not discriminatory under *Price Waterhouse*.

The latter situation is not actionable under the catch-22 theory because workers have the same potential to advance on the job - as long as they play the part, stick to their sex-assigned at-birth dress code rubrics. That is a very limiting read of *Price Waterhouse*. But, it allows us to make sense of the gap between the prohibition of stereotyping and the reality where stereotyping is prevalent.

3. Or an even narrower read: stereotyping is only an indication for sex-discrimination. Take for example Justice Alito dissent in *Bostock v. Clayton Cty*. There, Justice Alito reads Price Waterhouse to suggest that "[*Price Waterhouse*] observed that 'sex stereotypes do not inevitably prove that gender played a part in a particular employment decision' but 'can certainly be *evidence* that gender played a part.' And the plurality made it clear that "[t]he plaintiff must show that the employer actually relied on her gender in making its decision." *Bostock v. Clayton Cty.*, 590 U.S. 644, 700 (2020).

Therefore, the utilization of stereotypes can be used as evidence for actual sex discrimination. But are not actionable in it of themselves.



A Catch-22 theory of Price Waterhouse, an illustration.
Source: Link

iii. Reputational Costs as the Effect of Law

Consider the second prong of the *Price Waterhouse* rule. The employer must demonstrate that they would have made the same decision regardless of the protected group (or the stereotype).

In *Price Waterhouse*, this intuition (always there in antidiscrimination law) pushed Price Waterhouse to dig up and find reasons why Ann Hopkins is not "partner material." This was an uphill struggle because Hopkins was clearly above the fray in terms of outcomes. So, instead, Price Waterhouse focused on her character. Her demeanor. Her personal relations skills. *Price Waterhouse* is not ambiguous about what employers must do to win - they must persuade the court and the world - that they would take the same negative workplace decision on the merits. And employers, their HR departments, private investigators, special advisors, and lawyers want to win. And to win, they must dig up as much damaging information with the most damning personal ramifications possible. First, knowing that reputational costs are part of

the risk an employee takes might deter future lawsuits, and second, because that is what the law asks them to do.
Can you think of a rule that would minimize, if not eliminate, reputational costs in antidiscrimination claims?

4.6. Griggs v. Duke Power Co., 401 U.S. 424 (1971)

Full decision: (link); **Docket**: (link); **Oral argument**: (link)

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted the writ in this case to resolve the question whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify N*****s at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.

Congress provided, in Title VII of the Civil Rights Act of 1964, for class actions for enforcement of provisions of the Act and this proceeding was brought by a group of incumbent N**** employees against Duke Power Company. All the petitioners are employed at the Company's Dan River Steam Station, a power generating facility located at Draper, North Carolina. At the time this action was instituted, the Company had 95 employees at the Dan River Station, 14 of whom were N*****s; 13 of these are petitioners here.

The District Court found that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, the Company openly discriminated on the basis of race in the hiring and assigning of employees at its Dan River plant. The plant was organized into five operating departments: (1) Labor, (2) Coal Handling, (3) Operations, (4) Maintenance, and (5) Laboratory and Test. N*****s were employed only in the Labor Department where the highest paying jobs paid less than the lowest paying jobs in the other four "operating" departments in which only whites were employed. Promotions were normally made within each department on the basis of job seniority. Transferees into a department usually began in the lowest position.

In 1955 the Company instituted a policy of requiring a high school education for initial assignment to any department except Labor, and for transfer from the Coal Handling to any "inside" department (Operations, Maintenance, or Laboratory). When the Company abandoned its policy of restricting N*****s to the Labor Department in 1965, completion of high school also was made a prerequisite to transfer from Labor to any other department. From the time the

high school requirement was instituted to the time of trial, however, white employees hired before the time of the high school education requirement continued to perform satisfactorily and achieve promotions in the "operating" departments. Findings on this score are not challenged.

The Company added a further requirement for new employees on July 2, 1965, the date on which Title VII became effective. To qualify for placement in any but the Labor Department it became necessary to register satisfactory scores on two professionally prepared aptitude tests, as well as to have a high school education. Completion of high school alone continued to render employees eligible for transfer to the four desirable departments from which N*****s had been excluded if the incumbent had been employed prior to the time of the new requirement. In September 1965 the Company began to permit incumbent employees who lacked a high school education to qualify for transfer from Labor or Coal Handling to an "inside" job by passing two tests -- the Wonderlic Personnel Test, which purports to measure general intelligence, and the Bennett Mechanical Comprehension Test. Neither was directed or intended to measure the ability to learn to perform a particular job or category of jobs. The requisite scores used for both initial hiring and transfer approximated the national median for high school graduates.

The District Court had found that while the Company previously followed a policy of overt racial discrimination in a period prior to the Act, such conduct had ceased. The District Court also concluded that Title VII was intended to be prospective only and, consequently, the impact of prior inequities was beyond the reach of corrective action authorized by the Act.

The Court of Appeals was confronted with a question of first impression, as are we, concerning the meaning of Title VII. After careful analysis a majority of that court concluded that a subjective test of the employer's intent should govern, particularly in a close case, and that in this case there was no showing of a discriminatory purpose in the adoption of the diploma and test requirements. On this basis, the Court of Appeals concluded there was no violation of the Act.

The Court of Appeals reversed the District Court in part, rejecting the holding that residual discrimination arising from prior employment practices was insulated from remedial action. The Court of Appeals noted, however, that the District Court was correct in its conclusion that there was no showing of a racial purpose or invidious intent in the adoption of the high school diploma requirement or general intelligence test and that these standards had been applied fairly to whites and N*****s alike. It held that, in the absence of a discriminatory purpose, use of such requirements was permitted by the Act. In so doing, the Court of Appeals rejected the claim that because these two requirements operated to render ineligible a markedly disproportionate number of N*****s, they were unlawful under Title VII unless shown to be job related. We granted the writ on these claims.

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other

employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

The Court of Appeals' opinion, and the partial dissent, agreed that, on the record in the present case, "whites register far better on the Company's alternative requirements" than N*****s. 420 F.2d 1225, 1239 n. 6. This consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are N*****s, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in *Gaston County* v. *United States*, 395 U.S. 285. There, because of the inferior education received by N*****s in North Carolina, this Court barred the institution of a literacy test for voter registration on the ground that the test would abridge the right to vote indirectly on account of race. Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has -- to resort again to the fable -- provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude N*****s cannot be shown to be related to job performance, the practice is prohibited.

On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability. Rather, a vice president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force.

The evidence, however, shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used. The promotion record of present employees who

would not be able to meet the new criteria thus suggests the possibility that the requirements may not be needed even for the limited purpose of preserving the avowed policy of advancement within the Company. In the context of this case, it is unnecessary to reach the question whether testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon a showing that such long-range requirements fulfill a genuine business need. In the present case the Company has made no such showing.

The Court of Appeals held that the Company had adopted the diploma and test requirements without any "intention to discriminate against n**** employees." 420 F.2d, at 1232. We do not suggest that the Court erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.

The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.
….
Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.

The judgment of the Court of Appeals is, as to that portion of the judgment appealed from, reversed.

4.6.1. Timeline

Date	Case Name	Decision	Notes
September 30, 1968	*Griggs v. Duke* US District Court for the Middle District of North Carolina, Greensboro Division (1968)	Court entered a judgment against the employees and dismissed the class action against the employers	**First filed in 1968** Employer's high school diploma requirement did not violate Title VII • Link
January 9, 1970	*Griggs v. Duke* US Court of Appeals for the Fourth Circuit (1970)	Court reversed in part and affirmed in part.	Judgment dismissing the employee's racial discrimination complaint was reversed with respect with the employees hired prior to the education requirement; those employees are entitled to relief under Title VII. Remainder of judgment affirmed. • Link
May 25, 1970	*Griggs v. Duke* Supreme Court of the United States (1970)	Solicitor General united to file brief expressing views of the US.	• Link
October 12, 1970	*Griggs v. Duke* Supreme Court of the United States (1970)	Motion of United Steelworkers of America, AFL-CIO, for leave to file a brief as amicus curiae granted.	• Link
Argued December 14, 1970 **Decided March 8, 1971**	*Griggs v. Duke* Supreme Court of the United States (1971)	Court reversed the lower court's judgment in favor of the employer.	Employer's education requirement did not violate Title VII • Link

September 25, 1972	*Griggs v. Duke* US District Court for the Middle District of North Carolina, Greensboro Division (1972)	Court entered an order, as mandated, which enjoined the defendant from further acts of racial discrimination.	• Link
Argued December 6, 1974 **Decided April 2, 1975**	*Griggs v. Duke* US Court of Appeals for the Fourth Circuit (1975)	Court affirmed judgment of district court in denying employees' motion for entry of appropriate injunctive relief.	• Link

4.6.2. Notes

i. A Rule-Exception Legal Structure

Note the Rule-Exception legal structure of *Griggs*.

RULE: Section 2000e-2(a)(2) makes it an unlawful employment practice to:

> …[L]imit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

EXCEPTION: Section 2000e-2(h) says that:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice . . . for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

Hence, *Griggs*.

It is unlawful for an employee to segregate its workforce in a way that would "tend to deprive" employment opportunities because of race, sex. etc., but it is completely lawful to do so following "the results of any professionally developed ability test." So, Duke Power Co. argues

that this is precisely what they did, they indeed segregated the workforce, but it was using a professionally developed ability test following a bona fide occupational qualification need.

ii. *A Tale of Two* Griggs

Griggs is considered a canonical decision under two important traditions in antidiscrimination law. First is a seminal decision in disparate impact litigation– the struggle to curb discrimination that is done via seemingly neutral means. The other tradition is the view of antidiscrimination laws as antisubordination (or anti-subjugation) vehicles, meaning that the aim of Title VII is to combat the systemic oppression of specific, previously discriminated groups (Black workers, Women, etc.) because of their race, sex, etc. And not primarily rooting out all forms of discrimination (discrimination against White Man comes to mind).

How can *Griggs* be understood in an antisubordination way? Well, *Griggs*, in its facts and context, was a legal lever in a particular moment in time– the desegregation of employment in the South. As such, it contains all kinds of phrases and wordings that support the antisubordination thesis. For example:

> Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

This “status quo” and “prior discriminatory employment practice” the paragraph is referring to is the segregated workforce of Duke, as an example of all other still racially-segregated-in-practice workplaces. Title VII is here to salvage us from a particular social and political discriminatory ill – race-based segregation. And even more concretely:

> The objective of Congress in the enactment of Title VII . . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.

So here you go. *Griggs*, and perhaps Title VII more broadly, is a tool in the fight to achieve equality for particular, previously discriminated against groups. It's’ not a free-for-all model of how to do disparate impact litigation. The specific concern here is the “freezing” of past discrimination and not new neutral forms of selection that might have a discriminatory effect.

But *Griggs* is also stock-filled with a diluted broader-yet-thinner understanding of what Title VII is doing. And while the antisubordination prong is anchored in history, the general prong is anchored, hmm, in a fable:

> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has -- to resort again to the fable -- provided that the vessel in which the milk is proffered be one all seekers can use.

Consider which *Griggs* you buy into, if any.

iii. Theoretical Foundations of the Antisubordination Thesis - a look from the Equal Protection Clause lit

In response to viewing antidiscrimination as a vehicle for anti-classification claims of any sort and from everywhich way, another alternative was formulated. The subject of the article below is the possible framings of the Equal Protection Clause, but much can be taken from this formulation to Title VII jurisprudence.

Owen M. Fiss, *Groups and the Equal Protection Clause*, *Philosophy & Public Affairs* 107, 147-153 (1976).

> In attempting to formulate another theory of equal protection, I have viewed the Clause primarily, but not exclusively, as a protection for blacks. In part, this perspective stems from the original intent-the fact that the Clause was viewed as a means of safeguarding blacks from hostile state action. The Equal Protection Clause (following the circumlocution of the slave-clauses in the antebellum Constitution) uses the word "person," rather than "blacks." The generality of the word chosen to describe those protected enables other groups to invoke its protection; and I am willing to admit that was also probably intended. But this generality of coverage does not preclude a theory of primary reference-that blacks were the intended primary beneficiaries, that it was a concern for their welfare that prompted the Clause.
>
> It is not only original intent that explains my starting point. It is also the way the courts have used the Clause. The most intense degree of protection has in fact been given to blacks; they have received a degree of protection that no other group has received. They are the wards of the Equal Protection Clause, and any new theory formulated should reflect this practice. I am also willing to speculate that, as a matter of psychological fact, race provides the paradigm for judicial decision.

. . . .

The conception of blacks as a social group is only the first step in constructing a mediating principle. We must also realize they are a very special type of social group. They have two other characteristics as a group that are critical in understanding the function and reach of the Equal Protection Clause. One is that blacks are very badly off, probably our worst-off class (in terms of material well-being second only to the American Indians), and in addition they have occupied the lowest rung for several centuries. In a sense, they are America's perpetual underclass. It is both of these characteristics-the relative position of the group and the duration of the position-that make efforts to improve the status of the group defensible. This redistribution may be rooted in a theory of compensation-blacks as a group were *put* in that position by others and the redistributive measures are *owed* to the group as a form of compensation. . . . But a redistributive strategy need not rest on this idea of compensation, it need not be backward looking (though past discrimination might be relevant for *explaining* the identity and status of blacks as a social group). The redistributive strategy could give expression to an ethical view against caste, one that would make it undesirable for any social group to occupy a position of subordination for any extended period of time.

. . . .

It is not just the socioeconomic status of blacks as a group that explains their special position in equal protection theory. It is also their political status. The power of blacks in the political arena is severely limited. For the last two centuries the political power of this group was circumscribed in most direct fashion-disenfranchisement. The electoral strength of blacks was not equal to their numbers. . . . One source of weakness is their numbers, the fact that they are a numerical minority; the second is their economic status, their position as the perpetual underclass; and the third is that, as a "discrete and insular" minority, they are the object of "prejudice"-that is, the subject of fear, hatred, and distaste that make it particularly difficult for them to form coalitions with others (such as the white poor) and that make it advantageous for the dominant political parties to hurt them-to use them as a scapegoat.

. . . .

. . . . I think it appropriate to view blacks as a group that is relatively powerless in the political arena and in my judgment that political status of the group justifies a special judicial solicitude on their behalf.

When the product of a political process is a law that hurts blacks, the usual countermajoritarian objection to judicial invalidation-the objection that denies those "nine men" the right to substitute their view for that of "the people"-has little force. For the judiciary could be viewed as amplifying the voice of the powerless minority; the

judiciary is attempting to rectify the injustice of the political process as a method of adjusting competing claims.

Further Readings:

- Sunstein, Cass R. "The anticaste principle." *Michigan Law Review* 92.8 (1994): 2410-2455.
- Driver, Justin. "The strange career of antisubordination." *University of Chicago Law Review* 91.3 (2024): 1.

4.7. Dothard v. Rawlinson, 433 U.S. 321 (1977)

Full decision: (link); **Docket**: (link); **Oral argument**: (link)

Mr. Justice STEWART delivered the opinion of the Court.

Appellee Dianne Rawlinson sought employment with the Alabama Board of Corrections as a prison guard, called in Alabama a 'correctional counselor.' After her application was rejected, she brought this class suit under Title VII of the Civil Rights Act of 1964, and under 42 U.S.C.S 1983, alleging that she had been denied employment because of her sex in violation of federal law. A three-judge Federal District Court for the Middle District of Alabama decided in her favor.

I

At the time she applied for a position as correctional counselor trainee, Rawlinson was a 22-year-old college graduate whose major course of study had been correctional psychology. She was refused employment because she failed to meet the minimum 120-pound weight requirement established by an Alabama statute. The statute also establishes a height minimum of 5 feet 2 inches.

After her application was rejected because of her weight, Rawlinson filed a charge with the Equal Employment Opportunity Commission, and ultimately received a right-to-sue letter. She then filed a complaint in the District Court on behalf of herself and other similarly situated women, challenging the statutory height and weight minima as violative of Title VII and the Equal Protection Clause of the Fourteenth Amendment. While the suit was pending, the Alabama Board of Corrections adopted Administrative Regulation 204, establishing gender criteria for assigning correctional counselors to maximum-security institutions for 'contact positions,' that is, positions requiring continual close physical proximity to inmates of the institution. …

Like most correctional facilities in the United States, Alabama's prisons are segregated on the basis of sex. Currently the Alabama Board of Corrections operates four major all-male penitentiaries Holman Prison, Kilby Corrections Facility, G. K. Fountain Correction Center, and Draper Correctional Center. The Board also operates the Julia Tutwiler Prison for Women, the Frank Lee Youth Center, the Number Four Honor Camp, the State Cattle Ranch, and nine Work

Release Centers, one of which is for women. The Julia Tutwiler Prison for Women and the four male penitentiaries are maximum-security institutions. Their inmate living quarters are for the most part large dormitories, with communal showers and toilets that are open to the dormitories and hallways. The Draper and Fountain penitentiaries carry on extensive farming operations, making necessary a large number of strip searches for contraband when prisoners re-enter the prison buildings.

A correctional counselor's primary duty within these institutions is to maintain security and control of the inmates by continually supervising and observing their activities. To be eligible for consideration as a correctional counselor, an applicant must possess a valid Alabama driver's license, have a high school education or its equivalent, be free from physical defects, be between the ages of 20 ½ years and 45 years at the time of appointment, and fall between the minimum height and weight requirements of 5 feet 2 inches, and 120 pounds, and the maximum of 6 feet 10 inches, and 300 pounds. Appointment is by merit, with a grade assigned each applicant based on experience and education. No written examination is given.

At the time this litigation was in the District Court, the Board of Corrections employed a total of 435 people in various correctional counselor positions, 56 of whom were women. Of those 56 women, 21 were employed at the Julia Tutwiler Prison for Women, 13 were employed in noncontact positions at the four male maximum-security institutions, and the remaining 22 were employed at the other institutions operated by the Alabama Board of Corrections. Because most of Alabama's prisoners are held at the four maximum-security male penitentiaries, 336 of the 435 correctional counselor jobs were in those institutions, a majority of them concededly in the ‘contact’ classification. Thus, even though meeting the statutory height and weight requirements, women applicants could under Regulation 204 compete equally with men for only about 25% of the correctional counselor jobs available in the Alabama prison system.

II

In enacting Title VII, Congress required ‘the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.’ *Griggs v. Duke Power* Co., 401 U.S. 424. The District Court found that the minimum statutory height and weight requirements that applicants for employment as correctional counselors must meet constitute the sort of arbitrary barrier to equal employment opportunity that Title VII forbids. ….

A

The gist of the claim that the statutory height and weight requirements discriminate against women does not involve an assertion of purposeful discriminatory motive. It is asserted, rather,

that these facially neutral qualification standards work in fact disproportionately to exclude women from eligibility for employment by the Alabama Board of Corrections. We dealt in *Griggs v. Duke Power Co*., supra and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, with similar allegations that facially neutral employment standards disproportionately excluded N*****s from employment, and those cases guide our approach here.

Those cases make clear that to establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern. Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet 'the burden of showing that any given requirement (has) . . . a manifest relationship to the employment in question.' *Griggs v. Duke Power Co*., supra, at 432. If the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection devices without a similar discriminatory effect would also 'serve the employer's legitimate interest in 'efficient and trustworthy workmanship.“ *Albemarle Paper Co. v. Moody*, supra, at 425, quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801.

Although women 14 years of age or older compose 52.75% of the Alabama population and 36.89% of its total labor force, they hold only 12.9% of its correctional counselor positions. In considering the effect of the minimum height and weight standards on this disparity in rate of hiring between the sexes, the District Court found that the 5$2$-requirement would operate to exclude 33.29% of the women in the United States between the ages of 18-79, while excluding only 1.28% of men between the same ages. The 120-pound weight restriction would exclude 22.29% of the women and 2.35% of the men in this age group. When the height and weight restrictions are combined, Alabama's statutory standards would exclude 41.13% of the female population while excluding less than 1% of the male population.

Accordingly, the District Court found that Rawlinson had made out a prima facie case of unlawful sex discrimination.

The appellants argue that a showing of disproportionate impact on women based on generalized national statistics should not suffice to establish a prima facie case.

They point in particular to Rawlinson's failure to adduce comparative statistics concerning actual applicants for correctional counselor positions in Alabama. There is no requirement, however, that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants. See *Griggs v. Duke Power Co*., supra. The application process might itself not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory. See *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365-367. A potential applicant could easily determine her height and weight and conclude that to make an application would be futile. Moreover,

reliance on general population demographic data was not misplaced where there was no reason to suppose that physical height and weight characteristics of Alabama men and women differ markedly from those of the national population.

For these reasons, we cannot say that the District Court was wrong in holding that the statutory height and weight standards had a discriminatory impact on women applicants. The plaintiffs in a case such as this are not required to exhaust every possible source of evidence, if the evidence actually presented on its face conspicuously demonstrates a job requirement's grossly discriminatory impact. If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own. In this case no such effort was made.

B

We turn, therefore, to the appellants' argument that they have rebutted the prima facie case of discrimination by showing that the height and weight requirements are job related. These requirements, they say, have a relationship to strength, a sufficient but unspecified amount of which is essential to effective job performance as a correctional counselor. In the District Court, however, the appellants produced no evidence correlating the height and weight requirements with the requisite amount of strength thought essential to good job performance. Indeed, they failed to offer evidence of any kind in specific justification of the statutory standards.

If the job-related quality that the appellants identify is bona fide, their purpose could be achieved by adopting and validating a test for applicants that measures strength directly. Such a test, fairly administered, would fully satisfy the standards of Title VII because it would be one that ‘measure(s) the person for the job and not the person in the abstract.’ *Griggs v. Duke Power Co.*, 401 U.S., at 436. But nothing in the present record even approaches such a measurement.

For the reasons we have discussed, the District Court was not in error in holding that Title VII of the Civil Rights Act of 1964, as amended, prohibits application of the statutory height and weight requirements to Rawlinson and the class she represents.

III

Unlike the statutory height and weight requirements, Regulation 204 explicitly discriminates against women on the basis of their sex. In defense of this overt discrimination, the appellants rely on s 703(e) of Title VII, 42 U.S.C. s 2000e-2(e), which permits sex-based discrimination ‘in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.’

The District Court rejected the bona-fide occupational-qualification (bfoq) defense, relying on the virtually uniform view of the federal courts that s 703(e) provides only the narrowest of exceptions to the general rule requiring equality of employment opportunities. This view has been variously formulated. In *Diaz v. Pan American World Airways*, 442 F.2d 385, 388, the Court of Appeals for the Fifth Circuit held that 'discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively.' (Emphasis in original.) In an earlier case, *Weeks v. Southern Bell Telephone and Telegraph Co.*, 5 Cir., 408 F.2d 228, 235, the same court said that an employer could rely on the bfoq exception only by proving 'that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.' See also *Phillips v. Martin Marietta Corp*., 400 U.S. 542. But whatever the verbal formulation, the federal courts have agreed that it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes, and the District Court in the present case held in effect that Regulation 204 is based on just such stereotypical assumptions.

We are persuaded by the restrictive language of s 703(e), the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex. In the particular factual circumstances of this case, however, we conclude that the District Court erred in rejecting the State's contention that Regulation 204 falls within the narrow ambit of the bfoq exception.

The environment in Alabama's penitentiaries is a peculiarly inhospitable one for human beings of whatever sex. Indeed, a Federal District Court has held that the conditions of confinement in the prisons of the State, characterized by 'rampant violence' and a 'jungle atmosphere,' are constitutionally intolerable. Pugh v. Locke, 406 F.Supp. 318, 325 (MD Ala.). The record in the present case shows that because of inadequate staff and facilities, no attempt is made in the four maximum-security male penitentiaries to classify or segregate inmates according to their offense or level of dangerousness a procedure that, according to expert testimony, is essential to effective penological administration. Consequently, the estimated 20% of the male prisoners who are sex offenders are scattered throughout the penitentiaries' dormitory facilities.

In this environment of violence and disorganization, it would be an oversimplification to characterize Regulation 204 as an exercise in 'romantic paternalism.' Cf. *Frontiero v. Richardson*, 411 U.S. 677, 684. In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself. More is at stake in this case, however, than an individual woman's decision to weigh and accept the risks of employment in a 'contact' position in a maximum-security male prison.

The essence of a correctional counselor's job is to maintain prison security. A woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary of the type Alabama now runs could be directly reduced by her womanhood. There is a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison. There would also be a real risk that other inmates, deprived of a normal heterosexual environment, would assault women guards because they were women. In a prison system where violence is the order of the day, where inmate access to guards is facilitated by dormitory living arrangements, where every institution is understaffed, and where a substantial portion of the inmate population is composed of sex offenders mixed at random with other prisoners, there are few visible deterrents to inmate assaults on women custodians.

Appellee Rawlinson's own expert testified that dormitory housing for aggressive inmates poses a greater security problem than single-cell lockups, and further testified that it would be unwise to use women as guards in a prison where even 10% of the inmates had been convicted of sex crimes and were not segregated from the other prisoners. The likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel. The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility.

There was substantial testimony from experts on both sides of this litigation that the use of women as guards in ‘contact’ positions under the existing conditions in Alabama maximum-security male penitentiaries would pose a substantial security problem, directly linked to the sex of the prison guard. On the basis of that evidence, we conclude that the District Court was in error in ruling that being male is not a bona fide occupational qualification for the job of correctional counselor in a ‘contact’ position in an Alabama male maximum-security penitentiary.

The judgment is accordingly affirmed in part and reversed in part, and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

....

4.7.1. Timeline

Date	Case Name	Decision	Notes
June 28, 1976	*Mieth v. Dothard* US District Court for the Middle District of Alabama,	Judgment entered in favor of female applicants in their	**First filed in 1976** ● Link

	Northern Division (1976)	class action lawsuit.	
November 29, 1976	*Dothard v. Rawlinson* United States District for the Middle District of Alabama (1976)	The Court ruled in favor of the plaintiff and found that the statute and regulation discriminated against her on the basis of sex.	Found that the state did not sufficiently rebut the prima facie case showing unlawful sex discrimination.
March 7, 1977	*Dothard v. Rawlinson* Supreme Court of the United States (1977)	Motions for Women's Legal Defense Fund et al. and American Civil Liberties Union to file briefs as amici curiae granted.	• Link
June 27, 1977	*Dothard v. Rawlinson* Supreme Court of the United States (1977)	The Court affirmed the Court's ruling that Title VII prohibited application of the statutory height and weight requirements, but found that the Court erred in rejecting the state's BFOQ defense. Remanded for further proceedings.	Title VII does not require that a plaintiff's statistical showing of disparate impact be based on characteristics of the actual job applicants Being male is a BFOQ for a correctional-counselor position that requires close physical proximity to inmates in an all-male maximum- security prison. • Link

4.7.2 Notes

i. *Essence(?!)*

All across *Dothard* we find a persistent thread of assuming that stuff has an *essence*, or that the court must rely on essence to determine discrimination.

The first way in which essence enters the picture is with *Griggs'*-like analysis of disparate impact. The second stage of *Griggs* is that an employer must demonstrate a "manifest

relationship [of the facially neutral criteria] to the employment in question." To demonstrate that, we must hold steady some description of what the employment (job, work, task) "is" or "isn't" to figure out whether or not the criteria in question has a "manifest relation" to it.

The second way in which essence is integrated into *Dothard* is in the discussion of the BFOQ exception. Consider this concluding phrase to the *Dothard* opinion: "The employee's very womanhood would … directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility." The Court stabilizes and connects three moving targets: 1) the "essence" of womanhood; 2) the essence of the employees' duties and 3) the essence of the business, of which the correctional officer duties are a part of.

But if we assume that the court does not have access to some booklet of essences, where do they get this stuff? In a pluralistic society it is expected that people can define for themselves what their essence is, if any (no court can determine the essence of my very "womanhood"). The Court recognizes that recognizing prescriptions of essence to women are "paternalistic" but then seems to veer away from it. Why?

If the Court at least marginally acknowledges that people might be able to assign essence to themselves, they really don't see many alternatives for employer-defined duty and jobs-essence. The Court defers almost entirely to Alabama's description of what it is they do (the essence of the job) and how it is that they are going to do that (the essence of the duties). But, even if we assume that indeed the employer gets to define its business' essence, how can we settle this deference to the employer with the Court's recognition of the failures of Alabama's prison system to maintain exactly that essence? What is at stake here?

ii. *BFOQ's limited coverage - why race and color are out?*

A peculiarity of the BFOQ defense is its limited coverage. BFOQ is an exception to a rule. The rule is that it is an unlawful employment practice to discriminate on the basis of race, color, sex, national origin and religion. But, it is *not* an unlawful employment practice to discriminate on the basis of sex, national origin, and religion if the employer has a BFOQ defense. Note the missing categories of race and color. Why did the legislature create a loophole for some forms of discrimination and not others? What might be the rationale here?

One option follows *Griggs*. In *Griggs*, we had two options for what the role of Title VII is. One was as a general antidiscrimination law, and the other (which we called the antisubordination

thesis) was a device aimed to root out particular forms of discrimination, such as those against Black workers.

Excluding Black workers from BFOQ exclusions does not sit well with general antidiscrimination law, but does sit well with an antisubordination approach. Title VII here is a tool in a particular struggle– racial segregation of the workforce. It may be used for other purposes (i.e., protecting sex, religion, etc.), sure, but those are secondary, less important goals.

See if you can find other reasons for why race and color are not in the BFOQ exclusion.

iii. BFOQ Examples

To get at the scope of the BFOQ exception, try and consider the following examples:

- A religious institution selecting ministries based on religion.
- A Black history museum chooses instructors based on race.
- A Palestinian cultural center chooses guides according to national origin.
- A movie director hires for “Asian” roles based on color and national origin.
- A fashion company hires models based on sex.
- A professor hires an RA for a research project on “sexual harassment on the job” based on sex.

iv. BFOQ and the NLRA and Board

Under Board doctrine, a group of employees covered by a collective bargaining agreement is limited in its ability file for new representation of the bargaining unit. This is called a “Contract Bar.” *See Hexton Furniture Co.*, 111 NLRB 342 (1955). However, over the years the Board decided that discriminatory collective bargaining agreements, for example those that discriminate on the basis of race (and maybe sex) do not create such a bar because of their discriminatory nature.

In comes the BFOQ defense.

In *St. Louis Cordage Mills*, 168 NLRB 981 (1967) the Board held that despite the general notion that discriminatory contracts do not bar new representation petitions, a contract providing for separate sex-based seniority lists remained a bar. Why? Because the Board could not rule out the possibility that such separate seniority lists are not allowed under the BFOQ exception. BFOQ, as all exceptions, have an oversized bite.

See also:
- NLRB Elections Manual, Sec. 9-800, page 110 (2017).

v. BFOQ's Bite in a Color-Blind World

The BFOQ defense has two excluded categories: race and color. When we think about those exclusion we tend to think that those are there to protect Black interests. For some reason, the above explanation suggested, discrimination because of race and color is more important to prevent than discrimination because of sex, national origin and religion.

But, today race and color discrimination claims are color-blind. This means that "because of race" covers Whites as well. So, if I run a Brazilian-heritage museum I can discriminate based on national origin if I have a valid BFOQ defense. But, if I run a Black-heritage museum I can't discriminate based on race and color because I don't have a BFOQ defense.

In this race-blind world the BFOQ stands as another marker for why the category of "race" discrimination, and not specifically Black segregation really matters.

iv. The 1991 Civil Rights Act
(link)

703(k) Burden of proof in disparate impact cases.

(1)

(A) An unlawful employment practice based on disparate impact is established under this title only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)

(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the

elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.
(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.
(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

4.8. United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979)

Full decision: (link); **Docket**: (link); **Oral argument**: (link)

Mr. Justice BRENNAN delivered the opinion of the Court.

Challenged here is the legality of an affirmative action plan—collectively bargained by an employer and a union—that reserves for black employees 50% of the openings in an in-plant craft-training program until the percentage of black craft-workers in the plant is commensurate with the percentage of blacks in the local labor force. The question for decision is whether Congress, in Title VII of the Civil Rights Act of 1964, left employers and unions in the private sector free to take such race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories. We hold that Title VII does not prohibit such race-conscious affirmative action plans.

I

In 1974, petitioner United Steelworkers of America (USWA) and petitioner Kaiser Aluminum & Chemical Corp. (Kaiser) entered into a master collective-bargaining agreement covering terms and conditions of employment at 15 Kaiser plants. The agreement contained, *inter alia*, an affirmative action plan designed to eliminate conspicuous racial imbalances in Kaiser's then almost exclusively white craft-work forces. Black craft-hiring goals were set for each Kaiser plant equal to the percentage of blacks in the respective local labor forces. To enable plants to meet these goals, on-the-job training programs were established to teach unskilled production workers—black and white—the skills necessary to become craftworkers. The plan reserved for black employees 50% of the openings in these newly created in-plant training programs.

This case arose from the operation of the plan at Kaiser's plant in Gramercy, La. Until 1974, Kaiser hired as craftworkers for that plant only persons who had had prior craft experience. Because blacks had long been excluded from craft unions, few were able to present such credentials. As a consequence, prior to 1974 only 1.83% (5 out of 273) of the skilled craftworkers at the Gramercy plant were black, even though the work force in the Gramercy area was approximately 39% black.

Pursuant to the national agreement Kaiser altered its craft-hiring practice in the Gramercy plant. Rather than hiring already trained outsiders, Kaiser established a training program to train its production workers to fill craft openings. Selection of craft trainees was made on the basis of seniority, with the proviso that at least 50% of the new trainees were to be black until the percentage of black skilled craftworkers in the Gramercy plant approximated the percentage of blacks in the local labor force. See 415 F.Supp. 761, 764.

During 1974, the first year of the operation of the Kaiser-USWA affirmative action plan, 13 craft trainees were selected from Gramercy's production work force. Of these, seven were black and six white. The most senior black selected into the program had less seniority than several white production workers whose bids for admission were rejected. Thereafter one of those white production workers, respondent Brian Weber (hereafter respondent), instituted this class action in the United States District Court for the Eastern District of Louisiana.

The complaint alleged that the filling of craft trainee positions at the Gramercy plant pursuant to the affirmative action program had resulted in junior black employees' receiving training in preference to senior white employees, thus discriminating against respondent and other similarly situated white employees in violation of §§ 703(a) and d) of Title VII. The District Court held that the plan violated Title VII, entered a judgment in favor of the plaintiff class, and granted a permanent injunction prohibiting Kaiser and the USWA "from denying plaintiffs, access to on-the-job training programs on the basis of race." divided panel of the Court of Appeals for the Fifth Circuit affirmed, holding that all employment preferences based upon race, including those preferences incidental to bona fide affirmative action plans, violated Title VII's prohibition against racial discrimination in employment. 563 F.2d 216 (1977). We granted certiorari. We reverse.

II

We emphasize at the outset the narrowness of our inquiry. …. The only question before us is the narrow statutory issue of whether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan. ….

Respondent argues that Congress intended in Title VII to prohibit all race-conscious affirmative action plans. Respondent's argument rests upon a literal interpretation of §§ 703(a) and (d) of the Act. Those sections make it unlawful to "discriminate . . . because of . . . race" in hiring and in the selection of apprentices for training programs. Since, the argument runs, *McDonald v. Sante Fe Trail Transp. Co., supra*, settled that Title VII forbids discrimination against whites as well as blacks, and since the Kaiser-USWA affirmative action plan operates to discriminate against

white employees solely because they are white, it follows that the Kaiser-USWA plan violates Title VII.

Respondent's argument is not without force. But it overlooks the significance of the fact that the Kaiser-USWA plan is an affirmative action plan voluntarily adopted by private parties to eliminate traditional patterns of racial segregation. In this context respondent's reliance upon a literal construction of §§ 703(a) and (d) and upon *McDonald* is misplaced. It is a "familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers." *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892). The prohibition against racial discrimination in §§ 703(a) and (d) of Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose. Examination of those sources makes clear that an interpretation of the sections that forbade all race-conscious affirmative action would "bring about an end completely at variance with the purpose of the statute" and must be rejected. *United States v. Public Utilities Comm'n*, 345 U.S. 295 (1953).

Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with "the plight of the N**** in our economy." 110 Cong.Rec. 6548 (1964) (remarks of Sen. Humphrey). Before 1964, blacks were largely relegated to "unskilled and semi-skilled jobs." *Ibid.* (remarks of Sen. Humphrey); *id.*, at 7204 (remarks of Sen. Clark); *id.*, at 7379–7380 (remarks of Sen. Kennedy). Because of automation the number of such jobs was rapidly decreasing. See *id.*, at 6548 (remarks of Sen. Humphrey); *id.*, at 7204 (remarks of Sen. Clark). As a consequence, "the relative position of the N**** worker [was] steadily worsening. In 1947 the nonwhite unemployment rate was only 64 percent higher than the white rate; in 1962 it was 124 percent higher." *Id.*, at 6547 (remarks of Sen. Humphrey). See also *id.*, at 7204 (remarks of Sen. Clark). Congress considered this a serious social problem. As Senator Clark told the Senate:

> "The rate of n**** unemployment has gone up consistently as compared with white unemployment for the past 15 years. This is a social malaise and a social situation which we should not tolerate. That is one of the principal reasons why the bill should pass." *Id.*, at 7220.

Congress feared that the goals of the Civil Rights Act—the integration of blacks into the mainstream of American society—could not be achieved unless this trend were reversed. And Congress recognized that that would not be possible unless blacks were able to secure jobs "which have a future." *Id.*, at 7204 (remarks of Sen. Clark). See also *id.*, at 7379–7380 (remarks of Sen. Kennedy). As Senator Humphrey explained to the Senate:

> "What good does it do a n**** to be able to eat in a fine restaurant if he cannot afford to pay the bill? What good does it do him to be accepted in a hotel that is too expensive for his modest income? How can a n**** child be motivated to take full advantage of

> integrated educational facilities if he has no hope of getting a job where he can use that education?" *Id.*, at 6547.
>
> "Without a job, one cannot afford public convenience and accommodations. Income from employment may be necessary to further a man's education, or that of his children. If his children have no hope of getting a good job, what will motivate them to take advantage of educational opportunities?" *Id.*, at 6552.

These remarks echoed President Kennedy's original message to Congress upon the introduction of the Civil Rights Act in 1963.

> "There is little value in a N****'s obtaining the right to be admitted to hotels and restaurants if he has no cash in his pocket and no job." 109 Cong.Rec. at 11159.

Accordingly, it was clear to Congress that "[t]he crux of the problem [was] to open employment opportunities for N*****s in occupations which have been traditionally closed to them," 10 Cong.Rec. 6548 (1964) (remarks of Sen. Humphrey), and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed.

It plainly appears from the House Report accompanying the Civil Rights Act that Congress did not intend wholly to prohibit private and voluntary affirmative action efforts as one method of solving this problem. The Report provides:

> "No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems *will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination*." H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. 18 (1963). (Emphasis supplied.)

Given this legislative history, we cannot agree with respondent that Congress intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve. The very statutory words intended as a spur or catalyst to cause "employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history," *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, (1975), cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges. It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," 110 Cong.Rec. 6552

(1964) (remarks of Sen. Humphrey), constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Our conclusion is further reinforced by examination of the language and legislative history of § 703(j) of Title VII. Opponents of Title VII raised two related arguments against the bill. First, they argued that the Act would be interpreted to *require* employers with racially imbalanced work forces to grant preferential treatment to racial minorities in order to integrate. Second, they argued that employers with racially imbalanced work forces would grant preferential treatment to racial minorities, even if not required to do so by the Act. See 110 Cong.Rec. 8618–8619 (1964) (remarks of Sen. Sparkman). Had Congress meant to prohibit all race-conscious affirmative action, as respondent urges, it easily could have answered both objections by providing that Title VII would not require or *permit* racially preferential integration efforts. But Congress did not choose such a course. Rather, Congress added § 703(j) which addresses only the first objection. The section provides that nothing contained in Title VII "shall be interpreted to *require* any employer . . . to grant preferential treatment . . . to any group because of the race . . . of such . . . group on account of" a *de facto* racial imbalance in the employer's work force. The section does *not* state that "nothing in Title VII shall be interpreted to *permit* " voluntary affirmative efforts to correct racial imbalances. The natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action.

The reasons for this choice are evident from the legislative record. Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that "management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible." H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 29 (1963). Section 703(j) was proposed by Senator Dirksen to allay any fears that the Act might be interpreted in such a way as to upset this compromise. The section was designed to prevent § 703 of Title VII from being interpreted in such a way as to lead to undue "Federal Government interference with private businesses because of some Federal employee's ideas about racial balance or racial imbalance." 110 Cong.Rec. 14314 (1964) (remarks of Sen. Miller). Clearly, a prohibition against all voluntary, race-conscious, affirmative action efforts would disserve these ends. Such a prohibition would augment the powers of the Federal Government and diminish traditional management prerogatives while at the same time impeding attainment of the ultimate statutory goals. In view of this legislative history and in view of Congress' desire to avoid undue federal regulation of private businesses, use of the word "require" rather than the phrase "require or permit" in § 703(j) fortifies the conclusion that Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action.

We therefore hold that Title VII's prohibition in §§ 703(a) and (d) against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans.

III

We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged Kaiser-USWA affirmative action plan falls on the permissible side of the line. The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to "open employment opportunities for N*****s in occupations which have been traditionally closed to them." 110 Cong.Rec. 6548 (1964) (remarks of Sen. Humphrey).

At the same time, the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hirees. Cf. *McDonald v. Santa Fe Trail Transp. Co.,* 427 U.S. 273 (1976). Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craftworkers in the Gramercy plant approximates the percentage of blacks in the local labor force.

We conclude, therefore, that the adoption of the Kaiser-USWA plan for the Gramercy plant falls within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories. Accordingly, the judgment of the Court of Appeals for the Fifth Circuit is

Reversed.

Mr. Justice BLACKMUN, concurring [omitted]

….

Mr. Justice REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

In a very real sense, the Court's opinion is ahead of its time: it could more appropriately have been handed down five years from now, in 1984, a year coinciding with the title of a book from which the Court's opinion borrows, perhaps subconsciously, at least one idea. Orwell describes in his book a governmental official of Oceania, one of the three great world powers, denouncing the current enemy, Eurasia, to an assembled crowd:

> It was almost impossible to listen to him without being first convinced and then maddened. . . . The speech had been proceeding for perhaps twenty minutes when a messenger hurried onto the platform and a scrap of paper was slipped into the speaker's

> hand. He unrolled and read it without pausing in his speech. Nothing altered in his voice or manner, or in the content of what he was saying, but suddenly the names were different. Without words said, a wave of understanding rippled through the crowd. Oceania was at war with Eastasia! . . . The banners and posters with which the square was decorated were all wrong! . . .
>
> [T]he speaker had switched from one line to the other actually in mid-sentence, not only without a pause, but without even breaking the syntax." G. Orwell, Nineteen Eighty-Four 181–182 (1949).

Today's decision represents an equally dramatic and equally unremarked switch in this Court's interpretation of Title VII.

The operative sections of Title VII prohibit racial discrimination in employment *simpliciter.* Taken in its normal meaning and as understood by all Members of Congress who spoke to the issue during the legislative debates, this language prohibits a covered employer from considering race when making an employment decision, whether the race be black or white. Several years ago, however, a United States District Court held that "the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged N**** employee does not raise a claim upon which Title VII relief may be granted." *McDonald v. Santa Fe Trail Transp. Co.,* 427 U.S. 273, 278 (1976). This Court unanimously reversed, concluding from the "uncontradicted legislative history" that "[T]itle VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they n*****s . . . ." *Id.*, at 280.

We have never wavered in our understanding that Title VII "prohibits *all* racial discrimination in employment, without exception for any group of particular employees." *Id.,* at 283. In *Griggs v. Duke Power Co.,* 401 U.S. 424, (1971), our first occasion to interpret Title VII, a unanimous Court observed that "[d]iscriminatory preference, for any group, minority or majority, is precisely and only what Congress has proscribed." And in our most recent discussion of the issue, we uttered words seemingly dispositive of this case: "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." *Furnco Construction Corp. v. Waters,* 438 U.S. 567 (1978) (emphasis in original).

Today, however, the Court behaves much like the Orwellian speaker earlier described, as if it had been handed a note indicating that Title VII would lead to a result unacceptable to the Court if interpreted here as it was in our prior decisions. Accordingly, without even a break in syntax, the Court rejects "a literal construction of § 703(a)" in favor of newly discovered "legislative history," which leads it to a conclusion directly contrary to that compelled by the "uncontradicted legislative history" unearthed in *McDonald* and our other prior decisions. Now

we are told that the legislative history of Title VII shows that employers are free to discriminate on the basis of race: an employer may, in the Court's words, "trammel the interests of the white employees" in favor of black employees in order to eliminate "racial imbalance." Our earlier interpretations of Title VII, like the banners and posters decorating the square in Oceania, were all wrong.

….

Thus, by a *tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini, the Court eludes clear statutory language, "uncontradicted" legislative history and uniform precedent in concluding that employers are, after all, permitted to consider race in making employment decisions. It may be that one or more of the principal sponsors of Title VII would have preferred to see a provision allowing preferential treatment of minorities written into the bill. Such a provision, however, would have to have been expressly or impliedly excepted from Title VII's explicit prohibition on all racial discrimination in employment. There is no such exception in the Act. And a reading of the legislative debates concerning Title VII, in which proponents and opponents alike uniformly denounced discrimination in favor of, as well as discrimination against, N*****s, demonstrates clearly that any legislator harboring an unspoken desire for such a provision could not possibly have succeeded in enacting it into law.

I

….

Brian Weber is white. He was hired at Kaiser's Gramercy plant in 1968. In April 1974, Kaiser announced that it was offering a total of nine positions in three on-the-job training programs for skilled craft jobs. Weber applied for all three programs, but was not selected. The successful candidates—five black and four white applicants—were chosen in accordance with the 50% minority admission quota mandated under the 1974 collective-bargaining agreement. Two of the successful black applicants had less seniority than Weber. Weber brought the instant class action in the United States District Court for the Eastern District of Louisiana, alleging that use of the 50% minority admission quota to fill vacancies in Kaiser's craft training programs violated Title VII's prohibition on racial discrimination in employment. ….

II

Were Congress to act today specifically to prohibit the type of racial discrimination suffered by Weber, it would be hard pressed to draft language better tailored to the task than that found in § 703(d) of Title VII:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of

> his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.
> 78 Stat. 256, 42 U.S.C. § 2000e–2(d).

Equally suited to the task would be § 703(a)(2), which makes it unlawful for an employer to classify his employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a)(2).

Entirely consistent with these two express prohibitions is the language of § 703(j) of Title VII, which provides that the Act is not to be interpreted "to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group" to correct a racial imbalance in the employer's work force. 42 U.S.C. § 2000e–2(j). Seizing on the word "require," the Court infers that Congress must have intended to "permit" this type of racial discrimination. Not only is this reading of § 703(j) outlandish in the light of the flat prohibitions of §§ 703(a) and (d), but also, as explained in Part III, it is totally belied by the Act's legislative history.

Quite simply, Kaiser's racially discriminatory admission quota is flatly prohibited by the plain language of Title VII. This normally dispositive fact, however, gives the Court only momentary pause. An "interpretation" of the statute upholding Weber's claim would, according to the Court, " 'bring about an end completely at variance with the purpose of the statute.'" To support this conclusion, the Court calls upon the "spirit" of the Act, which it divines from passages in Title VII's legislative history indicating that enactment of the statute was prompted by Congress' desire " 'to open employment opportunities for N*****s in occupations which [had] been traditionally closed to them.' " *Ante,* at 2728, quoting 110 Cong.Rec. 6548 (1964) (remarks of Sen. Humphrey). But the legislative history invoked by the Court to avoid the plain language of §§ 703(a) and (d) simply misses the point. To be sure, the reality of employment discrimination against N*****s provided the primary impetus for passage of Title VII. But this fact by no means supports the proposition that Congress intended to leave employers free to discriminate against white persons. ….

….

There is perhaps no device more destructive to the notion of equality than the *numerus clausus* —the quota. Whether described as "benign discrimination" or "affirmative action," the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another. In passing Title VII, Congress outlawed *all* racial discrimination, recognizing that no discrimination based on race is benign, that no action disadvantaging a person because of his color is affirmative. With today's holding, the Court introduces into Title VII a tolerance for the very evil that the law was intended to eradicate, without offering even a clue as to what the limits on that tolerance may be. We are told simply that Kaiser's racially discriminatory admission quota "falls on the permissible side of the line." *Ante,* at 2730. By going not

merely *beyond*, but directly *against* Title VII's language and legislative history, the Court has sown the wind. Later courts will face the impossible task of reaping the whirlwind.

4.8.1. Timeline

Date	Case Name	Decision	Notes
June 17, 1976	*Weber v. Kaiser Aluminum and Chemical Corp.* US District Court for the Eastern District of Louisiana (1976)	Court granted the employees a permanent injunction restraining the employer and the union from denying the employees action to training on the basis of race.	**First filed in 1976** A collectively bargained affirmative action plan violated Title VII • Link
November 17, 1977	*Weber v. Kaiser Aluminum and Chemical Corp.* US Court of Appeals for the Fifth Circuit (1977)	Affirmed decision of District Court.	Congress did not intend for Title VII to disadvantage other workers Executive order does not override Congressional order • Link Rehearing request denied on **April 17, 1978** • Link
Argued March 28, 1979 **Decided June 27, 1979**	*United Steelworkers of America, AFL-CIO-CLC v. Weber* Supreme Court of the United States (1979)	Court reversed the appellate court's affirmance of the District Court's finding; found in favor of Steelworkers.	Affirmative action policies are allowed under Title VII if they aim to correct past discrimination, have a goal/fixed, and do not disadvantage majority workers • Link

			Petition for rehearing denied on **October 1, 1979** • Link
February 1, 1980	*Weber v. Kaiser Aluminum and Chemical Corp.* US Court of Appeals for the Fifth Circuit (1980)	Vacate trial court judgment, as per Supreme Court mandate, and remand the cause to that court for further proceedings in line with the Supreme Court's opinion.	Affirmative action plan held to not violate Title VII's prohibition against racial discrimination. • Link

4.8.2. Notes

i. Why are affirmative action plans not prohibited under Title VII?

Let's go over the legal structure once again. Title VII prohibits discrimination because of race. It does so explicitly in numerous sections, such as 703(a)(2). In *Griggs* and *Dothard* however, we found exceptions to this rule. *Griggs* dealt with the "professionally developed test" exception in 703(h), and *Dothard*, amongst other things, dealt with the BFOQ exception. Both are based on explicit (as in, based on the words of the statutory text) exemptions from the general do-not-discriminate rule.

In *Steelworkers*, the Court tells us that affirmative action plans are allowed because it is inconceivable that "Congress intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve."

Ok, so they are saying that there is no explicit statutory anchor. But that poses all kinds of questions and problems.

First and foremost, why can't Congress be assumed to tell us what is allowed and not allowed in the text of Title VII? Affirmative action plans were not a novel development. They were known to the legislature, so how come plaintiffs are barred from arguing that those programs are discriminatory based on race if it does not state explicitly that those programs are excluded?

In other words, why, when Congress chose to exclude professionally developed tests, or BFOQ positions, amongst others, from the scope of Title VII, it chose to put it in writing, and here– nothing?

ii. A substantive answer to why protect affirmative action plans - Title VII is about antisubordination

One substantive intuition as to why the Court is protecting affirmative action plans against White workers' complaints follows the antisubordination prong.

According to this line of thinking, we all know what Congress was doing in passing Title VII– trying to eliminate the racial segregation of the workforce. And everything in the Act ought to be read under that light– including implicit carve outs for White plaintiffs arguing against affirmative action plans. Title VII was not race-blind - it had a clear goal a-la-*Griggs* of putting an end to a particular racial status quo and a specific set of harms suffered by Black workers. White workers' pleas under Title VII that would work to stifle that goal (maintain the status quo in a *Griggs* fashion) are of lesser importance and ought to be treated as such.

iii. *Antidiscrimination law and the employer prerogative*
In later cases, *Steelworkers* is cited for the proposition that "Title VII …. prohibit[s] discrimination against historically disadvantaged groups, without 'diminishing traditional management prerogatives,' *Steelworkers* v. *Weber*, 443 U.S. 193, 207 (1979)" (Holder v. Hall, 512 U.S. 874, 956 (1994) (link)).

So, according to this statement of the principle underlying *Steelworkers*, Title VII is a device used to curb discrimination, but one that must do so "without diminishing traditional management prerogatives."

Hmm. What are those "traditional employer prerogatives?" Well, the canonical list would include: hiring, termination, setting wages, and allocating workplace resources, responsibilities, and more. Everything we think employers are legally allowed to do is by default [checks notes…], everything.

So what does it mean that Title VII prevents discrimination except in issues of employer prerogative? Isn't the whole purpose of Title VII, and perhaps of work law more broadly, to take stuff out of the traditional employer prerogative?

A literal reading of this sentence is meaningless. Or at least it leaves Title VII as meaningless. But, Title VII is not meaningless, so we are left with the only other option of reading this: narrowing the scope of Title VII. Limiting and capping its carve outs of traditional employer prerogative. A balance of a sort.

Note the connection between the Court-made carve outs to statutory law, the employer prerogative, and the sticky notion of balancing. We will revisit this theme in the labor law module.

iv. Affirmative Action as Discrimination in Higher Ed Admissions

Since *Steelworkers*, the Supreme Court has changed its views about affirmative action from a device so intrinsic to the goals of antidiscrimination policy that it is immune from racial discrimination claims, into a discriminatory device in itself.

Over the course of five decades the Court questioned, then capped, then prohibited affirmative action plans in educational institutions admissions. The reasoning behind it is orthogonal to the reasoning of *Steelworkers*. "The way to stop discrimination based on race is to stop discriminating based on race." Chief Justice Roberts said in 2007 (*Parents Involved in Community Schools v. Seattle School District No.* 1, 551 U.S. 701, 748 (2007)(link)) and once again, in 2023, repeating that "eliminating racial discrimination means eliminating all of it." (SFFA v. Harvard, 600 U.S. 181, 206 (2023)(link)).

The nexus between affirmative action in the higher-ed context and employment decisions in Title VII was always clear. In *SFFA v. Harvard*, Justice Gorsuch made that connection explicit by stating that Title VII offers "essentially identical terms" to those of Title VI, the legal hook in Harvard's case.

For reasons discussed later, not many private-sector affirmative action plans exist. However, things that look like affirmative action plans, namely various DEI initiatives, do exist and are under contemporary scrutiny. If *Steelworkers* might survive on the books, it may simply be because affirmative actions have gone mostly extinct in the real world.

4.9. Bostock v. Clayton Cnty., Georgia 140 S. Ct. 1731 (2020)

Full decision: (link); **Docket**: (link); **Oral argument**: (link)

Justice GORSUCH delivered the opinion of the Court.

Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.

I

Few facts are needed to appreciate the legal question we face. Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status.

Gerald Bostock worked for Clayton County, Georgia, as a child welfare advocate. Under his leadership, the county won national awards for its work. After a decade with the county, Mr. Bostock began participating in a gay recreational softball league. Not long after that, influential members of the community allegedly made disparaging comments about Mr. Bostock's sexual orientation and participation in the league. Soon, he was fired for conduct “unbecoming” a county employee.

Donald Zarda worked as a skydiving instructor at Altitude Express in New York. After several seasons with the company, Mr. Zarda mentioned that he was gay and, days later, was fired. Aimee Stephens worked at R.G. & G.R. Harris Funeral Homes in Garden City, Michigan. When she got the job, Ms. Stephens presented as a male. But two years into her service with the company, she began treatment for despair and loneliness. Ultimately, clinicians diagnosed her with gender dysphoria and recommended that she begin living as a woman. In her sixth year with the company, Ms. Stephens wrote a letter to her employer explaining that she planned to “live and work full-time as a woman” after she returned from an upcoming vacation. The funeral home fired her before she left, telling her “this is not going to work out.”

While these cases began the same way, they ended differently. Each employee brought suit under Title VII alleging unlawful discrimination on the basis of sex. 42 U.S.C. § 2000e–2(a)(1). In Mr. Bostock's case, the Eleventh Circuit held that the law does not prohibit employers from firing employees for being gay and so his suit could be dismissed as a matter of law. Meanwhile, in Mr. Zarda's case, the Second Circuit concluded that sexual orientation discrimination does violate Title VII and allowed his case to proceed. Ms. Stephens's case has a more complex procedural history, but in the end the Sixth Circuit reached a decision along the same lines as the Second Circuit's, holding that Title VII bars employers from firing employees because of their transgender status. During the course of the proceedings in these long-running disputes, both Mr. Zarda and Ms. Stephens have passed away. But their estates continue to press their causes for the benefit of their heirs. And we granted certiorari in these matters to resolve at last the disagreement among the courts of appeals over the scope of Title VII's protections for homosexual and transgender persons.

II

This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.

With this in mind, our task is clear. We must determine the ordinary public meaning of Title VII's command that it is “unlawful ... for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.” § 2000e–2(a)(1). To do so, we orient ourselves to the time of the statute's adoption, here 1964, and begin by examining the key statutory terms in turn before assessing their impact on the cases at hand and then confirming our work against this Court's precedents.

A

The only statutorily protected characteristic at issue in today's cases is “sex”—and that is also the primary term in Title VII whose meaning the parties dispute. Appealing to roughly contemporaneous dictionaries, the employers say that, as used here, the term “sex” in 1964 referred to “status as either male or female [as] determined by reproductive biology.” The employees counter by submitting that, even in 1964, the term bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation. But because nothing in our approach to these cases turns on the outcome of the

parties' debate, and because the employees concede the point for argument's sake, we proceed on the assumption that "sex" signified what the employers suggest, referring only to biological distinctions between male and female.

Still, that's just a starting point. The question isn't just what "sex" meant, but what Title VII says about it. Most notably, the statute prohibits employers from taking certain actions "because of " sex. And, as this Court has previously explained, "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.' " *University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. 338, 350, (2013). In the language of law, this means that Title VII's "because of " test incorporates the " 'simple' " and "traditional" standard of but-for causation. *Nassar*, 570 U.S. at 346, 360. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. See *Gross*, 557 U.S. at 176, 129 S.Ct. 2343. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.

This can be a sweeping standard. Often, events have multiple but-for causes. So, for example, if a car accident occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. Cf. *Burrage v. United States*, 571 U.S. 204, 211–212 (2014). When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff 's sex was one but-for cause of that decision, that is enough to trigger the law. See *ibid.*; *Nassar*, 570 U.S. at 350, 133 S.Ct. 2517.

No doubt, Congress could have taken a more parsimonious approach. As it has in other statutes, it could have added "solely" to indicate that actions taken "because of " the confluence of multiple factors do not violate the law. Or it could have written "primarily because of " to indicate that the prohibited factor had to be the main cause of the defendant's challenged employment decision. But none of this is the law we have. If anything, Congress has moved in the opposite direction, supplementing Title VII in 1991 to allow a plaintiff to prevail merely by showing that a protected trait like sex was a "motivating factor" in a defendant's challenged employment practice. Civil Rights Act of 1991, § 107, codified at 42 U.S.C. § 2000e–2(m). Under this more forgiving standard, liability can sometimes follow even if sex *wasn't* a but-for cause of the employer's challenged decision. Still, because nothing in our analysis depends on the motivating factor test, we focus on the more traditional but-for causation standard that continues to afford a viable, if no longer exclusive, path to relief under Title VII. § 2000e–2(a)(1).

As sweeping as even the but-for causation standard can be, Title VII does not concern itself with everything that happens "because of " sex. The statute imposes liability on employers only when

they “fail or refuse to hire,” “discharge,” “or otherwise ... discriminate against” someone because of a statutorily protected characteristic like sex. The employers acknowledge that they discharged the plaintiffs in today's cases, but assert that the statute's list of verbs is qualified by the last item on it: “otherwise ... discriminate against.” By virtue of the word *otherwise*, the employers suggest, Title VII concerns itself not with every discharge, only with those discharges that involve discrimination.

Accepting this point, too, for argument's sake, the question becomes: What did “discriminate” mean in 1964? As it turns out, it meant then roughly what it means today: “To make a difference in treatment or favor (of one as compared with others).” Webster's New International Dictionary 745 (2d ed. 1954). To “discriminate against” a person, then, would seem to mean treating that individual worse than others who are similarly situated. See *Burlington N. & S. F. R. Co. v. White*, 548 U.S. 53, 59 (2006). In so-called “disparate treatment” cases like today's, this Court has also held that the difference in treatment based on sex must be intentional. See, *e.g., Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988). So, taken together, an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII.

At first glance, another interpretation might seem possible. Discrimination sometimes involves “the act, practice, or an instance of discriminating categorically rather than individually.” Webster's New Collegiate Dictionary 326 (1975). On that understanding, the statute would require us to consider the employer's treatment of groups rather than individuals, to see how a policy affects one sex as a whole versus the other as a whole. That idea holds some intuitive appeal too. Maybe the law concerns itself simply with ensuring that employers don't treat women generally less favorably than they do men. So how can we tell which sense, individual or group, “discriminate” carries in Title VII?

The statute answers that question directly. It tells us three times—including immediately after the words “discriminate against”—that our focus should be on individuals, not groups: Employers may not “fail or refuse to hire or ... discharge any *individual*, or otherwise ... discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* ... sex.” § 2000e–2(a)(1). And the meaning of “individual” was as uncontroversial in 1964 as it is today: “A particular being as distinguished from a class, species, or collection.” Webster's New International Dictionary, at 1267. Here, again, Congress could have written the law differently. It might have said that “it shall be an unlawful employment practice to prefer one sex to the other in hiring, firing, or the terms or conditions of employment.” It might have said that there should be no “sex discrimination,” perhaps implying a focus on differential treatment between the two sexes as groups. More narrowly still, it could have forbidden only “sexist policies” against women as a class. But, once again, that is not the law we have.

The consequences of the law's focus on individuals rather than groups are anything but academic. Suppose an employer fires a woman for refusing his sexual advances. It's no defense for the employer to note that, while he treated that individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall. The employer is liable for treating *this* woman worse in part because of her sex. Nor is it a defense for an employer to say it discriminates against both men and women because of sex. This statute works to protect individuals of both sexes from discrimination, and does so equally. So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in *both* cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it.

B

From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff 's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred. Title VII's message is “simple but momentous”: An individual employee's sex is “not relevant to the selection, evaluation, or compensation of employees.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989).

The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the

individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

That distinguishes these cases from countless others where Title VII has nothing to say. Take an employer who fires a female employee for tardiness or incompetence or simply supporting the wrong sports team. Assuming the employer would not have tolerated the same trait in a man, Title VII stands silent. But unlike any of these other traits or actions, homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.

Nor does it matter that, when an employer treats one employee worse because of that individual's sex, other factors may contribute to the decision. Consider an employer with a policy of firing any woman he discovers to be a Yankees fan. Carrying out that rule because an employee is a woman *and* a fan of the Yankees is a firing "because of sex" if the employer would have tolerated the same allegiance in a male employee. Likewise here. When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—*both* the individual's sex *and* something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach.

Reframing the additional causes in today's cases as additional intentions can do no more to insulate the employers from liability. Intentionally burning down a neighbor's house is arson, even if the perpetrator's ultimate intention (or motivation) is only to improve the view. No less, intentional discrimination based on sex violates Title VII, even if it is intended only as a means to achieving the employer's ultimate goal of discriminating against homosexual or transgender employees. There is simply no escaping the role intent plays here: Just as sex is necessarily a but-for *cause* when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably *intends* to rely on sex in its decisionmaking. Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman. To be sure, that employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex.

An employer musters no better a defense by responding that it is equally happy to fire male *and* female employees who are homosexual or transgender. Title VII liability is not limited

to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women. Instead, the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII. So just as an employer who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability, an employer who fires both Hannah and Bob for being gay or transgender does the same.

At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that "should be the end of the analysis." 883 F.3d at 135 (Cabranes, J., concurring in judgment).

….

III

What do the employers have to say in reply? For present purposes, they do not dispute that they fired the plaintiffs for being homosexual or transgender. Sorting out the true reasons for an adverse employment decision is often a hard business, but none of that is at issue here. Rather, the employers submit that even intentional discrimination against employees based on their homosexuality or transgender status supplies no basis for liability under Title VII.

The employers' argument proceeds in two stages. Seeking footing in the statutory text, they begin by advancing a number of reasons why discrimination on the basis of homosexuality or transgender status doesn't involve discrimination because of sex. But each of these arguments turns out only to repackage errors we've already seen and this Court's precedents have already rejected. In the end, the employers are left to retreat beyond the statute's text, where they fault us for ignoring the legislature's purposes in enacting Title VII or certain expectations about its operation. They warn, too, about consequences that might follow a ruling for the employees. But none of these contentions about what the employers think the law was meant to do, or should do, allow us to ignore the law as it is.

A

Maybe most intuitively, the employers assert that discrimination on the basis of homosexuality and transgender status aren't referred to as sex discrimination in ordinary conversation. If asked by a friend (rather than a judge) why they were fired, even today's plaintiffs would likely respond that it was because they were gay or transgender, not because of sex. According to the employers, that conversational answer, not the statute's strict terms, should guide our thinking and suffice to defeat any suggestion that the employees now before us were fired because of sex.

But this submission rests on a mistaken understanding of what kind of cause the law is looking for in a Title VII case. In conversation, a speaker is likely to focus on what seems most relevant or informative to the listener. So an employee who has just been fired is likely to identify the primary or most direct cause rather than list literally every but-for cause. To do otherwise would be tiring at best. But these conversational conventions do not control Title VII's legal analysis, which asks simply whether sex was a but-for cause. In *Phillips*, for example, a woman who was not hired under the employer's policy might have told her friends that her application was rejected because she was a mother, or because she had young children. Given that many women could be hired under the policy, it's unlikely she would say she was not hired because she was a woman. But the Court did not hesitate to recognize that the employer in *Phillips* discriminated against the plaintiff because of her sex. Sex wasn't the only factor, or maybe even the main factor, but it was one but-for cause—and that was enough. You can call the statute's but-for causation test what you will—expansive, legalistic, the dissents even dismiss it as wooden or literal. But it is the law.

Trying another angle, the defendants before us suggest that an employer who discriminates based on homosexuality or transgender status doesn't *intentionally* discriminate based on sex, as a disparate treatment claim requires. But, as we've seen, an employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules. An employer that announces it will not employ anyone who is homosexual, for example, intends to penalize male employees for being attracted to men and female employees for being attracted to women.

What, then, do the employers mean when they insist intentional discrimination based on homosexuality or transgender status isn't intentional discrimination based on sex? Maybe the employers mean they don't intend to harm one sex or the other as a class. But as should be clear by now, the statute focuses on discrimination against individuals, not groups. Alternatively, the employers may mean that they don't perceive themselves as motivated by a desire to discriminate based on sex. But nothing in Title VII turns on the employer's labels or any further intentions (or motivations) for its conduct beyond sex discrimination. In *Manhart*, the employer intentionally required women to make higher pension contributions only to fulfill the further purpose of making things more equitable between men and women as groups. In *Phillips*, the employer may have perceived itself as discriminating based on motherhood, not sex, given that its hiring policies as a whole *favored* women. But in both cases, the Court set all this aside as irrelevant. The employers' policies involved intentional discrimination because of sex, and Title VII liability necessarily followed.

Aren't these cases different, the employers ask, given that an employer could refuse to hire a gay or transgender individual without ever learning the applicant's sex? Suppose an employer asked homosexual or transgender applicants to tick a box on its application form. The employer then had someone else redact any information that could be used to discern sex. The resulting

applications would disclose which individuals are homosexual or transgender without revealing whether they also happen to be men or women. Doesn't that possibility indicate that the employer's discrimination against homosexual or transgender persons cannot be sex discrimination?

No, it doesn't. Even in this example, the individual applicant's sex still weighs as a factor in the employer's decision. Change the hypothetical ever so slightly and its flaws become apparent. Suppose an employer's application form offered a single box to check if the applicant is either black or Catholic. If the employer refuses to hire anyone who checks that box, would we conclude the employer has complied with Title VII, so long as it studiously avoids learning any particular applicant's race or religion? Of course not: By intentionally setting out a rule that makes hiring turn on race or religion, the employer violates the law, whatever he might know or not know about individual applicants.

The same holds here. There is no way for an applicant to decide whether to check the homosexual or transgender box without considering sex. To see why, imagine an applicant doesn't know what the words homosexual or transgender mean. Then try writing out instructions for who should check the box without using the words man, woman, or sex (or some synonym). It can't be done. Likewise, there is no way an employer can discriminate against those who check the homosexual or transgender box without discriminating in part because of an applicant's sex. By discriminating against homosexuals, the employer intentionally penalizes men for being attracted to men and women for being attracted to women. By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today. Any way you slice it, the employer intentionally refuses to hire applicants in part because of the affected individuals' sex, even if it never learns any applicant's sex.

Next, the employers turn to Title VII's list of protected characteristics—race, color, religion, sex, and national origin. Because homosexuality and transgender status can't be found on that list and because they are conceptually distinct from sex, the employers reason, they are implicitly excluded from Title VII's reach. Put another way, if Congress had wanted to address these matters in Title VII, it would have referenced them specifically.

But that much does not follow. We agree that homosexuality and transgender status are distinct concepts from sex. But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second. Nor is there any such thing as a "canon of donut holes," in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule. And that is exactly how this Court has always approached Title VII. "Sexual harassment" is conceptually distinct from sex discrimination, but it can fall within Title VII's

sweep. *Oncale*, 523 U.S. at 79–80. Same with "motherhood discrimination." See *Phillips*, 400 U.S. at 544. Would the employers have us reverse those cases on the theory that Congress could have spoken to those problems more specifically? Of course not. As enacted, Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them.

The employers try the same point another way. Since 1964, they observe, Congress has considered several proposals to add sexual orientation to Title VII's list of protected characteristics, but no such amendment has become law. Meanwhile, Congress has enacted other statutes addressing other topics that do discuss sexual orientation. This postenactment legislative history, they urge, should tell us something.

But what? There's no authoritative evidence explaining why later Congresses adopted other laws referencing sexual orientation but didn't amend this one. Maybe some in the later legislatures understood the impact Title VII's broad language already promised for cases like ours and didn't think a revision needed. Maybe others knew about its impact but hoped no one else would notice. Maybe still others, occupied by other concerns, didn't consider the issue at all. All we can know for certain is that speculation about why a later Congress declined to adopt new legislation offers a "particularly dangerous" basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt. *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U.S. 633, 650 (1990); *Sullivan v. Finkelstein*, 496 U.S. 617, 632, 110 S.Ct. 2658, 110 L.Ed.2d 563 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative history ... should not be taken seriously, not even in a footnote").

That leaves the employers to seek a different sort of exception. Maybe the traditional and simple but-for causation test should apply in all other Title VII cases, but it just doesn't work when it comes to cases involving homosexual and transgender employees. The test is too blunt to capture the nuances here. The employers illustrate their concern with an example. When we apply the simple test to Mr. Bostock—asking whether Mr. Bostock, a man attracted to other men, would have been fired had he been a woman—we don't just change his sex. Along the way, we change his sexual orientation too (from homosexual to heterosexual). If the aim is to isolate whether a plaintiff 's sex caused the dismissal, the employers stress, we must hold sexual orientation constant—meaning we need to change both his sex and the sex to which he is attracted. So for Mr. Bostock, the question should be whether he would've been fired if he were a woman attracted to women. And because his employer would have been as quick to fire a lesbian as it was a gay man, the employers conclude, no Title VII violation has occurred.

While the explanation is new, the mistakes are the same. The employers might be onto something if Title VII only ensured equal treatment between groups of men and women or if the statute applied only when sex is the sole or primary reason for an employer's challenged adverse employment action. But both of these premises are mistaken. Title VII's plain terms and our precedents don't care if an employer treats men and women comparably as groups; an employer

who fires both lesbians and gay men equally doesn't diminish but doubles its liability. Just cast a glance back to *Manhart*, where it was no defense that the employer sought to equalize pension contributions based on life expectancy. Nor does the statute care if other factors besides sex contribute to an employer's discharge decision. Mr. Bostock's employer might have decided to fire him only because of the confluence of two factors, his sex and the sex to which he is attracted. But exactly the same might have been said in *Phillips*, where motherhood was the added variable.

Still, the employers insist, something seems different here. Unlike certain other employment policies this Court has addressed that harmed only women or only men, the employers' policies in the cases before us have the same adverse consequences for men and women. How could sex be necessary to the result if a member of the opposite sex might face the same outcome from the same policy?

What the employers see as unique isn't even unusual. Often in life and law two but-for factors combine to yield a result that could have also occurred in some other way. Imagine that it's a nice day outside and your house is too warm, so you decide to open the window. Both the cool temperature outside and the heat inside are but-for causes of your choice to open the window. That doesn't change just because you also would have opened the window had it been warm outside and cold inside. In either case, no one would deny that the window is open "because of" the outside temperature. Our cases are much the same. So, for example, when it comes to homosexual employees, male sex and attraction to men are but-for factors that can combine to get them fired. The fact that female sex and attraction to women can *also* get an employee fired does no more than show the same outcome can be achieved through the combination of different factors. In either case, though, sex plays an essential but-for role.

At bottom, the employers' argument unavoidably comes down to a suggestion that sex must be the sole or primary cause of an adverse employment action for Title VII liability to follow. And, as we've seen, that suggestion is at odds with everything we know about the statute. Consider an employer eager to revive the workplace gender roles of the 1950s. He enforces a policy that he will hire only men as mechanics and only women as secretaries. When a qualified woman applies for a mechanic position and is denied, the "simple test" immediately spots the discrimination: A qualified man would have been given the job, so sex was a but-for cause of the employer's refusal to hire. But like the employers before us today, this employer would say not so fast. By comparing the woman who applied to be a mechanic to a man who applied to be a mechanic, we've quietly changed two things: the applicant's sex and her trait of failing to conform to 1950s gender roles. The "simple test" thus overlooks that it is really the applicant's bucking of 1950s gender roles, not her sex, doing the work. So we need to hold that second trait constant: Instead of comparing the disappointed female applicant to a man who applied for the

same position, the employer would say, we should compare her to a man who applied to be a secretary. And because that jobseeker would be refused too, this must not be sex discrimination.

No one thinks *that*, so the employers must scramble to justify deploying a stricter causation test for use only in cases involving discrimination based on sexual orientation or transgender status. Such a rule would create a curious discontinuity in our case law, to put it mildly. Employer hires based on sexual stereotypes? Simple test. Employer sets pension contributions based on sex? Simple test. Employer fires men who do not behave in a sufficiently masculine way around the office? Simple test. But when that same employer discriminates against women who are attracted to women, or persons identified at birth as women who later identify as men, we suddenly roll out a new and more rigorous standard? Why are *these* reasons for taking sex into account different from all the rest? Title VII's text can offer no answer.
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Some of those who supported adding language to Title VII to ban sex discrimination may have hoped it would derail the entire Civil Rights Act. Yet, contrary to those intentions, the bill became law. Since then, Title VII's effects have unfolded with far-reaching consequences, some likely beyond what many in Congress or elsewhere expected.

But none of this helps decide today's cases. Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.

It is so ordered.

4.9.1. Timeline

Date	Case Name	Decision	Notes
November 3, 2016	*Bostock v. Clayton County* US District Court for the Northern District of Georgia, Atlanta Division (2016)	Defendant's Motion to Dismiss is granted, and second complaint is dismissed with prejudice.	**First filed in 2016** • Link
July 21, 2017	*Bostock v. Clayton County* United States District Court for the Northern District (2017)	Dismissed Bostock's employment discrimination suit under Title VII	• Link
May 10, 2018	*Bostock v. Clayton County Board of Commissioners*	Affirmed the district court's decision	• Link

	Fourth Circuit Court of Appeals (2018)		• Rehearing denied on **July 18, 2018** ○ Link
May 25, 2018	*Bostock v. Clayton County* Supreme Court of the United States (2018)	Petition for writ of certiorari filed.	• Link
April 22, 2019	*Bostock v. Clayton County* Supreme Court of the United States (2019)	Petition for writ of certiorari granted, cases consolidated, and one hour is allotted for oral argument.	• Link
June 26 2019 - August 23	*Bostock v. Clayton County* Supreme Court of the United States (2019)	Amicus briefs, brief amici curiae filed	• Docket & Documents
Argued October 8, 2019 **Decided June 15, 2020**	*Bostock v. Clayton County, Georgia* Supreme Court of the United States (2020)	Judgment of Second and Sixth Circuits affirmed, judgment of Eleventh Circuit reversed, and case remanded.	Discrimination based on sexual orientation and/or gender identity violates Title VII • Link
August 27, 2020	*Bostock v. Clayton County Board of Commissioners* United States Court of Appeals for the Eleventh Circuit (2020)	On remand from the Supreme Court, reversed the district court's dismissal of the Title VII and remand for further procedures consistent.	• Link
October 14, 2022	*Bostock v. Clayton County Board of Commissioners*	Civil case terminated, case settled.	• Link

	US District Court for the Northern District of Georgia, Atlanta Division (2022)		

4.9.2. Notes

i. Textualism, Title VII and moving forward

According to Justice Gorsuch: "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law…." Consider the accuracy of that statement, is it true that extratextual consideration loses against the plain text?

In *Steelworkers*, for example, the Court creates a novel, non-textual exception to the "do not discriminate" rule regarding affirmative action plans. How does *Bostock*'s textualist method settle with *Steelworkers'* non-textualist exception? One answer is that it doesn't. But Gorsuch insists that it does: "when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule. And that is exactly how this Court has always approached Title VII." Hmm. I wonder where Gorsuch places *Steelworkers* in this history.

We will see more examples of the importance of non-textual sources of statutory interpretation in our labor law chapter.

ii. *Language Games as The Law*

There is a peculiar aesthetic to Gorsuch's opinion. It looks and feels like a clean proof about logic and language. Not a formal structure, but as close as possible to it in a legal opinion. In *Bostock*'s Title VII, history and purpose matters only so far as there are ambiguities in the language that cannot be resolved using such logic and language games.

This produces a much simpler, self-evident decision. It is "clear", Gorsuch tells us, what the law "is" or "is not." Title VII is not mired in the history of its own making, the give-and-take of Congressional politics, the sweat, blood, and tears of social movement organizing, the crushing weight of centuries of racial and sex-oppression in the labor market. All of this is gone. What we are left with is a formulaic-like analysis of what employers must, by definition, consider when they reject an applicant for being gay or trans.

Before confronting Gorsuch on the merits of its language arguments, it is important to note the gap between this overall approach to law and other opinions we read.

iii. But-For Causation under Title VII

The main legal challenge plaintiffs faced in *Bostock* was to prove that the phrase "because of … sex" includes discrimination because of gay or transgender status. The challenge is a substantial one, because everyone, both plaintiffs and defendants, agree that the legislature did not intend to protect discrimination over "gender." Thus, if Title VII does protect certain gender traits, it is an unintended consequence. Justice Gorsuch's reasoning is twofold:

First, substantiating that the phrase "because of" in Title VII jurisprudence means a "but for" causation standard. Meaning that if we remove the protected characteristics, the discriminatory action would not take place. We've seen a similar standard in *Price Waterhouse*, where the employer can escape liability by proving that even without considering the discriminatory (or stereotypical) content they would make the same decision.

Second, is describing gay and transgender status in terms that necessitates sex. This means that, to know that someone is gay, an employer must know their sex-assigned-at-birth *and* their sexual preference. A gay man, by Gorsuch's definition is [Man] + [Sexual preference for Man]. The employer must know the contents of the first brackets to make employment decisions based on someone being gay, and the contents of the first bracket is the part protected by Title VII. Similarly, a trans man, again according to Gorsuch, is [female at birth] + [transitioning/has transitioned into a man]. And again, the contents of the first bracket are the part protected by Title VII.

Gorsuch's analysis is void of any treatment of what Congress meant to do about gay and transgender status individuals. It does not matter for him, because according to his interpretation you cannot understand being gay or being transgender without understanding (at least) the individual's sex-assigned-at-birth– not now and not ever– and that is what Congress chose to protect.

iv. Language Games Revisited

According to Gorsuch, discrimination because an employee is gay necessitates knowing their sex-assigned-at-birth. This is so because Gorsuch understands such discrimination as the difference between the following two situations:

Situation #	Sex Assigned at Birth	Attribute	Employment Outcome
1	Male	Loves Susan (f)	Pat on the back
2	Female	Loves Susan (f)	Termination

According to Gorsuch, the reason discrimination because someone is gay is inherently tied to sex-assigned-at-birth (Sex-1) discrimination is because the employer must know the sex-assigned-at-birth of the employee in addition to who they love (Susan) to make a gayness-based employment decision.

This is opposed to the situation the dissent and the employers are drawing where the difference between those two situations is not with biological sex at all– but with gender expressions or preferences. Here is how the employers made the distinction:

Situation #	Sex Assigned at Birth	Attribute	Employment Outcome
1	Male	Straight	None
2	Female	Gay	Termination

Here, the employers examine the same situation as including not only the sex-assigned-at-birth as changing, but also the attribute column. We don't care, employers argue, about the sex of the employee, all we care about is their sexual preference, which is an attribute not connected to biological sex. In other words, we don't have to know a person's sex to know that they are attracted to the same sex as theirs. Gorsuch calls such hypotheticals fanciful. Perhaps.

But, it seems at least plausible that some (bad actor) employers really don't care about the Sex-1 of their gay employees, and care (heinously, deeply) about their sexual preference. It also makes sense that some gay workers see themselves as belonging to a "gay" community that encompasses multiple Sex-1s, and view their sources of power, agency, and vulnerability as derived from such group-attributes, regardless of their own Sex1.
What do those challenges do to Gorsuch's "inherently" argument?

v. Gorsuch's reliance on Sex-Stereotyping

If we rely on this rubric as the (rudimentary) way of tying gender to sex, we thus face a problem. As at least two possible ways of understanding sexual-preference discrimination exist, why does one trump over the other? There are multiple general legal vectors that would prefer not placing legal liability over employers if we can help it. So – why do we prefer the first rubric to the second?

Here it seems the answer is sex-stereotyping. Both rubrics are unlawful under Title VII because they involve sex-stereotyping. When employers discriminate gay workers they discriminate based on the sex stereotype that man are attracted to women, women to man, man should stay man, and women should stay women. This requires a broad and entrenched understanding on the prohibition of sex-stereotyping under *Price Waterhouse*.

The employers can maintain two lines of defense. One is about the generality of their stereotypes – its not about particular sex (women should wear makeup) but about everyone regardless of sex (all people should be attracted to their opposite sex). A second line of defense is that Price Waterhouse was never meant to be this broad prohibition of sexual-stereotypes, and by codifying all gender performance and preferences as sex-based the Court significantly expands Title VII's protection far beyond Congressional intent.

vi. Does Bostock mean that all gender identity is now a protected characteristic under Title VII?

Bostock stands for the proposition that gay and trans-status individuals are protected from discrimination under Title VII. The reasoning underlying that coverage is that those gender traits are inherently tied to Sex-Assigned-at-Birth, and therefore are protected.
But, what does *Bostock* means for other gender identities that are not gay or trans?
Well, the *Bostock* answer is that if those gender identities and preferences are similarly inherently tied to sex, then yes they are protected. Specifically, there is one theory in *Bostock* that would help all non-conforming genders prevail – the particular reading of sex-stereotyping. Under the stereotyping theory the *Bostock* plaintiffs won because they were penalized for deviating from sex-stereotyping about the relations between sex-assigned-at-birth and gender identity.

Common gender-roles and identities are nothing more than a stereotype we assign to the two common sex-assigned-at-birth sexes. Which means that if a gender identity involves deviating from the common gender expressions, it is protected. But this version is problematic.

Bostock Dissenters can say that they penalize broad social cultural norms not sex-specific stereotypes. So for example, if in Price Waterhouse the plaintiff was penalized for not conforming to sex-specific stereotypes (women should be… act… look… walk…) in Bostock the plaintiffs were penalized for not following both-sex social norms (people should be attracted to the sex opposite of their sex assigned at birth; people should stay-the-line and act according to their sex-assigned-at-birth).

Indeed it seems like taking Bostock's approach, any deviation from cultural and social norms, even those unrelated to sex-assigned-at-birth can be penalized. For example, let's define an "autosexual" as an individual attracted to himself. A lesser person would joke about the frequency of this gender expression in academia. So, can an employer terminate an autosexual individual?

Imagine Ben to be an autosexual individual. Using the two *Bostock* rubrics, it seems we can create a situation where we replace a sex-based characteristic – who is bringing Adam to the party – which corresponds to Sex.

Situation #	Sex	Who is invited to the party?	Employment outcome
1	Ben (M)	Ben (M)	Termination
2	Sandy (F)	Ben (M)	Good job!

This table is then strengthened by a stereotype that we have about Males which states, like in *Bostock*, that they should be attracted to the opposite sex. So, a win? Not necessarily.

Again, using the tables, the dissent would insist that the difference between situation 1 and 2 is about gender expression and sexual attraction. And again, the dissent would highlight how sex-stereotyping is either: 1) only a helpful guide to courts; or 2) should, at least, be specific to the sex of the plaintiff arguing for discrimination.

But distinguishing the autosexual case from the Bostock one is not easy.

Oy vey.

Justice Gorsuch's clarity proves remarkably unclear.

4.10. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020)

Full decision: (link); **Docket**: (link); **Oral argument**: (link)

JUSTICE ALITO delivered the opinion of the Court.

These cases require us to decide whether the First Amendment permits courts to intervene in employment disputes involving teachers at religious schools who are entrusted with the responsibility of instructing their students in the faith. The First Amendment protects the right of religious institutions "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U. S. 94, 116 (1952). Applying this principle, we held in *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171 (2012), that the First Amendment barred a court from entertaining an employment discrimination claim brought by an elementary school teacher, Cheryl Perich, against the religious school where she taught. Our decision built on a line of lower court cases adopting what was dubbed the "ministerial exception" to laws governing the employment relationship between a religious institution and certain key employees. We did not announce "a rigid formula" for determining whether an employee falls within this exception, but we identified circumstances that we found relevant in that case, including Perich's title as a "Minister of Religion, Commissioned," her educational training, and her responsibility to teach religion and participate with students in religious activities.

In the cases now before us, we consider employment discrimination claims brought by two elementary school teachers at Catholic schools whose teaching responsibilities are similar to Perich's. Although these teachers were not given the title of "minister" and have less religious training than Perich, we hold that their cases fall within the same rule that dictated our decision in *Hosanna-Tabor*. The religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission. Judicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate.

I

A

1

The first of the two cases we now decide involves Agnes Morrissey-Berru, who was employed at Our Lady of Guadalupe School (OLG), a Roman Catholic primary school in the Archdiocese of Los Angeles. For many years, Morrissey-Berru was employed at OLG as a lay fifth or sixth grade teacher. Like most elementary school teachers, she taught all subjects, and since OLG is a Catholic school, the curriculum included religion. As a result, she was her students' religion teacher.

Morrissey-Berru earned a B. A. in English Language Arts, with a minor in secondary education, and she holds a California teaching credential. While on the faculty at OLG, she took religious education courses at the school's request, and was expected to attend faculty prayer services.

Each year, Morrissey-Berru and OLG entered into an employment agreement, that set out the school's "mission" and Morrissey-Berru's duties. The agreement stated that the school's mission was "to develop and promote a Catholic School Faith Community," and it informed Morrissey-Berru that "[a]ll [her] duties and responsibilities as a Teache[r were to] be performed within this overriding commitment."

The agreement explained that the school's hiring and retention decisions would be guided by its Catholic mission, and the agreement made clear that teachers were expected to "model and promote" Catholic "faith and morals." Under the agreement, Morrissey-Berru was required to participate in "[s]chool liturgical activities, as requested," and the agreement specified that she could be terminated "for 'cause'" for failing to carry out these duties or for "conduct that brings discredit upon the School or the Roman Catholic Church." The agreement required compliance with the faculty handbook, which sets out similar expectations. The pastor of the parish, a Catholic priest, had to approve Morrissey-Berru's hiring each year.

Like all teachers in the Archdiocese of Los Angeles, Morrissey-Berru was "considered a catechist," *i.e.*, "a teacher of religio[n]." Catechists are "responsible for the faith formation of the students in their charge each day." Morrissey-Berru provided religious instruction every day using a textbook designed for use in teaching religion to young Catholic students. Under the prescribed curriculum, she was expected to teach students, among other things, "to learn and express belief that Jesus is the son of God and the Word made flesh"; to "identify the ways" the church "carries on the mission of Jesus"; to "locate, read and understand stories from the Bible"; to "know the names, meanings, signs and symbols of each of the seven sacraments"; and to be able to "explain the communion of saints." She tested her students on that curriculum in a yearly exam. She also directed and produced an annual passion play. Morrissey-Berru prepared her students for participation in the Mass and for communion and confession. She also occasionally selected and prepared students to read at Mass. And she was expected to take her students to Mass once a week and on certain feast days (such as the Feast Day of St. Juan Diego, All Saints Day, and the Feast of Our Lady), and to take them to confession and to pray the Stations of the Cross. Each year, she brought them to the Catholic Cathedral in Los Angeles, where they participated as altar servers. This visit, she explained, was "an important experience" because "[i]t is a big honor" for children to "serve the altar" at the cathedral. Morrissey-Berru also prayed with her students. Her class began or ended every day with a Hail Mary. She led the students in prayer at other times, such as when a family member was ill. And she taught them to recite the Apostle's Creed and the Nicene Creed, as well as prayers for specific purposes, such as in connection with the sacrament of confession.

The school reviewed Morrissey-Berru's performance under religious standards. The "'Classroom Observation Report'" evaluated whether Catholic values were "infused through all subject areas" and whether there were religious signs and displays in the classroom. Morrissey-Berru testified that she tried to instruct her students "in a manner consistent with the teachings of the Church," and she said that she was "committed to teaching children Catholic values" and providing a "faith-based education." And the school principal confirmed that Morrissey-Berru was expected to do these things.

2

In 2014, OLG asked Morrissey-Berru to move from a full-time to a part-time position, and the next year, the school declined to renew her contract. She filed a claim with the Equal Employment Opportunity Commission (EEOC), received a right-to-sue letter, and then filed suit under the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U. S. C. §621 *et seq.*, claiming that the school had demoted her and had failed to renew her contract so that it could replace her with a younger teacher. The school maintains that it based its decisions on classroom performance—specifically, Morrissey-Berru's difficulty in administering a new reading and writing program, which had been introduced by the school's new principal as part of an effort to maintain accreditation and improve the school's academic program.

Invoking the "ministerial exception" that we recognized in *Hosanna-Tabor*, OLG successfully moved for summary judgment, but the Ninth Circuit reversed in a brief opinion. 769 Fed. Appx. 460, 461 (2019). The court acknowledged that Morrissey-Berru had "significant religious responsibilities" but reasoned that "an employee's duties alone are not dispositive under *Hosanna-Tabor*'s framework." *Ibid.* Unlike Perich, the court noted, Morrissey-Berru did not have the formal title of "minister," had limited formal religious training, and "did not hold herself out to the public as a religious leader or minister." *Ibid.* In the court's view, these "factors" outweighed the fact that she was invested with significant religious responsibilities. *Ibid.* The court therefore held that Morrissey-Berru did not fall within the "ministerial exception." OLG filed a petition for certiorari, and we granted review.

B

1

The second case concerns the late Kristen Biel, who worked for about a year and a half as a lay teacher at St. James School, another Catholic primary school in Los Angeles. For part of one academic year, Biel served as a long-term substitute teacher for a first grade class, and for one full year she was a full-time fifth grade teacher. Like Morrissey-Berru, she taught all subjects, including religion. Biel had a B. A. in liberal studies and a teaching credential. During her time

at St. James, she attended a religious conference that imparted "[d]ifferent techniques on teaching and incorporating God" into the classroom. Biel was Catholic.

Biel's employment agreement was in pertinent part nearly identical to Morrissey-Berru's. The agreement set out the same religious mission; required teachers to serve that mission; imposed commitments regarding religious instruction, worship, and personal modeling of the faith; and explained that teachers' performance would be reviewed on those bases.
Biel's agreement also required compliance with the St. James faculty handbook, which resembles the OLG handbook. The St. James handbook defines "religious development" as the school's first goal and provides that teachers must "mode[l] the faith life," "exemplif[y] the teachings of Jesus Christ," "integrat[e] Catholic thought and principles into secular subjects," and "prepar[e] students to receive the sacraments." The school principal confirmed these expectations.

Like Morrissey-Berru, Biel instructed her students in the tenets of Catholicism. She was required to teach religion for 200 minutes each week, and administered a test on religion every week. She used a religion textbook selected by the school's principal, a Catholic nun. The religious curriculum covered "the norms and doctrines of the Catholic Faith, including . . . the sacraments of the Catholic Church, social teachings according to the Catholic Church, morality, the history of Catholic saints, [and] Catholic prayers."

Biel worshipped with her students. At St. James, teachers are responsible for "prepar[ing] their students to be active participants at Mass, with particular emphasis on Mass responses," and Biel taught her students about "Catholic practices like the Eucharist and confession." At monthly Masses, she prayed with her students. Her students participated in the liturgy on some occasions by presenting the gifts (bringing bread and wine to the priest).

Teachers at St. James were "required to pray with their students every day," and Biel observed this requirement by opening and closing each school day with prayer, including the Lord's Prayer or a Hail Mary.

As at OLG, teachers at St. James are evaluated on their fulfillment of the school's religious mission. James used the same classroom observation standards as OLG and thus examined whether teachers "infus[ed]" Catholic values in all their teaching and included religious displays in their classrooms. The school's principal, a Catholic nun, evaluated Biel on these measures.

2

St. James declined to renew Biel's contract after one full year at the school. She filed charges with the EEOC, and after receiving a right-to-sue letter, brought this suit, alleging that she was discharged because she had requested a leave of absence to obtain treatment for breast cancer.

The school maintains that the decision was based on poor performance—namely, a failure to observe the planned curriculum and keep an orderly classroom.

Like OLG, St. James obtained summary judgment under the ministerial exception, but a divided panel of the Ninth Circuit reversed, reasoning that Biel lacked Perich's "credentials, training, [and] ministerial background," 911 F. 3d 603, 608 (2018).

Judge D. Michael Fisher, sitting by designation, dissented. Considering the totality of the circumstances, he would have held that the ministerial exception applied "because of the substance reflected in [Biel's] title and the important religious functions she performed" as a "stewar[d] of the Catholic faith to the children in her class."

….

II

A

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Among other things, the Religion Clauses protect the right of churches and other religious institutions to decide matters "'of faith and doctrine'" without government intrusion. *Hosanna-Tabor*, 565 U. S., at 186. State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion. The First Amendment outlaws such intrusion.

The independence of religious institutions in matters of "faith and doctrine" is closely linked to independence in what we have termed "'matters of church government.'" 565 U. S., at 186, 132. This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission. And a component of this autonomy is the selection of the individuals who play certain key roles.

The "ministerial exception" was based on this insight. Under this rule, courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions. The rule appears to have acquired the label "ministerial exception" because the individuals involved in pioneering cases were described as "ministers." See *McClure* v. *Salvation Army*, 460 F. 2d 553, 558-559 (CA5 1972); *Rayburn* v. *General Conference of Seventh-day Adventists*, 772 F. 2d 1164, 1168 (CA4 1985). Not all pre-*Hosanna-Tabor* decisions applying the exception involved "ministers" or even members of the clergy. See, *e.g.*, *EEOC* v. *Southwestern Baptist Theological Seminary*, 651 F. 2d 277, 283-284 (CA5

1981); *EEOC* v. *Roman Catholic Diocese of Raleigh*, *N. C.*, 213 F. 3d 795, 800-801 (CA4 2000). But it is instructive to consider why a church's independence on matters "of faith and doctrine" requires the authority to select, supervise, and if necessary, remove a minister without interference by secular authorities. Without that power, a wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith. The ministerial exception was recognized to preserve a church's independent authority in such matters.

B

When the so-called ministerial exception finally reached this Court in *Hosanna-Tabor*, we unanimously recognized that the Religion Clauses foreclose certain employment discrimination claims brought against religious organizations. 565 U. S., at 188. The constitutional foundation for our holding was the general principle of church autonomy to which we have already referred: independence in matters of faith and doctrine and in closely linked matters of internal government. ….
….

C

In *Hosanna-Tabor*, Cheryl Perich, a kindergarten and fourth grade teacher at an Evangelical Lutheran school, filed suit in federal court, claiming that she had been discharged because of a disability, in violation of the Americans with Disabilities Act of 1990 (ADA), 42 U. S. C. §12112(a). The school responded that the real reason for her dismissal was her violation of the Lutheran doctrine that disputes should be resolved internally and not by going to outside authorities. We held that her suit was barred by the "ministerial exception" and noted that it "concern[ed] government interference with an internal church decision that affects the faith and mission of the church." 565 U. S., at 190. We declined "to adopt a rigid formula for deciding when an employee qualifies as a minister," and we added that it was "enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment." *Id.*, at 190-191. We identified four relevant circumstances but did not highlight any as essential.

First, we noted that her church had given Perich the title of "minister, with a role distinct from that of most of its members." *Id.*, at 191. Although she was not a minister in the usual sense of the term—she was not a pastor or deacon, did not lead a congregation, and did not regularly conduct religious services—she was classified as a "called" teacher, as opposed to a lay teacher, and after completing certain academic requirements, was given the formal title "'Minister of Religion, Commissioned.'" Second, Perich's position "reflected a significant degree of religious training followed by a formal process of commissioning." Third, "Perich held herself out as a minister of the Church by accepting the formal call to religious service, according to its terms," and by claiming certain tax benefits. Fourth, "Perich's job duties reflected a role in conveying

the Church's message and carrying out its mission." The church charged her with "'lead[ing] others toward Christian maturity'" and "'teach[ing] faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church.'" Although Perich also provided instruction in secular subjects, she taught religion four days a week, led her students in prayer three times a day, took her students to a chapel service once a week, and participated in the liturgy twice a year. "As a source of religious instruction," we explained, "Perich performed an important role in transmitting the Lutheran faith to the next generation."

The case featured two concurrences. In the first, Justice Thomas stressed that courts should "defer to a religious organization's good-faith understanding of who qualifies as its minister." That is so, JUSTICE THOMAS explained, because "[a] religious organization's right to choose its ministers would be hollow . . . if secular courts could second-guess" the group's sincere application of its religious tenets.

….

D

1

In determining whether a particular position falls within the *Hosanna-Tabor* exception, a variety of factors may be important. The circumstances that informed our decision in *Hosanna-Tabor* were relevant because of their relationship to Perich's "role in conveying the Church's message and carrying out its mission," *id.*, at 192, but the other noted circumstances also shed light on that connection. In a denomination that uses the term "minister," conferring that title naturally suggests that the recipient has been given an important position of trust. In Perich's case, the title that she was awarded and used demanded satisfaction of significant academic requirements and was conferred only after a formal approval process, *id.*, at 191, and those circumstances also evidenced the importance attached to her role. But our recognition of the significance of those factors in Perich's case did not mean that they must be met—or even that they are necessarily important—in all other cases.

Take the question of the title "minister." Simply giving an employee the title of "minister" is not enough to justify the exception. And by the same token, since many religious traditions do not use the title "minister," it cannot be a necessary requirement. Requiring the use of the title would constitute impermissible discrimination, and this problem cannot be solved simply by including positions that are thought to be the counterparts of a "minister," such as priests, nuns, rabbis, and imams. See Brief for Respondents. Nuns are not the same as Protestant ministers. A brief submitted by Jewish organizations makes the point that "Judaism has many 'ministers,'" that is, "the term 'minister' encompasses an extensive breadth of religious functionaries in Judaism." For Muslims, "an inquiry into whether imams or other leaders bear a title equivalent to

'minister' can present a troubling choice between denying a central pillar of Islam—*i.e.*, the equality of all believers—and risking loss of ministerial exception protections."

If titles were all-important, courts would have to decide which titles count and which do not, and it is hard to see how that could be done without looking behind the titles to what the positions actually entail. Moreover, attaching too much significance to titles would risk privileging religious traditions with formal organizational structures over those that are less formal.

For related reasons, the academic requirements of a position may show that the church in question regards the position as having an important responsibility in elucidating or teaching the tenets of the faith. Presumably the purpose of such requirements is to make sure that the person holding the position understands the faith and can explain it accurately and effectively. But insisting in every case on rigid academic requirements could have a distorting effect. This is certainly true with respect to teachers. Teaching children in an elementary school does not demand the same formal religious education as teaching theology to divinity students. Elementary school teachers often teach secular subjects in which they have little if any special training. In addition, religious traditions may differ in the degree of formal religious training thought to be needed in order to teach. In short, these circumstances, while instructive in *Hosanna-Tabor*, are not inflexible requirements and may have far less significance in some cases.

What matters, at bottom, is what an employee does. And implicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school. As we put it, Perich had been entrusted with the responsibility of "transmitting the Lutheran faith to the next generation." 565 U. S., at 192. One of the concurrences made the same point, concluding that the exception should include "any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or *teacher of its faith*." *Id.*, at 199.

Religious education is vital to many faiths practiced in the United States. This point is stressed by briefs filed in support of OLG and St. James by groups affiliated with a wide array of faith traditions. In the Catholic tradition, religious education is "'intimately bound up with the whole of the Church's life.'" Under canon law, local bishops must satisfy themselves that "those who are designated teachers of religious instruction in schools . . . are outstanding in correct doctrine, the witness of a Christian life, and teaching skill." Code of Canon Law, Canon 804, §2 (1998).

Similarly, Protestant churches, from the earliest settlements in this country, viewed education as a religious obligation. A core belief of the Puritans was that education was essential to thwart the "chief project of that old deluder, Satan, to keep men from the knowledge of the Scriptures." Thus, in 1647, the Massachusetts General Court passed what has been called the Old Deluder Satan Act requiring every sizable town to establish a school. Most of the oldest

educational institutions in this country were originally established by or affiliated with churches, and in recent years, non-denominational Christian schools have proliferated with the aim of inculcating Biblical values in their students. Many such schools expressly set themselves apart from public schools that they believe do not reflect their values.

Religious education is a matter of central importance in Judaism. As explained in briefs submitted by Jewish organizations, the Torah is understood to require Jewish parents to ensure that their children are instructed in the faith. One brief quotes Maimonides's statement that religious instruction "is an obligation of the highest order, entrusted only to a schoolteacher possessing 'fear of Heaven.'" "The contemporary American Jewish community continues to place the education of children in its faith and rites at the center of its communal efforts."

Religious education is also important in Islam. "[T]he acquisition of at least rudimentary knowledge of religion and its duties [is] mandatory for the Muslim individual." This precept is traced to the Prophet Muhammad, who proclaimed that "'[t]he pursuit of knowledge is incumbent on every Muslim.' "[T]he development of independent private Islamic schools ha[s] become an important part of the picture of Muslim education in America."

The Church of Jesus Christ of Latter-day Saints has a long tradition of religious education, with roots in revelations given to Joseph Smith. See Doctrine and Covenants of the Church of Jesus Christ of Latter-day Saints §93:36 (2013). "The Church Board of Education has established elementary, middle, or secondary schools in which both secular and religious instruction is offered."

Seventh-day Adventists "trace the importance of education back to the Garden of Eden." Seventh-day Adventist formation "restore[s] human beings into the image of God as revealed by the life of Jesus Christ" and focuses on the development of "knowledge, skills, and understandings to serve God and humanity."

This brief survey does not do justice to the rich diversity of religious education in this country, but it shows the close connection that religious institutions draw between their central purpose and educating the young in the faith.

2

When we apply this understanding of the Religion Clauses to the cases now before us, it is apparent that Morrissey-Berru and Biel qualify for the exemption we recognized in *Hosanna-Tabor*. There is abundant record evidence that they both performed vital religious duties. Educating and forming students in the Catholic faith lay at the core of the mission of the schools where they taught, and their employment agreements and faculty handbooks specified in no

uncertain terms that they were expected to help the schools carry out this mission and that their work would be evaluated to ensure that they were fulfilling that responsibility. As elementary school teachers responsible for providing instruction in all subjects, including religion, they were the members of the school staff who were entrusted most directly with the responsibility of educating their students in the faith. And not only were they obligated to provide instruction about the Catholic faith, but they were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith. They prayed with their students, attended Mass with the students, and prepared the children for their participation in other religious activities. Their positions did not have all the attributes of Perich's. Their titles did not include the term "minister," and they had less formal religious training, but their core responsibilities as teachers of religion were essentially the same. And both their schools expressly saw them as playing a vital part in carrying out the mission of the church, and the schools' definition and explanation of their roles is important. In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition. A religious institution's explanation of the role of such employees in the life of the religion in question is important.
….

…
For these reasons, the judgment of the Court of Appeals in each case is reversed, and the cases are remanded for proceedings consistent with this opinion.
It is so ordered.

Concur by: THOMAS [omitted]

…..

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

Two employers fired their employees allegedly because one had breast cancer and the other was elderly. Purporting to rely on this Court's decision in *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171 (2012), the majority shields those employers from disability and age-discrimination claims. In the Court's view, because the employees taught short religion modules at Catholic elementary schools, they were "ministers" of the Catholic faith and thus could be fired for any reason, whether religious or nonreligious, benign or bigoted, without legal recourse. The Court reaches this result even though the teachers taught primarily secular subjects, lacked substantial religious titles and training, and were not even required to be Catholic. In foreclosing the teachers' claims, the Court skews the facts, ignores the applicable standard of review, and collapses *Hosanna-Tabor*'s careful analysis into a single consideration: whether a church thinks its employees play an important religious role. Because that simplistic

approach has no basis in law and strips thousands of schoolteachers of their legal protections, I respectfully dissent.

I

A

Our pluralistic society requires religious entities to abide by generally applicable laws. *E.g.*, *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 879-882 (1990). Consistent with the First Amendment (and over sincerely held religious objections), the Government may compel religious institutions to pay Social Security taxes for their employees, *United States* v. *Lee*, 455 U. S. 252, 256-261 (1982), deny nonprofit status to entities that discriminate because of race, *Bob Jones Univ.* v. *United States*, 461 U. S. 574, 603-605 (1983), require applicants for certain public benefits to register with Social Security numbers, *Bowen* v. *Roy*, 476 U. S. 693, 699-701 (1986), enforce child-labor protections, *Prince* v. *Massachusetts*, 321 U. S. 158, 166-170 (1944), and impose minimum-wage laws, *Tony and Susan Alamo Foundation* v. *Secretary of Labor*, 471 U. S. 290, 303-306 (1985).

Congress, however, has crafted exceptions to protect religious autonomy. Some antidiscrimination laws, like the Americans with Disabilities Act, permit a religious institution to consider religion when making employment decisions. 42 U. S. C. §12113(d)(1). Under that Act, a religious organization may also "require that all applicants and employees conform" to the entity's "religious tenets." §12113(d)(2). Title VII further permits a school to prefer "hir[ing] and employ[ing]" people "of a particular religion" if its curriculum "propagat[es]" that religion. §2000e-2(e); see also §2000e-1(a). These statutory exceptions protect a religious entity's ability to make employment decisions—hiring or firing—for religious reasons.

The "ministerial exception," by contrast, is a judge-made doctrine. This Court first recognized it eight years ago in *Hosanna-Tabor*, concluding that the First Amendment categorically bars certain antidiscrimination suits by religious leaders against their religious employers. 565 U. S., at 188-190. When it applies, the exception is extraordinarily potent: It gives an employer free rein to discriminate because of race, sex, pregnancy, age, disability, or other traits protected by law when selecting or firing their "ministers," even when the discrimination is wholly unrelated to the employer's religious beliefs or practices. That is, an employer need not cite or possess a religious reason at all; the ministerial exception even condones animus.

When this Court adopted the ministerial exception, it affirmed the holdings of virtually every federal appellate court that had embraced the doctrine. Those courts had long understood that the exception's stark departure from antidiscrimination law is narrow. Wary of the exception's

"potential for abuse," federal courts treaded "case-by-case" in determining which employees are ministers exposed to discrimination without recourse. Thus, their analysis typically trained on whether the putative minister was a "spiritual leade[r]" within a congregation such that "he or she should be considered clergy." *Rayburn* v. *General Conference of Seventh-day Adventists*, 772 F. 2d 1164, 1168-1169 (CA4 1985). That approach recognized that a religious entity's ability to choose its faith leaders—rabbis, priests, nuns, imams, ministers, to name a few—should be free from government interference, but that generally applicable laws still protected most employees.

This focus on leadership led to a consistent conclusion: Lay faculty, even those who teach religion at church-affiliated schools, are not "ministers." [listing cases]….
….

Hosanna-Tabor did not upset this consensus. Instead, it recognized the ministerial exception's roots in protecting religious "elections" for "ecclesiastical offices" and guarding the freedom to "select" titled "clergy" and churchwide leaders. To be sure, the Court stated that the "ministerial exception is not limited to the head of a religious congregation." Nevertheless, this Court explained that the exception applies to someone with a leadership role "distinct from that of most of [the organization's] members," someone in whom "[t]he members of a religious group put their faith," or someone who "personif[ies]" the organization's "beliefs" and "guide[s] it on its way."

This analysis is context-specific. It necessarily turns on, among other things, the structure of the religious organization at issue. Put another way (and as the Court repeats throughout today's opinion), *Hosanna-Tabor* declined to adopt a "rigid formula for deciding when an employee qualifies as a minister." Rather, *Hosanna-Tabor* focused on four "circumstances" to determine whether a fourth-grade teacher, Cheryl Perich, was employed at a Lutheran school as a "minister": (1) "the formal title given [her] by the Church," (2) "the substance reflected in that title," (3) "her own use of that title," and (4) "the important religious functions she performed for the Church." *Id.*, at 190, 192. ….
….

II

Until today, no court had held that the ministerial exception applies with disputed facts like these and lay teachers like respondents, let alone at the summary-judgment stage.

Only by rewriting *Hosanna-Tabor* does the Court reach a different result. The Court starts with an unremarkable view: that *Hosanna-Tabor*'s "recognition of the significance of " the first three "factors" in that case "did not mean that they must be met—or even that they are necessarily important—in all other cases." True enough. One can easily imagine religions incomparable to those at issue in *Hosanna-Tabor* and here. But then the Court recasts *Hosanna-Tabor* itself:

Apparently, the touchstone all along was a two-Justice concurrence. To that concurrence, "[w]hat matter[ed]" was "the religious function that [Perich] performed" and her "functional status." *Hosanna-Tabor*, 565 U. S., at 206 (opinion of ALITO, J.). Today's Court yields to the concurrence's view with identical rhetoric. "What matters," the Court echoes, "is what an employee does."

But this vague statement is no easier to comprehend today than it was when the Court declined to adopt it eight years ago. It certainly does not sound like a legal framework. Rather, the Court insists that a "religious institution's explanation of the role of [its] employees in the life of the religion in question is important." (THOMAS, J., concurring) (urging complete deference to a religious institution in determining which employees are exempt from antidiscrimination laws). But because the Court's new standard prizes a functional importance that it appears to deem churches in the best position to explain, one cannot help but conclude that the Court has just traded legal analysis for a rubber stamp.

Indeed, the Court reasons that "judges cannot be expected to have a complete understanding and appreciation" of the law and facts in ministerial-exception cases, and all but abandons judicial review. Although today's decision is limited to certain "teachers of religion," its reasoning risks rendering almost every Catholic parishioner and parent in the Archdiocese of Los Angeles a Catholic minister. That is, the Court's apparent deference here threatens to make nearly anyone whom the schools might hire "ministers" unprotected from discrimination in the hiring process. That cannot be right. Although certain religious functions may be important to a church, a person's performance of some of those functions does not mechanically trigger a categorical exemption from generally applicable antidiscrimination laws.

Today's decision thus invites the "potential for abuse" against which circuit courts have long warned. Nevermind that the Court renders almost all of the Court's opinion in *Hosanna-Tabor* irrelevant. It risks allowing employers to decide for themselves whether discrimination is actionable. Indeed, today's decision reframes the ministerial exception as broadly as it can, without regard to the statutory exceptions tailored to protect religious practice. As a result, the Court absolves religious institutions of any animus completely irrelevant to their religious beliefs or practices and all but forbids courts to inquire further about whether the employee is in fact a leader of the religion. Nothing in *Hosanna-Tabor* (or at least its majority opinion) condones such judicial abdication.

….

….

The Court's conclusion portends grave consequences. As the Government (arguing for Biel at the time) explained to the Ninth Circuit, "thousands of Catholic teachers" may lose employment-law protections because of today's outcome. Recording of Oral Arg. 25:15-25:30 in No. 17-

55180 (July 11, 2018), https://www.ca9.uscourts.gov/media/
view_video.php?pk_vid=0000014022. Other sources tally over a hundred thousand secular teachers whose rights are at risk. See, *e.g.*, Brief for Virginia et al. as *Amici Curiae* 33, n. 25. And that says nothing of the rights of countless coaches, camp counselors, nurses, social-service workers, in-house lawyers, media-relations personnel, and many others who work for religious institutions. All these employees could be subject to discrimination for reasons completely irrelevant to their employers' religious tenets.

In expanding the ministerial exception far beyond its historic narrowness, the Court overrides Congress' carefully tailored exceptions for religious employers. Little if nothing appears left of the statutory exemptions after today's constitutional broadside. So long as the employer determines that an employee's "duties" are "vital" to "carrying out the mission of the church," then today's laissez-faire analysis appears to allow that employer to make employment decisions because of a person's skin color, age, disability, sex, or any other protected trait for reasons having nothing to do with religion.

This sweeping result is profoundly unfair. The Court is not only wrong on the facts, but its error also risks upending antidiscrimination protections for many employees of religious entities. Recently, this Court has lamented a perceived "discrimination against religion." Yet here it swings the pendulum in the extreme opposite direction, permitting religious entities to discriminate widely and with impunity for reasons wholly divorced from religious beliefs. The inherent injustice in the Court's conclusion will be impossible to ignore for long, particularly in a pluralistic society like ours. One must hope that a decision deft enough to remold *Hosanna-Tabor* to fit the result reached today reflects the Court's capacity to cabin the consequences tomorrow.

I respectfully dissent.

4.10.1. Timeline

Date	Case Name	Decision	Notes
September 27, 2017	*Morrissey-Berru v. Our Lady of Guadalupe School* US District Court for the Central District of California	Defendant's motion for summary judgment is granted.	**First filed in 2017** Plaintiff is covered by the ministerial exception. • Link
April 30, 2019	*Morrissey-Berru v. Our Lady of Guadalupe School*	Reversed the District Court decision.	Plaintiff not covered, according to the four

	US Court of Appeals for the Ninth Circuit (2019)		factors outlined in *Hosanna-Tabor.* • Link
September 19 - October 28, 2019	*Our Lady of Guadalupe School v. Morrissey-Berru* Supreme Court of the United States (2019)	Briefs filed	• Docket & Documents
Argued May 11, 2020 **Decided July 8, 2020**	*Our Lady of Guadalupe School v. Morrissey-Berru* Supreme Court of the United States (2020)	Judgment of US Court of Appeals for the Ninth Circuit reversed, cases remanded.	Morrissey-Berru qualified for the ministerial exception as recognized in *Hosanna-Tabor.* • Link
August 21, 2020	*Morrissey-Berru v. Our Lady of Guadalupe School* US Court of Appeals for the Ninth Circuit (2020)	In accordance with Supreme Court decision, the judgment of the district court is affirmed.	• Link

4.11. Critiques of Antidiscrimination Law

4.11.1. Leftist Critiques of Antidiscrimination Law

i. Leftist critiques of antidiscrimination law I – Interest Convergence Theory

[Looking for a principle underlying Brown v. Board of Ed, and other race discrimination decisions] this principle of "interest convergence" provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.

It follows that the availability of fourteenth amendment protection in racial cases may not actually be determined by the character of harm suffered by blacks or the quantum of liability proved against whites. Racial remedies may instead be the outward manifestations of unspoken and perhaps sub conscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites. Racial justice - or its appearance - may, from time to time, be counted among the interests deemed important by the courts and by society's policymakers.

….

[T]he decision in Brown to break with the Court's long-held position on these issues cannot be understood without some consideration of the decision's value to whites, not simply those concerned about the immorality of racial inequality, but also those whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation. First, the decision helped to provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third world peoples. At least this argument was advanced by lawyers for both the NAACP and the federal government… Second, Brown offered much needed reassurance to American blacks that the precepts of equality and freedom so heralded during World War II might yet be given meaning at home…. Finally, there were whites who realized that the South could make the transition from a rural, plantation society to the sunbelt with all its potential and profit only when it ended its struggle to remain divided by state-sponsored segregation.

Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV.. 518, 523-25 (1980) (link).

ii. Leftist critiques of antidiscrimination law II – law v. political freedom

[Reading Nietzsche can be useful to understand] contemporary tendency to moralize in the place of political argument, and to understand the codification of injury and powerlessness – the marked turn away from freedom's pursuit – that this moralizing politics entails. Examples…. abound, but it is perhaps nowhere more evident than in the contemporary proliferation of efforts to pursue legal redress for injuries related to social subordination by marked attributes or behaviors: race, sexuality, and so forth. This effort, which strives to establish racism, sexism, and homophobia as morally heinous in the law, and to prosecute its individual perpetrators there has many of the attributes of what Nietzsche named the politics of ressentiment: developing a righteous critique of power from the perspective of the injured, it delimits a specific site of blame for suffering by constituting sovereign subjects and events as responsible for the "injury" of social subordination. It fixes the identities of the injured and the injuring as social positions, and

codifies as well the meanings of their actions against all possibilities of indeterminacy, ambiguity, and struggle for resignification or repositioning. This effort also casts the law in particular and the state more generally as neutral arbiters of injury rather than as themselves invested with the power to injure. Thus, the effort to "outlaw" social injury powerfully legitimizes law and the state as appropriate protectors against injury and casts injured individuals as needing such protection by such protectors. Finally, in its economy of perpetrator and victim, this project seeks not power or emancipation for the injured or the subordinated, but the revenge of punishment, making the perpetrator hurt as the sufferer does.

Wendy Brown, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY, 26-7 (1995) (link)

iii Leftist critiques of antidiscrimination law III – Critique of Rights

The critique of rights is connected to the indeterminacy thesis. The most straight-forward connection is this: According to the indeterminacy thesis, nothing whatever follows from a court's adoption of some legal rule (except insofar as the very fact that a court has adopted the rule has some social impact-the ideological dimension with which the critique of rights is concerned). Progressive legal victories occur, according to the indeterminacy thesis, because of the surrounding social circumstances. If those circumstances support material as well as ideological gains, well and good. And, of course, as long as those circumstances are stable, the legal victory will be so as well. But, if circumstances change, the "rule" could be eroded or, more interestingly, interpreted to support anti-progressive change.

….

The critique of rights, though, cautions against expecting too much of [legal] changes. By identifying the possibility of losing [politically] by winning [in court], the critique directs attention to questions about the political forces supporting the changes and whether those same forces are likely to interpret and apply the new rules in a progressive manner. The critique of rights also points out that the rhetoric of rights is available to anti-progressives. This has two aspects worth noting. First, if the rhetoric of rights in our culture is individualistic (and if that sort of individualism is anti-progressive in today's circumstances), conservatives are more likely than progressives to find the rhetoric of rights helpful. For example, conservatives have used the rhetoric of rights to obstruct progressive regulation of property and-in a directly related field-to challenge campaign finance regulation on the ground that it violates free speech rights. On this view, progressive victories are likely to be short-term only; in the longer run the individualism of rights-rhetoric will stabilize existing social relations rather than transform them. Second, when conservatives use the rhetoric of rights, the dialectic of counter-rights occurs. Here, progressives must characterize their proposals as themselves vindications of rights… Still, it remains true that

defending these proposals as required by the Constitution in order to overcome the conservative rights-claim that they are prohibited by the Constitution-is more difficult than defending them as good policy.

Mark Tushnet, *The Critique of Rights*, 47 SMUL REV. 23 (1993) (link).

5. LABOR LAW

5.a. The National Labor Relations Act (NLRA) and the National Labor Relations Board (NLRB)

In 1935, Congress passed the National Labor Relations Act (NLRA) (link). The NLRA is still the contemporary framework governing, ostensibly, *all* private sector labor relations in the U.S. As all laws and frameworks, the NLRA has significant exceptions and limitations, but its aim and reach is consistently framed as universal and all encompassing.

The 1935 NLRA itself, later amended, had the following structure:

Topic	Section(s)	Contents
Findings and Policy	*1*	• Interference in Commerce • Inequality of Bargaining Power between Employees and Employers • Legalizing the Right to Bargain
Definitions	*2*	
Forming the NLRB	*3 - 6*	• Establishing the Board as an agency • Determining the Status of Board members, salary and expenses
Rights of Employees	*7*	
Defining an Unfair Labor Practice (prohibited employer conduct)	*8*	• Interfering with Section 7 rights • Dominating a labor union • Discriminating against employees for exercising section 7 rights • Anti Retaliation clause • Refusing to Bargain
Conducting Elections	*9*	
Authority, Remedies, Process, Appeals on Decisions	*10*	
Investigatory Powers,	*11 - 12*	

subpoena and Information disclosures		
Misc.	*13 - 16*	

The NLRA as enacted had what is by all accounts the heart and soul of US labor relations, the Findings clause (1) and Employee Rights (7) contain tremendously inspiring words.
For example, from Section 1:

> ….
> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries .

And from Section 7:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Truly, inspiring stuff. The NLRA, however, contained much more mundane issues as well.
Section 3(c) for example:

> All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

Itemized receipts alongside the fundamental rights of all private sector employees.

Of note is that the very first thing the NLRA does after announcing its findings and defining stuff, is form a federal agency. That agency, its authorities, structures, procedures and remedies will stand at the heart of all things private-sector labor law for a century after the NLRA's enactment.

In 1947 the NLRA had its first, and final, major revision with an Act called the Labor Management Relations Act (LMRA) (link).

5.1. Statutory Background

NATIONAL LABOR RELATIONS ACT Also cited NLRA or the Act; 29 U.S.C. §§ 151-169 (link)

§152. [Sec. 2] DEFINITIONS

When used in this Act--

…

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

…

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

….

§ 157 [Sec. 7]. Rights of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,

….

§ 158. [Sec. 8] Unfair labor practices

(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 USCS § 157];

….

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization…

....

(c) **Expression of views without threat of reprisal or force or promise of benefit.** The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice

under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

§ 160. [Sec. 10] PREVENTION OF UNFAIR LABOR PRACTICES

….

> (c) … No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

….

§ 163. [Sec. 13] Right to strike preserved

Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

5.2. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 58 S. Ct. 904 (1938)

Full decision: (link); **Docket**: (link); **Oral argument**: (link)

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The Circuit Court of Appeals refused to decree enforcement of an order of the National Labor Relations Board. We granted certiorari because of an asserted conflict of decision.

The respondent, a California corporation, is engaged in the transmission and receipt of telegraph, radio, cable, and other messages between points in California and points in other States and foreign countries. It maintains an office in San Francisco for the transaction of its business wherein it employs upwards of sixty supervisors, operators and clerks, many of whom are members of Local No. 3 of the American Radio Telegraphists Association, a national labor organization; …. The [union] adopted a resolution to the effect that if satisfactory terms were not obtained by September 23 a strike of the San Francisco point-to-point operators should be called. The national officers determined on a general strike in view of the unsatisfactory state of the negotiations…. At midnight Friday, October 4, 1935, all the men there employed went on strike. The respondent, in order to maintain service, brought employes from its Los Angeles office and others from the New York and Chicago offices of the parent company to fill the strikers' places.

Although none of the San Francisco strikers returned to work Saturday, Sunday, or Monday, the strike proved unsuccessful in other parts of the country and, by Monday evening, October 7th, a number of the men became convinced that it would fail and that they had better return to work before their places were filled with new employes. One of them telephoned the respondent's traffic supervisor Monday evening to inquire whether the men might return. He was told that the respondent would take them back and it was arranged that the official should meet the employes

at a downtown hotel and make a statement to them. Before leaving the company's office for this purpose, the supervisor consulted with his superior, who told him that the men might return to work in their former positions but that, as the company had promised eleven men brought to San Francisco they might remain if they so desired, the supervisor would have to handle the return of the striking employes in such fashion as not to displace any of the new men who desired to continue in San Francisco. A little later the supervisor met two of the striking employes and gave them a list of all the strikers …. In furnishing this list the supervisor stated that the men could return to work in a body but he checked off the names of eleven strikers who he said would have to file applications for reinstatement, which applications would be subject to the approval of an executive of the company in New York.

Because of this statement the two employes, in notifying the strikers of the proposed meeting, with the knowledge of the supervisor, omitted to communicate with the eleven men whose names had been checked off. Thirty-six men attended the meeting. Some of the eleven in question heard of it and attended. The supervisor appeared at the meeting and reiterated his statement that the men could go back to work at once, but read from a list the names of the eleven who would be required to file applications for reinstatement to be passed upon in New York. Those present at the meeting voted on the question of immediately returning to work, and the proposition was carried. Most of the men left the meeting and went to the respondent's office Tuesday morning, October 8th, where on that day they resumed their usual duties. Then or shortly thereafter, six of the eleven in question took their places and resumed their work without challenge. It turned out that only five of the new men brought to San Francisco desired to stay.

Five strikers who were prominent in the activities of the union and in connection with the strike, whose names appeared upon the list of eleven, reported at the office at various times between Tuesday and Thursday. Each of them was told that he would have to fill out an application for employment; that the roll of employes was complete, and that his application would be considered in connection with any vacancy that might thereafter occur.

….the secretary of Local No. 3 presented a charge to the National Labor Relations Board that the respondent had violated § 8 (1) and (3) of the National Labor Relations Act. Thereupon the Board filed a complaint charging that the respondent had discharged, and was refusing to employ, the five men who had not been reinstated to their positions, for the reason that they had joined and assisted the labor organization known as Local No. 3 and had engaged in concerted activities with other employes of the respondent, for the purpose of collective bargaining and other mutual aid and protection; that by such discharge respondent had interfered with, restrained, and coerced the employes in the exercise of their rights guaranteed by § 7 of the National Labor Relations Act and so had been guilty of an unfair labor practice within the meaning of § 8 (1) of the Act. The complaint further alleged that the discharge of these men was a discrimination in respect of their hire and tenure of employment and a discouragement of membership in Local No. 3, and thus an unfair labor practice within the meaning of § 8 (3) of the Act.

The respondent filed an answer denying the allegations of the complaint, and moved to dismiss the proceeding on the ground that the Act is unconstitutional. The motion was taken under advisement by the Board's examiner and the case proceeded to hearing. After the completion of its testimony, the Board filed an amended complaint to comport with the evidence, in which it charged that the respondent had refused to re-employ the five operators for the reason that they had joined and assisted the labor organization known as Local No. 3 and engaged with other employes in concerted activities for the purpose of collective bargaining and other mutual aid and protection; that the refusal to re-employ them restrained and coerced the employes in the exercise of rights guaranteed by § 7 and so constituted an unfair labor practice within § 8 (1) of the Act. The amended complaint further asserted that the refusal to re-employ the men discriminated in regard to their hire and tenure of employment and discouraged membership in Local No. 3 and thus amounted to an unfair labor practice under § 8 (3) of the Act.

[T]he Board reached …. that "by refusing to reinstate to employment" the five men in question, "thereby discharging said employes," the respondent by "each of said discharges," discriminated in regard to tenure of employment and thereby discouraged membership in the labor organization known as Local No. 3, and, by the described acts "has interfered with, restrained, and coerced its employes in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act." As conclusions of law the Board found that the respondent had engaged in unfair labor practices affecting commerce within the meaning of § 8, subsections (1) and (3), and § 2, subsections (6) and (7) of the Act. It entered an order that respondent cease and desist from discharging, or threatening to discharge, any of its employes for the reason that they had joined or assisted Local No. 3 or otherwise engaged in union activities; from interfering with, restraining or coercing its employes in the exercise of the rights guaranteed by § 7 of the Act; offer the five men immediate and full reinstatement to their former positions, without prejudice to rights and privileges previously enjoyed, and make each of them whole for any loss of wages due to their discharge; post notices that the respondent would not discharge or discriminate against members of, or those desiring to become members of, the union, and keep the notices posted for thirty days.
….

[the Court analyze the authority of the Board against procedural and constitutional claims, and continue to analyze the legal arguments of the employer with regard to the Board's authority over striking employees and the rights of the employer]

The strikers remained employes under § 2 (3) of the Act which provides: "The term 'employee' shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, . . ." Within this definition the

strikers remained employes for the purpose of the Act and were protected against the unfair labor practices denounced by it.

It is contended that the Board lacked jurisdiction because respondent was at no time guilty of any unfair labor practice. Section 8 of the Act denominates as such practice action by an employer to interfere with, restrain, or coerce employes in the exercise of their rights to organize, to form, join or assist labor organizations, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or "by discrimination in regard to . . . tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . ." [It was not] an unfair labor practice to replace the striking employes with others in an effort to carry on the business. Although § 13 provides, "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike," it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. But the claim put forward is that the unfair labor practice indulged by the respondent was discrimination in reinstating striking employes by keeping out certain of them for the sole reason that they had been active in the union. As we have said, the strikers retained, under the Act, the status of employes. Any such discrimination in putting them back to work is, therefore, prohibited by § 8.
….
It appears that all of the men who had been on strike signed applications for reemployment shortly after their resumption of work. The Board found that, in taking back six of the eleven men and excluding five who were active union men, the respondent's officials discriminated against the latter on account of their union activities and that the excuse given that they did not apply until after the quota was full was an afterthought and not the true reason for the discrimination against them.

As we have said, the respondent was not bound to displace men hired to take the strikers' places in order to provide positions for them. It might have refused reinstatement on the ground of skill or ability, but the Board found that it did not do so. It might have resorted to any one of a number of methods of determining which of its striking employes would have to wait because five men had taken permanent positions during the strike, but it is found that the preparation and use of the list, and the action taken by respondent, were with the purpose to discriminate against those most active in the union. There is evidence to support these findings.
...

The judgment of the Circuit Court of Appeals is reversed and the cause is remanded to that court for further proceedings in conformity with this opinion.

Reversed.

5.2.1. Timeline

Date	Case Name	Decision	Notes
February 20, 1936	*Mackay Radio & Tel. Company* National Labor Relations Board (1936)	Orders Respondent to cease and desist from discharging or threatening to discharge for joining/assisting union, offer employees full reinstatement, pay back pay, post in offices that employees will not be discriminated against for associating with union.	**First filed in 1935, about 3 weeks after strike** NLRB alleged that Mackay Radio violated the NLRA. • Link
January 11, 1937	*NLRB v. Mackay Radio & Tel. Company* Circuit Court of Appeals, Ninth Circuit (1937)	The court denied the NLRB's application to enforce its order finding that the employer violated the Act.	• Link Affirmed on **October 19, 1937** • Link
February 28, 1938	*NLRB v. Mackay Radio & Tel. Co.* Supreme Court of the United States (1938)	Writ of certiorari granted.	• Link
Argued April 5-6, 1938 **Decided May 16, 1938**	*NLRB v. Mackay Radio & Tel. Company* Supreme Court of the United States (1938)	The Court reversed the lower court's decision.	Employers can replace striking workers as long as they do not discriminate in their rehiring • Link

5.2.2. Notes

i. Wait, what?

Under the NLRA it would be blatantly illegal for an employer to *terminate* workers on strike because they work concertedly to improve their terms and conditions of employment. But, *Mackay Radio* stands for the proposition that it would be perfectly legal to *permanently replace* striking workers.

Yes, it means exactly what you think it means. While technically a permanently replaced striking employee is still its employer's employee, this employee has no job, no income, cannot enter the premises, and will not receive a Christmas bonus. The *Mackay* Court doesn't make a big fuss out of it. A magician's sleight of hand.

There are two possible questions about *Mackay*: Why? And, how? Why did the Court in 1938, a year after the NLRA passed Constitutional scrutiny, allow employers to permanently replace their workers? And how exactly does the Court do that? We will start with the second question, the How question.

ii. How did the Court kill the right to strike?

Like it or not, the statutory text firmly anchors employees' rights. (Covered) employees enjoy broad Section 7 rights, actualized through Section 8 prohibiting employers from interfering with or discriminating against organizing workers. Section 13 of the NLRA mentions explicitly that the NLRA will not harm the right to strike.

If striking is a protected activity under Section 7, something that the *Mackay* Court does not question, then terminating workers and permanently replacing them seems equally disruptive to their strike. So it would seem, at least legally, that workers have a lot going on for them, a winning claim.

If workers have all of those explicit legal protections, employers must have something at least equally valid, right? Well, not exactly. Try to figure out what legal sources the *Mackay* Court uses to anchor employers' rights to replace (but not terminate) striking workers.

iii. Why did the Court kill the right to strike?

One thing that the *Mackay* decision does not lack is policy arguments. By policy arguments, I mean "stuff that the Court would like to see in the world." Two policy arguments are of particular importance: employers and replacement workers' rights.

Employers have a right, or so the Court tells us, to continue operation if "of no fault of their own", their workers strike. Replacement workers, the Court tells us, have rights to their jobs and their contracts that trump, apparently, the rights of the striking workers to their jobs and their contracts. Why does the Court favor the right of businesses to continue operations against striking workers? The Court doesn't tell us. Why does the Court favor the rights of replacement workers over the rights of striking workers? The Court doesn't say. Like many other policy preferences, how one prioritizes their policy objectives is not made explicit. Perhaps not even to the justices themselves.

But one question must be nagging, why does the Court assume that their policy preferences trump the policy preferences Congress laid out in the NLRA? Where (oh where) does the Court find statutory backing to their policy preferences?

iv. A peculiar horizontal distributive case

Mackay is peculiar in one more way: Mackay's distributive stakes are explicitly horizontal and not vertical. Work law distributes workplace goods between employees and employers. We know that. The HR department is where class warfare takes place, employers versus employees, *yada yada yada.*

But in *Mackay* the stakes are distributed explicitly between employees: striking workers and their replacements. Both sides of the aisle are workers.

All of work law distributes horizontal (worker v. worker; employer v. employer) as well as vertical (worker v. employer) stakes. Minimum wages do not just take from employers and give to workers; they also distribute unemployment and wages amongst workers. Unions not only empower workers, but create dual labor markets. Antidiscrimination laws, perhaps with the most explicit horizontal stakes, are used to transfer workplace goods from one group of workers (White, Men, etc.) to other groups.

In *Mackay* the practical question was not whether or not the employer can continue operation. The strike already failed. *Mackay* would continue operations. The only question left open was with whom? With its striking workers or with its replacement workers? In this distributional struggle the Court, again, prefers replacement workers. Why?

v. At-Will Workers are Permanent Workers (what)

Mackay stands for the proposition that an employer is not mandated by the NLRA to replace "permanent" replacements of "economic" strikers. Following this disastrous decision, a long and intertwined case law developed defining and confining what is the meaning of "economic" and of "permanent."

Not surprisingly, a cursed doctrine bears cursed offsprings.

With regard to what are "permanent" replacements the Board was handed a lifeline to save some of its dignity. According to early 2000s arguments, as long as the replacements are "at will workers" they cannot be "permanent." Why? because at will is the epitome of precarity. So, an employer who wishes to permanently replace its striking workers must offer them just-cause (or equivalent) rights.

This argument was a life-line because 1) it makes legal sense; 2) it would raise the cost of breaking strikes with scabs; and 3) worst thing happens, it increases job security in the US labor market. A win-win-win.

The Board rejected that argument. Why? Because at will is not 100% precarious and there is some (unspecified) way some workers might be able to secure "permanence" even on an at will contract. So, at will workers can still count as permanent replacements for the purpose of *Mackay Radio*. Instead of win-win-win, the Board chose lose-lose-lose.

See, *Jones Plastic & Engineering Co*., 351 NLRB 61 (Sep. 27, 2007).

vi. *And now: Beg.*

Before noting the long and tedious doctrinal development of Courts and Boards battling it out over the protection of striking workers, it is important to once again state the immense, earth-shattering, movement-crushing devastation that is *Mackay Radio*.

In it the Court did two things whilst making the substantive decision about the rights of striking workers. First, it ignored the text of the NLRA. It made clear to anyone willing to listen that from now on there is only one landlord of labor law, the Supreme Court. And if anyone wants anything from their legal master, they must beg. Nine elitist superclass uber-legislatures will determine your labor laws. From now on, types of workers' activity that the justices will not like will not be legal. Period.

Second, *Mackay* created a default that is not just about who calls the shots in labor law, but about the focus of labor law, and as a derivative, labor activism. As workers desperately need protection from their employers, they will frame and plan their actions around evading *Mackay Radio*. Sure, Unfair Labor Practices (ULP) strikes are excluded from the *Mackay Radio* rule. Gee, thanks. Protected strikes in this reading are nothing more than the enforcement mechanism of the law, not a substantive right workers have in the law itself.

Beg.

vii. A Case of At-Will Diffusion into NLRA Jurisprudence?

Is *Mackay* a case of the at-will rule sipping into statutory doctrine? Technically, no, or at least- it shouldn't. The at-will rule is a common law rule, which is overridden by statutory provisions. When the NLRA prohibits the interference in organizing, or discrimination against union activities or status it does not have (an indeed was meant to exclude) any at-will carveouts.

However, some NLRB jurisprudence reads Mackay in a disturbing at-will way. A 2011 NLRB General Counsel advice memo cites the proposition of Mackay as

> [A]n employer is free to hire permanent replacements for any non-discriminatory reason, but where anti-union discrimination is shown in the use of permanent replacements, a Section 8(a)(3) violation is established.

Yep, that's what we read (hurts every time). In citing the source of this proposition, the General Counsel writes:

> This is consistent with the employment-at-will doctrine alluded to by the Board in Hot Shoppes (an "employer has a legal right to replace economic strikers at will"). 146 NLRB at 805. Under that doctrine, an employee "may be fired for any reason or no reason at all…."

Piedmont Gardens, 32-CA-025266, Advice Memo (Feb. 25, 2011).

What the GC is doing here is equating the common law at-will rule (good reason, bad reason, etc.), with the statutory doctrine of economic strike protections. Those two things need not be equal, but for the GC, they are.

viii. Post Strike Vacancies and a (conditioned) Right to Reinstatement

Mackay Radio's rule is that an employer may lawfully refuse to reinstate economic striker when the employer hired permanent replacement to continue operations. This rule is good law, practiced and preached and enforced for almost 90 years.

One out for employees, is that in the case a strike failed, and the strikers ask to be reinstated, and the employer has a vacancy, the employer (usually) must reinstate them. Here is the Board's recent explanation for the terms of such reinstatement:

> Following strikers' unconditional offer to return to work, reinstatement remains contingent on the occurrence of a genuine job vacancy (known as a "*Laidlaw* vacancy") among the employer's then-existing work force; such a vacancy "is engendered when the employer expands its work force, discharges an employee, or when an employee quits or leaves the employer." The existence of a Laidlaw vacancy entitles a former striker to reinstatement to his former job unless he has obtained substantially equivalent employment elsewhere or unless the employer is able to sustain its burden of proof that the failure to recall was justified by legitimate and substantial business reasons.
>
> *Tracy Auto, L.P. dba Tracy Toyota*, 372 NLRB No. 101, 18 (2023)

Striking has its hazards. Losing your job is one.

ix. Striking and Unemployment Insurance

Some state Unemployment Insurance Laws makes striking workers ineligible for unemployment insurance collection. This makes striking harder for workers. Most employees regain eligibility once they terminate the strike, if not reinstated because of permanent replacements.

Beg. But with unemployment insurance.

> *See*, *e.g.*, *Fort Smith v. Moore*, 269 Ark. 617, 599 S.W.2d 750 (Ct. App. 1980).

5.2a. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)

MR. JUSTICE REED delivered the opinion of the Court.

In the *Republic Aviation Corporation* case, the employer, a large and rapidly growing military aircraft manufacturer, adopted, well before any union activity at the plant, a general rule against soliciting which read as follows:

> "Soliciting of any type cannot be permitted in the factory or offices."

The Republic plant was located in a built-up section of Suffolk County, New York. An employee persisted after being warned of the rule in soliciting union membership in the plant by passing out application cards to employees on his own time during lunch periods. The employee was discharged for infraction of the rule and, as the National Labor Relations Board found, without discrimination on the part of the employer toward union activity.

Three other employees were discharged for wearing UAW-CIO union steward buttons in the plant after being requested to remove the insignia. The union was at that time active in seeking to organize the plant. The reason which the employer gave for the request was that, as the union was not then the duly designated representative of the employees, the wearing of the steward buttons in the plant indicated an acknowledgment by the management of the authority of the stewards to represent the employees in dealing with the management and might impinge upon the employer's policy of strict neutrality in union matters and might interfere with the existing grievance system of the corporation.

The Board was of the view that wearing union steward buttons by employees did not carry any implication of recognition of that union by the employer where, as here, there was no competing labor organization in the plant. The discharges of the stewards, however, were found not to be motivated by opposition to the particular union or, we deduce, to unionism.

The Board determined that the promulgation and enforcement of the "no solicitation" rule violated § 8(1) of the National Labor Relations Act as it interfered with, restrained and coerced employees in their rights under § 7 and discriminated against the discharged employee under § 8(3). It determined also that the discharge of the stewards violated § 8(1) and 8(3). As a consequence of its conclusions as to the solicitation and the wearing of the insignia, the Board entered the usual cease and desist order and directed the reinstatement of the discharged employees with back pay and also the rescission of "the rule against solicitation in so far as it prohibits union activity and

solicitation on company property during the employees' own time." 51 N. L. R. B. 1186, 1189. The Circuit Court of Appeals for the Second Circuit affirmed.

. . . .

These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.

The Wagner Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary, that Act left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms. Thus a "rigid scheme of remedies" is avoided and administrative flexibility within appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation. *Phelps Dodge Corp*. v. *Labor Board*, 313 U.S. 177, 194. So far as we are here concerned, that purpose is the right of employees to organize for mutual aid without employer interference. This is the principle of labor relations which the Board is to foster.

The gravamen of the objection of both *Republic* and *Le Tourneau* to the Board's orders is that they rest on a policy formulated without due administrative procedure. To be more specific it is that the Board cannot substitute its knowledge of industrial relations for substantive evidence. The contention is that there must be evidence before the Board to show that the rules and orders of the employers interfered with and discouraged union organization in the circumstances and situation of each company. Neither in the *Republic* nor the *Le Tourneau* cases can it properly be said that there was evidence or a finding that the plant's physical location made solicitation away from company property ineffective to reach prospective union members. Neither of these is like a mining or lumber camp where the employees pass their rest as well as their work time on the employer's premises, so that union organization must proceed upon the employer's premises or be seriously handicapped.

. . . .

In the *Republic Aviation Corporation* case the evidence showed that the petitioner was in early 1943 a non-urban manufacturing establishment for military production which employed thousands. It was growing rapidly. Trains and automobiles gathered daily many employees for the plant from an area on Long Island, certainly larger than walking distance. The rule against solicitation was introduced in evidence and the circumstances of its violation by the dismissed employee after warning was detailed.

As to the employees who were discharged for wearing the buttons of a union steward, the evidence showed in addition the discussion in regard to their right to wear the insignia when the union had not been recognized by the petitioner as the representative of the employees. Petitioner looked upon a steward as a union representative for the adjustment of grievances with the management after employer recognition of the stewards' union. Until such recognition petitioner felt that it would violate its neutrality in labor organization if it permitted the display of a steward button by an employee. From its point of view, such display represented to other employees that the union already was recognized.

No evidence was offered that any unusual conditions existed in labor relations, the plant location or otherwise to support any contention that conditions at this plant differed from those occurring normally at any other large establishment.

. . . .

Not only has the Board in these cases sufficiently expressed the theory upon which it concludes that rules against solicitation or prohibitions against the wearing of insignia must fall as interferences with union organization, but, in so far as rules against solicitation are concerned, it had theretofore succinctly expressed the requirements of proof which it considered appropriate to outweigh or overcome the presumption as to rules against solicitation. In the *Peyton Packing Company* case, 49 N. L. R. B. 828, at 843, hereinbefore referred to, the presumption adopted by the Board is set forth.

Although this definite ruling appeared in the Board's decisions, no motion was made in the court by Republic or Le Tourneau after the Board's decisions for leave to introduce additional evidence to show unusual circumstances involving their plants or for other purposes. . . . .

In the *Republic Aviation* case, petitioner urges that irrespective of the validity of the rule against solicitation, its application in this instance did not violate § 8(3) because the rule was not discriminatorily applied against union solicitation but was impartially enforced against all solicitors. It seems clear, however, that if a rule against solicitation is invalid as to union solicitation on the employer's premises during the employee's own time, a discharge because of violation of that rule discriminates within the meaning of § 8(3) in that it discourages membership in a labor organization.

Republic Aviation Corporation v. *National Labor Relations Board* is affirmed.

5.3. NLRB v. Wash. Aluminum Co., 370 U.S. 9 (1962)

Full decision: (link); **Docket**: (link); **Oral argument**: (link)

MR. JUSTICE BLACK delivered the opinion of the Court.

The Court of Appeals for the Fourth Circuit, with Chief Judge Sobeloff dissenting, refused to enforce an order of the National Labor Relations Board directing the respondent Washington Aluminum Company to reinstate and make whole seven employees whom the company had discharged for leaving their work in the machine shop without permission on claims that the shop was too cold to work in.

…. The machine shop in which the seven discharged employees worked was not insulated and had a number of doors to the outside that had to be opened frequently. An oil furnace located in an adjoining building was the chief source of heat for the shop, although there were two gas-fired space heaters that contributed heat to a lesser extent. The heat produced by these units was not always satisfactory and, even prior to the day of the walkout involved here, several of the eight machinists who made up the day shift at the shop had complained from time to time to the company's foreman "over the cold working conditions."

January 5, 1959, was an extraordinarily cold day for Baltimore, with unusually high winds and a low temperature of 11 degrees followed by a high of 22. When the employees on the day shift came to work that morning, they found the shop bitterly cold, due not only to the unusually harsh weather, but also to the fact that the large oil furnace had broken down the night before and had not as yet been put back into operation. As the workers gathered in the shop just before the starting hour of 7:30, one of them, a Mr. Caron, went into the office of Mr. Jarvis, the foreman, hoping to warm himself but, instead, found the foreman's quarters as uncomfortable as the rest of the shop. As Caron and Jarvis sat in Jarvis' office discussing how bitingly cold the building was, some of the other machinists walked by the office window "huddled" together in a fashion that caused Jarvis to exclaim that "if those fellows had any guts at all, they would go home." When the starting buzzer sounded a few moments later, Caron walked back to his working place in the shop and found all the other machinists "huddled there, shaking a little, cold." Caron then said to these workers, ". . . Dave [Jarvis] told me if we had any guts, we would go home. . . . I am going home, it is too damned cold to work." Caron asked the other workers what they were going to do and, after some discussion among themselves, they decided to leave with him. One of these workers, testifying before the Board, summarized their entire discussion this way: "And we had all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way." As they started to leave, Jarvis approached and persuaded one of the workers to remain at the job. But Caron and the other six workers on the day shift left practically in a body in a matter of minutes after the 7:30 buzzer.

When the company's general foreman arrived between 7:45 and 8 that morning, Jarvis promptly informed him that all but one of the employees had left because the shop was too cold.
The company's president came in at approximately 8:20 a.m. and, upon learning of the walkout, immediately said to the foreman, ". . . if they have all gone, we are going to terminate them." After discussion "at great length" between the general foreman and the company president as to

what might be the effect of the walkout on employee discipline and plant production, the president formalized his discharge of the workers who had walked out by giving orders at 9 a. m. that the affected workers should be notified about their discharge immediately, either by telephone, telegram or personally. This was done.

On these facts the Board found that the conduct of the workers was a concerted activity to protest the company's failure to supply adequate heat in its machine shop, that such conduct is protected under the provision of § 7 of the National Labor Relations Act which guarantees that "Employees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection," and that the discharge of these workers by the company amounted to an unfair labor practice under § 8 (a)(1) of the Act, which forbids employers "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Acting under the authority of § 10 (c) of the Act, which provides that when an employer has been guilty of an unfair labor practice the Board can "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act," the Board then ordered the company to reinstate the discharged workers to their previous positions and to make them whole for losses resulting from what the Board found to have been the unlawful termination of their employment.

In denying enforcement of this order, the majority of the Court of Appeals took the position that because the workers simply "summarily left their place of employment" without affording the company an "opportunity to avoid the work stoppage by granting a concession to a demand," their walkout did not amount to a concerted activity protected by § 7 of the Act. On this basis, they held that there was no justification for the conduct of the workers in violating the established rules of the plant by leaving their jobs without permission and that the Board had therefore exceeded its power in issuing the order involved here because § 10 (c) declares that the Board shall not require reinstatement or back pay for an employee whom an employer has suspended or discharged "for cause."

We cannot agree that employees necessarily lose their right to engage in concerted activities under § 7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable. The language of § 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made. To compel the Board to interpret and apply that language in the restricted fashion suggested by the respondent here would only tend to frustrate the policy of the Act to protect the right of workers to act together to better their working conditions. Indeed, as indicated by this very case, such an interpretation of § 7 might place burdens upon employees so great that it would effectively nullify the right to engage in concerted activities which that section protects. The seven employees here were part of a small group of employees who were wholly unorganized. They had no bargaining representative and, in fact, no representative of any kind to present their

grievances to their employer. Under these circumstances, they had to speak for themselves as best they could. As pointed out above, prior to the day they left the shop, several of them had repeatedly complained to company officials about the cold working conditions in the shop. These had been more or less spontaneous individual pleas, unsupported by any threat of concerted protest, to which the company apparently gave little consideration and which it now says the Board should have treated as nothing more than "the same sort of gripes as the gripes made about the heat in the summertime." The bitter cold of January 5, however, finally brought these workers' individual complaints into concert so that some more effective action could be considered. Having no bargaining representative and no established procedure by which they could take full advantage of their unanimity of opinion in negotiations with the company, the men took the most direct course to let the company know that they wanted a warmer place in which to work. So, after talking among themselves, they walked out together in the hope that this action might spotlight their complaint and bring about some improvement in what they considered to be the "miserable" conditions of their employment. This we think was enough to justify the Board's holding that they were not required to make any more specific demand than they did to be entitled to the protection of § 7.

Although the company contends to the contrary, we think that the walkout involved here did grow out of a "labor dispute" within the plain meaning of the definition of that term in § 2(9) of the Act, which declares that it includes "any controversy concerning terms, tenure or *conditions of employment* . . . ." The findings of the Board, which are supported by substantial evidence and which were not disturbed below, show a running dispute between the machine shop employees and the company over the heating of the shop on cold days -- a dispute which culminated in the decision of the employees to act concertedly in an effort to force the company to improve that condition of their employment. The fact that the company was already making every effort to repair the furnace and bring heat into the shop that morning does not change the nature of the controversy that caused the walkout. At the very most, that fact might tend to indicate that the conduct of the men in leaving was unnecessary and unwise, and it has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not. Moreover, the evidence here shows that the conduct of these workers was far from unjustified under the circumstances. The company's own foreman expressed the opinion that the shop was so cold that the men should go home. This statement by the foreman but emphasizes the obvious -- that is, that the conditions of coldness about which complaint had been made before had been so aggravated on the day of the walkout that the concerted action of the men in leaving their jobs seemed like a perfectly natural and reasonable thing to do.

Nor can we accept the company's contention that because it admittedly had an established plant rule which forbade employees to leave their work without permission of the foreman, there was justifiable "cause" for discharging these employees, wholly separate and apart from any concerted activities in which they engaged in protest against the poorly heated plant. Section 10(c) of the Act does authorize an employer to discharge employees for "cause" and our cases

have long recognized this right on the part of an employer. But this, of course, cannot mean that an employer is at liberty to punish a man by discharging him for engaging in concerted activities which § 7 of the Act protects. And the plant rule in question here purports to permit the company to do just that for it would prohibit even the most plainly protected kinds of concerted work stoppages until and unless the permission of the company's foreman was obtained.

It is of course true that § 7 does not protect all concerted activities, but that aspect of the section is not involved in this case. The activities engaged in here do not fall within the normal categories of unprotected concerted activities such as those that are unlawful, violent or in breach of contract. Nor can they be brought under this Court's more recent pronouncement which denied the protection of § 7 to activities characterized as "indefensible" because they were there found to show a disloyalty to the workers' employer which this Court deemed unnecessary to carry on the workers' legitimate concerted activities. The activities of these seven employees cannot be classified as "indefensible" by any recognized standard of conduct. Indeed, concerted activities by employees for the purpose of trying to protect themselves from working conditions as uncomfortable as the testimony and Board findings showed them to be in this case are unquestionably activities to correct conditions which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society like ours.

We hold therefore that the Board correctly interpreted and applied the Act to the circumstances of this case and it was error for the Court of Appeals to refuse to enforce its order. The judgment of the Court of Appeals is reversed and the cause is remanded to that court with directions to enforce the order in its entirety.

Reversed and remanded.

5.3.1. Timeline

Date	Case Name	Decision	Notes
August 16, 1960	*Washington Aluminum Co.* National Labor Relations Board (1960)	Orders Respondent to cease and desist fro refusing to bargain collectively with union, if there comes an understanding, sign an agreement, post at Baltimore plant a notice (as described), for 60	**First filed in 1906** NLRB alleged that Washington Aluminum Co. committed unfair labor practices • Link

		days, and notify the Regional Director of the steps taken to follow these orders.	
Argued January 11, 1961 **Decided June 3, 1961**	*NLRB v. Washington Aluminum Co.* United States Court of Appeals, Fourth Circuit (1961)	Denied the Board's enforcement.	• Link
October 2nd, 1961	*NLRB v. Washington Aluminum Co.* Supreme Court of the United States (1961)	Petition for writ of certiorari filed by counsel for respondent.	• Link
December 4, 1961	*NLRB v. Washington Aluminum Co.* Supreme Court of the United States (1961)	Petition for writ of certiorari granted and case transferred to summary calendar.	• Link
October 28 - April 3, 1962	*NLRB v. Washington Aluminum Co.* Supreme Court of the United States (1961)	Briefs filed.	• Link
Argued April 10, 1962 **Decided May 28, 1962**	*NLRB v. Washington Aluminum Co.* Supreme Court of the United States (1962)	The Court reversed the court of appeals' judgment	Court of Appeals was directed to enforce the Board's order • Link

5.3.2. Notes

i. The Rule

What constitutes protected concerted activity under Section 7 of the NLRA? According to *Wash. Alum.* this rule has a negative aspect and a positive aspect. The negative aspect of this rule is the types of activities that the Court tells us are *not* protected: those that are unlawful, violent, in breach of contract, or those that are "indefensible." The positive aspect of the rule are the gestures the Court makes towards which activities *are* protected: here the court tells us something about the context in which those demands are made (arising out of a labor dispute) and some hints about the medium or manner in which demands are made.

Another important– yet implicit– aspect of the *Wash Alum.* rule is that unions need not be involved in order for workers to be protected under the NLRA. Section 7, so the *Wash. Alum*. Court tells us, protects activities that are not related to unionizing, electing representatives, and collective bargaining. The Court derives this protection from the broad language of Section 7's closing paragraph: "Employees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection".

ii. The Stakes

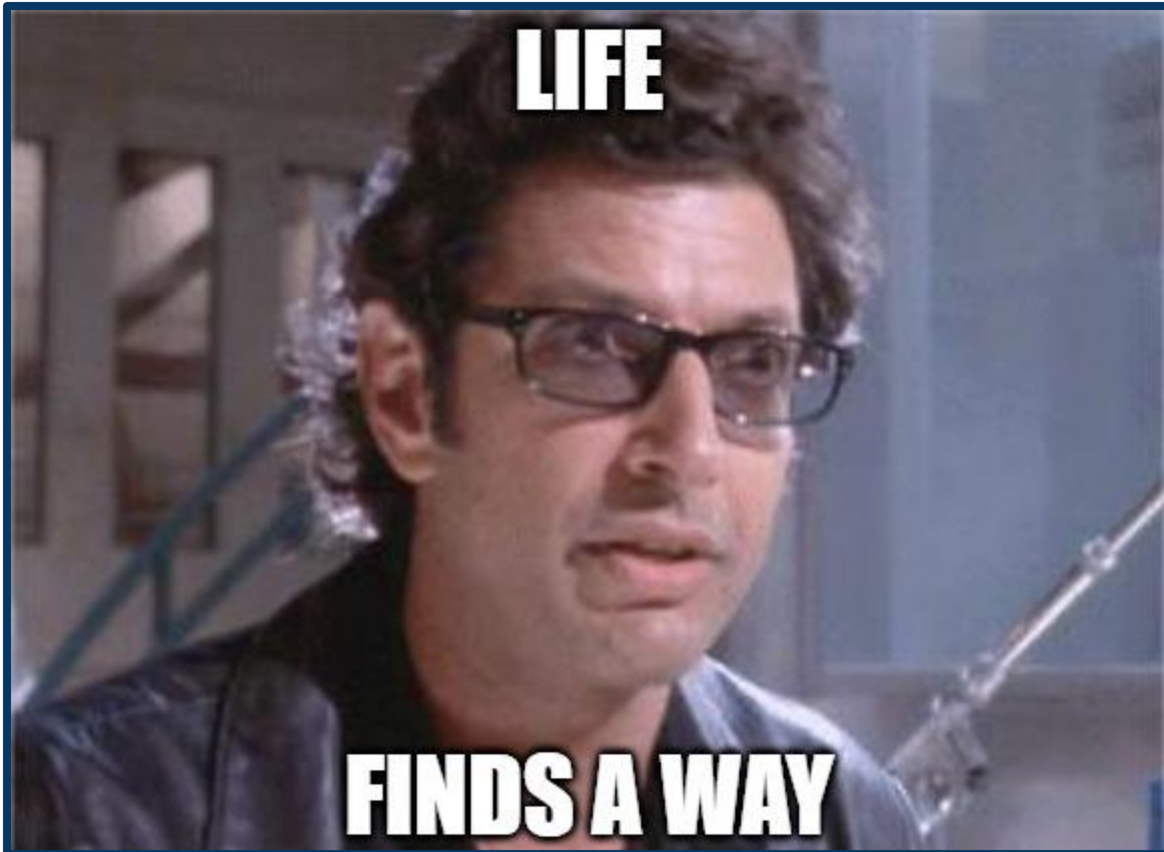
The stakes of *Wash Alum.* are immense. The choice the Court faced is whether or not the only venue for workplace organizing is through the highly formalized and regulated unionization process (organizing → elections → bargaining → signing → enforcing).

The alternative being that Section 7 is "open ended", in the sense that workers can find other ways to act concertedly "for the purpose of mutual aid or protection." The Court chose a limited, standard-like open-endedness. It limits the types of activities, and provides some guidelines for what will count as protected, but does not condition coverage with any strict formal requirements.

For employers, highly structured and formalized processes guarantee stability and certainty, and for the cynics amongst us– high transaction costs for unionization and red-tape deradicalization of workers.

Labor lawyers make a good living guiding workers and employers through the process of formal organizing and bargaining. Lawyers are needed precisely because of how formal the process is. *Wash. Alum*.'s promise is that labor law doesn't have to be ossified, predictable, and easy to kill. Within some (made-up) bounds of civility, workers can carve their own paths; life can find a way.

Or can it?



Workers will find a way, illustration.
Source: Link

5.3a. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978)

[dissenting opinions omitted]

MR. JUSTICE POWELL delivered the opinion of the Court.

Employees of petitioner sought to distribute a union newsletter in nonworking areas of petitioner's property during nonworking time urging employees to support the union and discussing a proposal to incorporate the state "right-to-work" statute into the state constitution and a Presidential veto of an increase in the federal minimum wage. The newsletter also called on employees to take action to protect their interests as employees with respect to these two issues. The question presented is whether petitioner's refusal to allow the distribution violated § 8(a)(1) of the National Labor Relations Act, by interfering with, restraining, or coercing employees' exercise of their right under § 7 of the Act, to engage in "concerted activities for the purpose of . . . mutual aid or protection."

I

Petitioner is a company that manufactures paper products in Silsbee, Tex. Since 1954, petitioner's production employees have been represented by Local 801 of the United Paperworkers International Union. It appears that many, although not all, of petitioner's approximately 800 production employees are members of Local 801. Since Texas is a "right-to-work" State by statute, Local 801 is barred from obtaining an agreement with petitioner requiring all production employees to become union members.

In March 1974, officers of Local 801, seeking to strengthen employee support for the union and perhaps recruit new members in anticipation of upcoming contract negotiations with petitioner, decided to distribute a union newsletter to petitioner's production employees. The newsletter was divided into four sections. The first and fourth sections urged employees to support and participate in the union and, more generally, extolled the benefits of union solidarity. The second section encouraged employees to write their legislators to oppose incorporation of the state "right-to-work" statute into a revised state constitution then under consideration, warning that incorporation would "[weaken] Unions and [improve] the edge business has at the bargaining table." The third section noted that the President recently had vetoed a bill to increase the federal minimum wage from $1.60 to $2.00 per hour, compared this action to the increase of prices and profits in the oil industry under administration policies, and admonished: "As working men and women we must defeat our enemies and elect our friends. If you haven't registered to vote, please do so today."

On March 26, 1974, Hugh Terry, an employee of petitioner and vice president of Local 801, asked Herbert George, petitioner's assistant personnel director, for permission to distribute the newsletter to employees in the "clock alley" that leads to petitioner's time clocks. George doubted whether management would allow employees to "hand out propaganda like that," but agreed to check with his superiors. Leonard Menius, petitioner's personnel director, confirmed that petitioner would not allow employees to distribute the newsletter in clock alley. A few days later George communicated this decision to Terry, but gave no reasons for it.

On April 22, 1974, Boyd Young, president of Local 801, together with Terry and another employee, asked George whether employees could distribute the newsletter in any nonworking areas of petitioner's property other than clock alley. After conferring again with Menius, George reported that employees would not be allowed to do so and that petitioner thought the union had other ways to communicate with employees. Local 801 then filed an unfair practice charge with the National Labor Relations Board (Board), alleging that petitioner's refusal to allow employees to distribute the newsletter in nonworking areas of petitioner's property during nonworking time interfered with, restrained, and coerced employees' exercise of their § 7 rights in violation of § 8(a)(1).

At a hearing on the charge, Menius testified that he had no objection to the first and fourth sections of the newsletter. He had denied permission to distribute the newsletter because he

"didn't see any way in which [the second and third sections were] related to our association with the Union." The Administrative Law Judge held that although not all of the newsletter had immediate bearing on the relationship between petitioner and Local 801, distribution of all its contents was protected under § 7 as concerted activity for the "mutual aid or protection" of employees. Because petitioner had presented no evidence of "special circumstances" to justify a ban on the distribution of protected matter by employees in nonworking areas during nonworking time, the Administrative Law Judge held that petitioner had violated § 8(a)(1) and ordered petitioner to cease and desist from the violation. The Board affirmed the Administrative Law Judge's rulings, findings, and conclusions, and adopted his recommended order. 215 N.L.R.B. 271 (1974).

The Court of Appeals enforced the order. . .. .

Because of apparent differences among the Courts of Appeals as to the scope of rights protected by the "mutual aid or protection" clause of § 7 we granted certiorari. We affirm.

II

Two distinct questions are presented. The first is whether, apart from the location of the activity, distribution of the newsletter is the kind of concerted activity that is protected from employer interference by §§ 7 and 8(a)(1) of the National Labor Relations Act. If it is, then the second question is whether the fact that the activity takes place on petitioner's property gives rise to a countervailing interest that outweighs the exercise of § 7 rights in that location. We address these questions in turn.

A

Section 7 provides that "[employees] shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." Petitioner contends that the activity here is not within the "mutual aid or protection" language because it does not relate to a "specific dispute" between employees and their own employer "over an issue which the employer has the right or power to affect." In support of its position, petitioner asserts that the term "employees" in § 7 refers only to employees of a particular employer, so that only activity by employees on behalf of themselves or other employees of the same employer is protected. Petitioner also argues that the term "collective bargaining" in § 7 "indicates a direct bargaining relationship whereas 'other mutual aid or protection' must refer to activities of a similar nature . . . ." Thus, in petitioner's view, under § 7 "the employee is only protected for activity within the scope of the employment relationship." Petitioner rejects the idea that § 7 might protect any activity that could be characterized as "political," and suggests that the discharge of an employee who engages in any such activity would not violate the Act.

We believe that petitioner misconceives the reach of the "mutual aid or protection" clause. The "employees" who may engage in concerted activities for "mutual aid or protection" are defined by § 2(3) of the Act, to "include any employee, and shall not be limited to the employees of a

particular employer, unless this subchapter explicitly states otherwise . . . ." This definition was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own. In recognition of this intent, the Board and the courts long have held that the "mutual aid or protection" clause encompasses such activity. Petitioner's argument on this point ignores the language of the Act and its settled construction.

We also find no warrant for petitioner's view that employees lose their protection under the "mutual aid or protection" clause when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship. The 74th Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context. It recognized this fact by choosing, as the language of § 7 makes clear, to protect concerted activities for the somewhat broader purpose of "mutual aid or protection" as well as for the narrower purposes of "self-organization" and "collective bargaining." Thus, it has been held that the "mutual aid or protection" clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums, and that employees' appeals to legislators to protect their interests as employees are within the scope of this clause. To hold that activity of this nature is entirely unprotected -- irrespective of location or the means employed -- would leave employees open to retaliation for much legitimate activity that could improve their lot as employees. As this could "frustrate the policy of the Act to protect the right of workers to act together to better their working conditions," *NLRB* v. *Washington Aluminum Co*., 370 U.S. 9, 14 (1962), we do not think that Congress could have intended the protection of § 7 to be as narrow as petitioner insists.

It is true, of course, that some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity. We may assume that at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the "mutual aid or protection" clause. It is neither necessary nor appropriate, however, for us to attempt to delineate precisely the boundaries of the "mutual aid or protection" clause. That task is for the Board to perform in the first instance as it considers the wide variety of cases that come before it. *Republic Aviation Corp*. v. *NLRB*, 324 U.S., at 798; *Phelps Dodge Corp*. v. *NLRB*, 313 U.S. 177, 194 (1941). To decide this case, it is enough to determine whether the Board erred in holding that distribution of the second and third sections of the newsletter is for the purpose of "mutual aid or protection."

The Board determined that distribution of the second section, urging employees to write their legislators to oppose incorporation of the state "right-to-work" statute into a revised state constitution, was protected because union security is "central to the union concept of strength through solidarity" and "a mandatory subject of bargaining in other than right-to-work states." . . . . The fact that Texas already has a "right-to-work" statute does not render employees' interest in

this matter any less strong, for, as the Court of Appeals noted, it is "one thing to face a statutory scheme which is open to legislative modification or repeal" and "quite another thing to face the prospect that such a scheme will be frozen in a concrete constitutional mandate." We cannot say that the Board erred in holding that this section of the newsletter bears such a relation to employees' interests as to come within the guarantee of the "mutual aid or protection" clause.

The Board held that distribution of the third section, criticizing a Presidential veto of an increase in the federal minimum wage and urging employees to register to vote to "defeat our enemies and elect our friends," was protected despite the fact that petitioner's employees were paid more than the vetoed minimum wage. It reasoned that the "minimum wage inevitably influences wage levels derived from collective bargaining, even those far above the minimum," and that "concern by [petitioner's] employees for the plight of other employees might gain support for them at some future time when they might have a dispute with their employer." We think that the Board acted within the range of its discretion in so holding. Few topics are of such immediate concern to employees as the level of their wages. The Board was entitled to note the widely recognized impact that a rise in the minimum wage may have on the level of negotiated wages generally. . . .

In sum, we hold that distribution of both the second and the third sections of the newsletter is protected under the "mutual aid or protection" clause of § 7.

B

The question that remains is whether the Board erred in holding that petitioner's employees may distribute the newsletter in nonworking areas of petitioner's property during nonworking time. Consideration of this issue must begin with the Court's decisions in *Republic Aviation Corp*. v. *NLRB, supra*, and *NLRB* v. *Babcock & Wilcox Co*., 351 U.S. 105 (1956). In *Republic Aviation* the Court upheld the Board's ruling that an employer may not prohibit its employees from distributing union organizational literature in nonworking areas of its industrial property during nonworking time, absent a showing by the employer that a ban is necessary to maintain plant discipline or production. This ruling obtained even though the employees had not shown that distribution off the employer's property would be ineffective. In the Court's view, the Board had reached an acceptable "adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments."

In *Babcock & Wilcox*, on the other hand, nonemployees sought to enter an employer's property to distribute union organizational literature. The Board applied the rule of *Republic Aviation* in this situation, but the Court held that there is a distinction "of substance" between "rules of law applicable to employees and those applicable to nonemployees." The difference was that the nonemployees in *Babcock & Wilcox* sought to trespass on the employer's property, whereas the employees in *Republic Aviation* did not. Striking a balance between § 7 organizational rights and an employer's right to keep strangers from entering on its property, the Court held that the employer in *Babcock & Wilcox* was entitled to prevent "nonemployee distribution of union literature [on its property] if reasonable efforts by the union through other available channels of

communication will enable it to reach the employees with its message . . . ." *Id*., at 112. The Court recently has emphasized the distinction between the two cases: "A wholly different balance was struck when the organizational activity was carried on by employees already rightfully on the employer's property, since the employer's management interests rather than his property interests were there involved." *Hudgens* v. *NLRB*, 424 U.S., at 521-522, n. 10.

It is apparent that the instant case resembles *Republic Aviation* rather closely. Here, as there, employees sought to distribute literature in nonworking areas of their employer's industrial property during nonworking time. Here, as there, the employer has not attempted to show that distribution would interfere with plant discipline or production. And here, as there, distribution of the newsletter clearly would be protected by § 7 against employer discipline if it took place off the employer's property. The only possible ground of distinction is that part of the newsletter in this case does not address purely organizational matters, but rather concerns other activity protected by § 7. The question, then, is whether this difference required the Board to apply a different rule here than it applied in *Republic Aviation*.

Petitioner contends that the Board must distinguish among distributions of protected matter by employees on an employer's property on the basis of the content of each distribution. . . . .

We hold that the Board was not required to adopt this view in the case at hand. In the first place, petitioner's reliance on its property right is largely misplaced. Here, as in *Republic Aviation*, petitioner's employees are "already rightfully on the employer's property," so that in the context of this case it is the "employer's management interests rather than [its] property interests" that primarily are implicated. As already noted, petitioner made no attempt to show that its management interests would be prejudiced in any way by the exercise of § 7 rights proposed by its employees here. Even if the mere distribution by employees of material protected by § 7 can be said to intrude on petitioner's property rights in any meaningful sense, the degree of intrusion does not vary with the content of the material. Petitioner's only cognizable property right in this respect is in preventing employees from bringing literature onto its property and distributing it there -- not in choosing which distributions protected by § 7 it wishes to suppress.

On the other side of the balance, it may be argued that the employees' interest in distributing literature that deals with matters affecting them as employees, but not with self-organization or collective bargaining, is so removed from the central concerns of the Act as to justify application of a different rule than in *Republic Aviation*. . . . . We are not prepared to say in this case that the Board erred in the view it took.

It is apparent that the complexity of the Board's rules and the difficulty of the Board's task might be compounded greatly if it were required to distinguish not only between literature that is within and without the protection of § 7, but also among subcategories of literature within that protection. In addition, whatever the strength of the employees' § 7 interest in distributing particular literature, the Board is entitled to view the intrusion by employees on the property

rights of their employer as quite limited in this context as long as the employer's management interests are adequately protected. The Board also properly may take into account the fact that the plant is a particularly appropriate place for the distribution of § 7 material, because it "is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees." *Gale Products*, 142 N. L. R. B. 1246, 1249 (1963).

. . . .

Affirmed.

APPENDIX TO OPINION OF THE COURT

NEWS BULLETIN TO LOCAL 801 MEMBERS

FROM BOYD YOUNG -- PRESIDENT

WE NEED YOU

As a member, we need you to help build the Union through your support and understanding. Too often members become disinterested and look upon their Union as being something separate from themselves. Nothing could be further from the truth.

This Union or any Union will only be as good as the members make it. The policies and practices of this Union are made by the membership -- *the active membership*. If this Union has ever missed its target it may be because not enough members made their views known where the final decisions are made -- The Union Meeting.

It would be impossible to satisfy everyone with the decisions that are made but the active member has the opportunity to bring the majority around to his way of thinking. This is how a democratic organization works and it's the best system around.

Through participation you can make your voice felt not only in this Local but throughout the International Union.

A PHONY LABEL -- *"right to work"*

Wages are determined at the bargaining table and the stronger the Union, the better the opportunity for improvements. The "right to work" law is simply an attempt to weaken the strength of Unions. The misleading title of "right to work" cannot guarantee anyone a job. It simply weakens the negotiating power of Unions by outlawing provisions in contracts for Union shops, agency shops, and modified Union shops. These laws do not improve wages or working conditions but just protect free riders. Free riders are people who take all the benefits of Unions without paying dues. They ride on the dues that members pay to build an organization to protect their rights and improve their way of life. At this time there is a very well organized and financed

attempt to place the "right to work" law in our new state constitution. This drive is supported and financed by big business, namely, the National Right-To-Work Committee and the National Chamber of Commerce. If their attempt is successful, it will more than pay for itself by weakening Unions and improving the edge business has at the bargaining table. States that have no "right-to-work" law consistently have higher wages and better working conditions. Texas is well known for its weak laws concerning the working class and the "right-to-work" law would only add insult to injury. If you fail to take action against the "right-to-work" law it may well show up in wages negotiated in the future. I urge every member to write their state congressman and senator in protest of the "right-to-work" law being incorporated into the state constitution. Write your state representative and state senator and let the delegate know how you feel.

POLITICS AND INFLATION

The Minimum Wage Bill, HR 7935, was vetoed by President Nixon. The President termed the bill as inflationary. The bill would raise the present $ 1.60 to $ 2.00 per hour for most covered workers.

It seems almost unbelievable that the President could term $ 2.00 per hour as inflationary and at the same time remain silent about oil companies profits ranging from 56% to 280%.

It also seems disturbing, that after the price of gasoline has increased to over 50 cents a gallon, that the fuel crisis is beginning to disappear. If the price of gasoline ever reaches 70 cents a gallon you probably couldn't find a closed filling station or empty pump in the Northern Hemisphere.

Congress is now [proceeding] with a second minimum wage bill that hopefully the President will sign into law. At $ 1.60 per hour you could work 40 hours a week, 52 weeks a year and never earn enough money to support a family.

As working men and women we must defeat our enemies and elect our friends. If you haven't registered to vote, please do so today.

FOOD FOR THOUGHT

In Union there is strength, justice, and moderation;

In disunion, nothing but an alternating humility and insolence.

COMING TOGETHER WAS A BEGINNING

STAYING TOGETHER IS PROGRESS

WORKING TOGETHER MEANS SUCCESS

THE PERSON WHO STANDS NEUTRAL, STANDS

FOR NOTHING!

5.3a.1 Timelines

Date	Case Name	Decision	Notes
December 4, 1974	*Eastex Inc.* National Labor Relations Board	Respondent shall cease and desist from enforcing a rule that employees cannot solicit during non working time regarding Section 7 right, and more actions.	• Link
April 7, 1977	*Eastex Inc. v. NLRB* US Court of Appeals for the Fifth Circuit	Court enforced the NLRB's order.	• Link
August 5, 1977	*Eastex Inc. v. NLRB* US Court of Appeals for the Fifth Circuit	Rehearing denied.	
Argued April 25, 1978 **Decided June 22, 1978**	*Eastex Inc. v. NLRB* Supreme Court of the United States	Court affirmed the lower court's decision.	• Link

5.4. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018)

Full decision: (link); **Docket**: (link); **Oral argument**: (link)

Justice Gorsuch delivered the opinion of the Court.

Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?
As a matter of policy these questions are surely debatable. But as a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings. Nor can we agree with the employees' suggestion that the National Labor Relations Act (NLRA) offers a conflicting command. It is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another. And abiding that duty here leads to an

unmistakable conclusion. The NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum. This Court has never read a right to class actions into the NLRA—and for three quarters of a century neither did the National Labor Relations Board. Far from conflicting, the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare the parties' agreements unlawful.

I

The three cases before us differ in detail but not in substance. Take *Ernst & Young LLP* v. *Morris*. There Ernst & Young and one of its junior accountants, Stephen Morris, entered into an agreement providing that they would arbitrate any disputes that might arise between them. The agreement stated that the employee could choose the arbitration provider and that the arbitrator could "grant any relief that could be granted by . . . a court" in the relevant jurisdiction. ….

After his employment ended, and despite having agreed to arbitrate claims against the firm, Mr. Morris sued Ernst & Young in federal court. He alleged that the firm had misclassified its junior accountants as professional employees and violated the federal Fair Labor Standards Act (FLSA) and California law by paying them salaries without overtime pay. Although the arbitration agreement provided for individualized proceedings, Mr. Morris sought to litigate the federal claim on behalf of a nationwide class under the FLSA's collective action provision, 29 U. S. C. §216(b).

Ernst & Young replied with a motion to compel arbitration. The district court granted the request, but the Ninth Circuit reversed this judgment. The Ninth Circuit recognized that the Arbitration Act generally requires courts to enforce arbitration agreements as written. But the court reasoned that the statute's "saving clause," see 9 U. S. C. §2, removes this obligation if an arbitration agreement violates some other federal law. And the court concluded that an agreement requiring individualized arbitration proceedings violates the NLRA by barring employees from engaging in the "concerted activit[y]," 29 U. S. C. §157, of pursuing claims as a class or collective action.
….

In 2012, the Board—for the first time in the 77 years since the NLRA's adoption—asserted that the NLRA effectively nullifies the Arbitration Act in cases like ours. *D. R. Horton, Inc.*, 357 N. L. R. B. 2277. Initially, this agency decision received a cool reception in court. See *D. R. Horton*, 737 F. 3d, at 355-362. In the last two years, though, some circuits have either agreed with the Board's conclusion or thought themselves obliged to defer to it under *Chevron U. S. A.*

Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). More recently still, the disagreement has grown as the Executive has disavowed the Board's (most recent) position, and the Solicitor General and the Board have offered us battling briefs about the law's meaning. We granted certiorari to clear the confusion.

II

We begin with the Arbitration Act and the question of its saving clause.

Congress adopted the Arbitration Act in 1925 in response to a perception that courts were unduly hostile to arbitration. No doubt there was much to that perception. Before 1925, English and American common law courts routinely refused to enforce agreements to arbitrate disputes. *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 510, n. 4 (1974). But in Congress's judgment arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved. So Congress directed courts to abandon their hostility and instead treat arbitration agreements as "valid, irrevocable, and enforceable." 9 U. S. C. §2. The Act, this Court has said, establishes "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 24 (1983).

Not only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures. See §3 (providing for a stay of litigation pending arbitration "in accordance with the terms of the agreement"); §4 (providing for "an order directing that . . . arbitration proceed in the manner provided for in such agreement"). Indeed, we have often observed that the Arbitration Act requires courts "rigorously" to "enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted." *American Express Co.* v. *Italian Colors Restaurant*, 570 U. S. 228, 233 (2013).

On first blush, these emphatic directions would seem to resolve any argument under the Arbitration Act. The parties before us contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures. And this much the Arbitration Act seems to protect pretty absolutely. See *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333 (2011). You might wonder if the balance Congress struck in 1925 between arbitration and litigation should be revisited in light of more contemporary developments. You might even ask if the Act was good policy when enacted. But all the same you might find it difficult to see how to avoid the statute's application.

Still, the employees suggest the Arbitration Act's saving clause creates an exception for cases like theirs. By its terms, the saving clause allows courts to refuse to enforce arbitration

agreements "upon such grounds as exist at law or in equity for the revocation of any contract." §2. That provision applies here, the employees tell us, because the NLRA renders their particular class and collective action waivers illegal. In their view, illegality under the NLRA is a "ground" that "exists at law . . . for the revocation" of their arbitration agreements, at least to the extent those agreements prohibit class or collective action proceedings.
….

Seeking to demonstrate an irreconcilable statutory conflict …the employees point to Section 7 of the NLRA. That provision guarantees workers "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U. S. C. §157.

From this language, the employees ask us to infer a clear and manifest congressional command to displace the Arbitration Act and outlaw agreements like theirs.

But that much inference is more than this Court may make. Section 7 focuses on the right to organize unions and bargain collectively. It may permit unions to bargain to prohibit arbitration. But it does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand.

Neither should any of this come as a surprise. The notion that Section 7 confers a right to class or collective actions seems pretty unlikely when you recall that procedures like that were hardly known when the NLRA was adopted in 1935. Federal Rule of Civil Procedure 23 didn't create the modern class action until 1966; class arbitration didn't emerge until later still; and even the Fair Labor Standards Act's collective action provision postdated Section 7 by years. See Rule 23-Class Actions, 28 U. S. C. App., p. 1258 (1964 ed., Supp. II). And while some forms of group litigation existed even in 1935, Section 7's failure to mention them only reinforces that the statute doesn't speak to such procedures.

A close look at the employees' best evidence of a potential conflict turns out to reveal no conflict at all. The employees direct our attention to the term "other concerted activities for the purpose of . . . other mutual aid or protection." This catchall term, they say, can be read to include class and collective legal actions. But the term appears at the end of a detailed list of activities speaking of "self-organization," "form[ing], join[ing], or assist[ing] labor organizations," and "bargain[ing] collectively." 29 U. S. C. §157. And where, as here, a more general term follows more specific terms in a list, the general term is usually understood to "'embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Circuit City Stores, Inc.* v. *Adams*, 532 U. S. 105, 115, (2001) (discussing *ejusdem generis* canon). All of

which suggests that the term "other concerted activities" should, like the terms that precede it, serve to protect things employees "just do" for themselves in the course of exercising their right to free association in the workplace, rather than "the highly regulated, courtroom-bound 'activities' of class and joint litigation." *Alternative Entertainment*, 858 F. 3d, at 414-415. None of the preceding and more specific terms speaks to the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum, and there is no textually sound reason to suppose the final catchall term should bear such a radically different object than all its predecessors.

The NLRA's broader structure underscores the point. After speaking of various "concerted activities" in Section 7, Congress proceeded to establish a regulatory regime applicable to each of them. The NLRA provides rules for the recognition of exclusive bargaining representatives, 29 U. S. C. §159, explains employees' and employers' obligation to bargain collectively, §158(d), and conscribes certain labor organization practices, §§158(a)(3), (b). The NLRA also touches on other concerted activities closely related to organization and collective bargaining, such as picketing, §158(b)(7), and strikes, §163. It even sets rules for adjudicatory proceedings under the NLRA itself. §§160, 161. Many of these provisions were part of the original NLRA in 1935, see 49 Stat. 449, while others were added later. But missing entirely from this careful regime is any hint about what rules should govern the adjudication of class or collective actions in court or arbitration. Without some comparably specific guidance, it's not at all obvious what procedures Section 7 might protect. Would opt-out class action procedures suffice? Or would opt-in procedures be necessary? What notice might be owed to absent class members? What standards would govern class certification? Should the same rules always apply or should they vary based on the nature of the suit? Nothing in the NLRA even whispers to us on any of these essential questions. And it is hard to fathom why Congress would take such care to regulate all the other matters mentioned in Section 7 yet remain mute about this matter alone—unless, of course, Section 7 doesn't speak to class and collective action procedures in the first place.
….

What all these textual and contextual clues indicate, our precedents confirm. In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, this Court has rejected *every* such effort to date …. with statutes ranging from the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act. .... Throughout, we have made clear that even a statute's express provision for collective legal actions does not necessarily mean that it precludes "'individual attempts at conciliation'" through arbitration. *Gilmer*, *supra,* at 32, 111 S. Ct. 1647. ….

The employees rejoin that our precedential story is complicated by some of this Court's cases interpreting Section 7 itself. But, as it turns out, this Court's Section 7 cases have usually involved just what you would expect from the statute's plain language: efforts by employees

related to organizing and collective bargaining in the workplace, not the treatment of class or collective actions in court or arbitration proceedings. See, *e.g., NLRB* v. *Washington Aluminum Co.*, 370 U. S. 9, 82 S. Ct. 1099 (1962) (walkout to protest workplace conditions); *NLRB* v. *Granite State Joint Board*, 409 U.S. 213, 93 S. Ct. 385, 34 L. Ed. 2d 422 (1972) (resignation from union and refusal to strike); *NLRB* v. *J. Weingarten, Inc.*, 420 U. S. 251, 95 S. Ct. 959, 43 L. Ed. 2d 171 (1975) (request for union representation at disciplinary interview). Neither do the two cases the employees cite prove otherwise. In *Eastex, Inc.* v. *NLRB*, 437 U. S. 556, 558, 98 S. Ct. 2505, 57 L. Ed. 2d 428 (1978), we simply addressed the question whether a union's distribution of a newsletter in the workplace qualified as a protected concerted activity. We held it did, noting that it was "undisputed that the union undertook the distribution in order to boost its support and improve its bargaining position in upcoming contract negotiations," all part of the union's "'continuing organizational efforts.'" *Id.,* at 575, and n. 24, 98 S. Ct. 2505. In *NLRB* v. *City Disposal Systems, Inc.*, 465 U. S. 822, 831-832 (1984), we held only that an employee's assertion of a right under a collective bargaining agreement was protected, reasoning that the collective bargaining "process—beginning with the organization of the union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement—is a single, collective activity." Nothing in our cases indicates that the NLRA guarantees class and collective action procedures, let alone for claims arising under different statutes and despite the express (and entirely unmentioned) teachings of the Arbitration Act.

That leaves the employees to try to make something of our dicta. The employees point to a line in *Eastex* observing that "it has been held" by other courts and the Board "that the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums." 437 U. S., at 565-566. But even on its own terms, this dicta about the holdings of other bodies does not purport to discuss what *procedures* an employee might be entitled to in litigation or arbitration. Instead this passage at most suggests only that "resort to administrative and judicial forums" isn't "entirely unprotected." *Id.,* at 566. Indeed, the Court proceeded to explain that it did not intend to "address . . . the question of what may constitute 'concerted' activities in this [litigation] context." *Ibid.,* n. 15. So even the employees' dicta, when viewed fairly and fully, doesn't suggest that individualized dispute resolution procedures might be insufficient and collective procedures might be mandatory. Neither should this come as a surprise given that not a single one of the lower court or Board decisions *Eastex* discussed went so far as to hold that Section 7 guarantees a right to class or collective action procedures. As we've seen, the Board did not purport to discover that right until 2012, and no federal appellate court accepted it until 2016. See *D. R. Horton*, 357 N. L. R. B. 2277.
….

IV

The dissent sees things a little bit differently. In its view, today's decision ushers us back to the *Lochner* era when this Court regularly overrode legislative policy judgments. The dissent even suggests we have resurrected the long-dead "yellow dog" contract. But like most apocalyptic warnings, this one proves a false alarm. *Cf.* L. Tribe, American Constitutional Law 435 (1978) ("'*Lochnerizing*' has become so much an epithet that the very use of the label may obscure attempts at understanding").

Our decision does nothing to override Congress's policy judgments. As the dissent recognizes, the legislative policy embodied in the NLRA is aimed at "safeguard[ing], first and foremost, workers' rights to join unions and to engage in collective bargaining." Those rights stand every bit as strong today as they did yesterday. And rather than revive "yellow dog" contracts against union organizing that the NLRA outlawed back in 1935, today's decision merely declines to read into the NLRA a novel right to class action procedures that the Board's own general counsel disclaimed as recently as 2010.
….
Ultimately, the dissent retreats to policy arguments. It argues that we should read a class and collective action right into the NLRA to promote the enforcement of wage and hour laws. But it's altogether unclear why the dissent expects to find such a right in the NLRA rather than in statutes like the FLSA that actually regulate wages and hours. Or why we should read the NLRA as mandating the availability of class or collective actions when the FLSA expressly authorizes them yet allows parties to contract for bilateral arbitration instead. While the dissent is no doubt right that class actions can enhance enforcement by "spread[ing] the costs of litigation," it's also well known that they can unfairly "plac[e] pressure on the defendant to settle even unmeritorious claims," *Shady Grove Orthopedic Associates, P. A.* v. *Allstate Ins. Co.*, 559 U. S. 393 (2010) (Ginsburg, J., dissenting).
….

The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the Arbitration Act. Because we can easily read Congress's statutes to work in harmony, that is where our duty lies.

So ordered.

Justice Ginsburg, with whom Justice Breyer, Justice Sotomayor, and Justice Kagan join, dissenting.

The employees in these cases complain that their employers have underpaid them in violation of the wage and hours prescriptions of the Fair Labor Standards Act of 1938 (FLSA), 29 U. S. C. §201 *et seq.*, and analogous state laws. Individually, their claims are small, scarcely of a size

warranting the expense of seeking redress alone. See Ruan, What's Left To Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers, 2012 Mich. St. L. Rev. 1103, 1118-1119. But by joining together with others similarly circumstanced, employees can gain effective redress for wage underpayment commonly experienced. See *id.,* at 1108-1111. To block such concerted action, their employers required them to sign, as a condition of employment, arbitration agreements banning collective judicial and arbitral proceedings of any kind. The question presented: Does the Federal Arbitration Act (Arbitration Act or FAA), 9 U. S. C. §1 *et seq.,* permit employers to insist that their employees, whenever seeking redress for commonly experienced wage loss, go it alone, never mind the right secured to employees by the National Labor Relations Act (NLRA), 29 U. S. C. §151 *et seq.,* "to engage in . . . concerted activities" for their "mutual aid or protection"? §157. The answer should be a resounding "No."

In the NLRA and its forerunner, the Norris-LaGuardia Act (NLGA), 29 U. S. C. §101 *et seq.*, Congress acted on an acute awareness: For workers striving to gain from their employers decent terms and conditions of employment, there is strength in numbers. A single employee, Congress understood, is disarmed in dealing with an employer. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33-34 (1937). The Court today subordinates employee-protective labor legislation to the Arbitration Act. In so doing, the Court forgets the labor market imbalance that gave rise to the NLGA and the NLRA, and ignores the destructive consequences of diminishing the right of employees "to band together in confronting an employer." *NLRB* v. *City Disposal Systems, Inc.*, 465 U. S. 822, 835 (1984). Congressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order.

To explain why the Court's decision is egregiously wrong, I first refer to the extreme imbalance once prevalent in our Nation's workplaces, and Congress' aim in the NLGA and the NLRA to place employers and employees on a more equal footing. I then explain why the Arbitration Act, sensibly read, does not shrink the NLRA's protective sphere.

I

It was once the dominant view of this Court that "[t]he right of a person to sell his labor upon such terms as he deems proper is . . . the same as the right of the purchaser of labor to prescribe [working] conditions." *Adair* v. *United States*, 208 U. S. 161, 174 (1908) (invalidating federal law prohibiting interstate railroad employers from discharging or discriminating against employees based on their membership in labor organizations); accord *Coppage* v. *Kansas*, 236 U. S. 1, 26, 35 (1915) (invalidating state law prohibiting employers from requiring employees, as a condition of employment, to refrain or withdraw from union membership).

The NLGA and the NLRA operate on a different premise, that employees must have the capacity to act collectively in order to match their employers' clout in setting terms and conditions of

employment. For decades, the Court's decisions have reflected that understanding. See *Jones & Laughlin Steel*, 301 U. S. 1 (upholding the NLRA against employer assault); cf. *United States* v. *Darby*, 312 U. S. 100 (1941) (upholding the FLSA).

A

The end of the 19th century and beginning of the 20th was a tumultuous era in the history of our Nation's labor relations. Under economic conditions then prevailing, workers often had to accept employment on whatever terms employers dictated. Aiming to secure better pay, shorter workdays, and safer workplaces, workers increasingly sought to band together to make their demands effective. H. Millis & E. Brown, From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations 7-8 (1950).

Employers, in turn, engaged in a variety of tactics to hinder workers' efforts to act in concert for their mutual benefit. See J. Seidman, The Yellow Dog Contract 11 (1932). Notable among such devices was the "yellow-dog contract." Such agreements, which employers required employees to sign as a condition of employment, typically commanded employees to abstain from joining labor unions. Many of the employer-designed agreements cast an even wider net, "proscrib[ing] all manner of concerted activities." Finkin, The Meaning and Contemporary Vitality of the Norris-LaGuardia Act, 93 Neb. L. Rev. 6, 16 (2014). As a prominent United States Senator observed, contracts of the yellow-dog genre rendered the "laboring man . . . absolutely helpless" by "waiv[ing] his right . . . to free association" and by requiring that he "singly present any grievance he has." 75 Cong. Rec. 4504 (remarks of Sen. Norris).

Early legislative efforts to protect workers' rights to band together were unavailing. See, *e.g., Coppage*, 236 U. S., at 26; Frankfurter & Greene, Legislation Affecting Labor Injunctions, 38 Yale L. J. 879, 889-890 (1929). Courts, including this one, invalidated the legislation based on then-ascendant notions about employers' and employees' constitutional right to "liberty of contract." See *Coppage*, 236 U. S., at 26, 35 S. Ct. 240, 59 L. Ed. 441; Frankfurter & Greene, *supra,* at 890-891. While stating that legislatures could curtail contractual "liberty" in the interest of public health, safety, and the general welfare, courts placed outside those bounds legislative action to redress the bargaining power imbalance workers faced. See *Coppage*, 236 U. S., at 16-19.

In the 1930's, legislative efforts to safeguard vulnerable workers found more receptive audiences. As the Great Depression shifted political winds further in favor of worker-protective laws, Congress passed two statutes aimed at protecting employees' associational rights. First, in 1932, Congress passed the NLGA, which regulates the employer-employee relationship indirectly. Section 2 of the Act declares:

> "Whereas . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own

> choosing, . . . and that he shall be free from the interference, restraint, or coercion of employers . . . in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U. S. C. §102.

Section 3 provides that federal courts shall not enforce "any . . . undertaking or promise in conflict with the public policy declared in [§2]." §103. In adopting these provisions, Congress sought to render ineffective employer-imposed contracts proscribing employees' concerted activity of any and every kind. See 75 Cong. Rec. 4504-4505 (remarks of Sen. Norris) ("[o]ne of the objects" of the NLGA was to "outlaw" yellow-dog contracts); Finkin, *supra*, at 16 (contracts prohibiting "all manner of concerted activities apart from union membership or support . . . were understood to be 'yellow dog' contracts"). While banning court enforcement of contracts proscribing concerted action by employees, the NLGA did not directly prohibit coercive employer practices.

But Congress did so three years later, in 1935, when it enacted the NLRA. Relevant here, §7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*." 29 U. S. C. §157 (emphasis added). Section 8(a)(1) safeguards those rights by making it an "unfair labor practice" for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§7]." §158(a)(1). To oversee the Act's guarantees, the Act established the National Labor Relations Board (Board or NLRB), an independent regulatory agency empowered to administer "labor policy for the Nation." *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 242 (1959).

Unlike earlier legislative efforts, the NLGA and the NLRA had staying power. When a case challenging the NLRA's constitutionality made its way here, the Court, in retreat from its *Lochner*-era contractual-"liberty" decisions, upheld the Act as a permissible exercise of legislative authority. See *Jones & Laughlin Steel*, 301 U. S., at 33-34. The Court recognized that employees have a "fundamental right" to join together to advance their common interests and that Congress, in lieu of "ignor[ing]" that right, had elected to "safeguard" it.

B

Despite the NLRA's prohibitions, the employers in the cases now before the Court required their employees to sign contracts stipulating to submission of wage and hours claims to binding arbitration, and to do so only one-by-one. When employees subsequently filed wage and hours claims in federal court and sought to invoke the collective-litigation procedures provided for in the FLSA and Federal Rules of Civil Procedure, the employers moved to compel individual

arbitration. The Arbitration Act, in their view, requires courts to enforce their take-it-or-leave-it arbitration agreements as written, including the collective-litigation abstinence demanded therein.

In resisting enforcement of the group-action foreclosures, the employees involved in this litigation do not urge that they must have access to a judicial forum. They argue only that the NLRA prohibits their employers from denying them the right to pursue work-related claims in concert in any forum. If they may be stopped by employer-dictated terms from pursuing collective procedures in court, they maintain, they must at least have access to similar procedures in an arbitral forum.

C

Although the NLRA safeguards, first and foremost, workers' rights to join unions and to engage in collective bargaining, the statute speaks more embracively. In addition to protecting employees' rights "to form, join, or assist labor organizations" and "to bargain collectively through representatives of their own choosing," the Act protects employees' rights "to engage in *other* concerted activities for the purpose of . . . mutual aid or protection." 29 U. S. C. §157 (emphasis added); see, *e.g., NLRB* v. *Washington Aluminum Co.*, 370 U. S. 9, 14-15, 82 S. Ct. 1099, 8 L. Ed. 2d 298 (1962) (§7 protected unorganized employees when they walked off the job to protest cold working conditions). See also 1 J. Higgins, The Developing Labor Law 209 (6th ed. 2012) ("Section 7 protects not only union-related activity but also 'other concerted activities . . . for mutual aid or protection.'"); 1 N. Lareau, Labor and Employment Law §1.01[1], p. 1-2 (2017) ("Section 7 extended to employees three federally protected rights: (1) the right to form and join unions; (2) the right to bargain collectively (negotiate) with employers about terms and conditions of employment; *and* (3) the right to work in concert with another employee or employees to achieve employment-related goals." (emphasis added)).

Suits to enforce workplace rights collectively fit comfortably under the umbrella "concerted activities for the purpose of . . . mutual aid or protection." 29 U. S. C. §157. "Concerted" means "[p]lanned or accomplished together; combined." American Heritage Dictionary 381 (5th ed. 2011). [**917] "Mutual" means "reciprocal." *Id.,* at 1163. When employees meet the requirements for litigation of shared legal claims in joint, collective, and class proceedings, the litigation of their claims is undoubtedly "accomplished together." By joining hands in litigation, workers can spread the costs of litigation and reduce the risk of employer retaliation. See *infra,* at 27-28, 200 L. Ed. 2d, at 928.

Recognizing employees' right to engage in collective employment litigation and shielding that right from employer blockage are firmly rooted in the NLRA's design. Congress expressed its intent, when it enacted the NLRA, to "protec[t] the exercise by workers of full freedom of association," thereby remedying "[t]he inequality of bargaining power" workers faced. 29 U. S. C. §151; see, *e.g., Eastex, Inc.* v. *NLRB*, 437 U. S. 556, 567 (1978) (the Act's policy is "to

protect the right of workers to act together to better their working conditions"; *City Disposal*, 465 U. S., at 835 ("[I]n enacting §7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment."). There can be no serious doubt that collective litigation is one way workers may associate with one another to improve their lot.

Since the Act's earliest days, the Board and federal courts have understood §7's "concerted activities" clause to protect myriad ways in which employees may join together to advance their shared interests. For example, the Board and federal courts have affirmed that the Act shields employees from employer interference when they participate in concerted appeals to the media, *e.g., NLRB* v. *Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d 503, 505-506 (CA2 1942), legislative bodies, *e.g., Bethlehem Shipbuilding Corp.* v. *NLRB*, 114 F. 2d 930, 937 (CA1 1940), and government agencies, *e.g., Moss Planing Mill Co.*, 103 N. L. R. B. 414, 418-419, enf'd, 206 F. 2d 557 (CA4 1953). "The 74th Congress," this Court has noted, "knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context." *Eastex*, 437 U. S., at 565.

Crucially important here, for over 75 years, the Board has held that the NLRA safeguards employees from employer interference when they pursue joint, collective, and class suits related to the terms and conditions of their employment. See, *e.g., Spandsco Oil and Royalty Co.*, 42 N. L. R. B. 942, 948-949 (1942) (three employees' joint filing of FLSA suit ranked as concerted activity protected by the NLRA); *Poultrymen's Service Corp.*, 41 N. L. R. B. 444, 460-463, and n. 28 (1942) (same with respect to employee's filing of FLSA suit on behalf of himself and others similarly situated), enf'd, 138 F. 2d 204 (CA3 1943); *Sarkes Tarzian, Inc.*, 149 N. L. R. B. 147, 149, 153 (1964) (same with respect to employees' filing class libel suit); *United Parcel Service, Inc.*, 252 N. L. R. B. 1015, 1018 (1980) (same with respect to employee's filing class action regarding break times), enf'd, 677 F. 2d 421 (CA6 1982); *Harco Trucking, LLC*, 344 N. L. R. B. 478, 478-479 (2005) (same with respect to employee's maintaining class action regarding wages). For decades, federal courts have endorsed the Board's view, comprehending that "the filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by §7." *Leviton Mfg. Co.* v. *NLRB*, 486 F. 2d 686, 689 (CA1 1973); see, *e.g., Brady* v. *NFL*, 644 F.3d 661, 673 (CA8 2011) (similar). The Court pays scant heed to this longstanding line of decisions.

D

In face of the NLRA's text, history, purposes, and longstanding construction, the Court nevertheless concludes that collective proceedings do not fall within the scope of §7. None of the Court's reasons for diminishing §7 should carry the day.

1

The Court relies principally on the *ejusdem generis* canon. Observing that §7's "other concerted activities" clause "appears at the end of a detailed list of activities," the Court says the clause should be read to "embrace" only activities "similar in nature" to those set forth first in the list, *ibid.* (internal quotation marks omitted), *i.e.,* "'self-organization,' 'form[ing], join[ing], or assist[ing] labor organizations,' and 'bargain[ing] collectively,'" *ibid.* The Court concludes that §7 should, therefore, be read to protect "things employees 'just do' for themselves." *Ibid.* (quoting *NLRB* v. *Alternative Entertainment, Inc.*, 858 F. 3d 393, 415 (CA6 2017). It is far from apparent why joining hands in litigation would not qualify as "things employees just do for themselves." In any event, there is no sound reason to employ the *ejusdem generis* canon to narrow §7's protections in the manner the Court suggests.

The *ejusdem generis* canon may serve as a useful guide where it is doubtful Congress intended statutory words or phrases to have the broad scope their ordinary meaning conveys. See *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, 519 (1923). Courts must take care, however, not to deploy the canon to undermine Congress' efforts to draft encompassing legislation. See *United States* v. *Powell*, 423 U. S. 87, 90 (1975) ("[W]e would be justified in narrowing the statute only if such a narrow reading was supported by evidence of congressional intent over and above the language of the statute."). Nothing suggests that Congress envisioned a cramped construction of the NLRA. Quite the opposite, Congress expressed an embracive purpose in enacting the legislation, *i.e.,* to "protec[t] the exercise by workers of full freedom of association." 29 U. S. C. §151.

2

In search of a statutory hook to support its application of the *ejusdem generis* canon, the Court turns to the NLRA's "structure." Citing a handful of provisions that touch upon unionization, collective bargaining, picketing, and strikes, the Court asserts that the NLRA "establish[es] a regulatory regime" governing each of the activities protected by §7. That regime, the Court says, offers "specific guidance" and "rules" regulating each protected activity. Observing that none of the NLRA's provisions explicitly regulates employees' resort to collective litigation, the Court insists that "it is hard to fathom why Congress would take such care to regulate all the other matters mentioned in [§7] yet remain mute about this matter alone—unless, of course, [§7] doesn't speak to class and collective action procedures in the first place." *Ibid.*

This argument is conspicuously flawed. When Congress enacted the NLRA in 1935, the only §7 activity Congress addressed with any specificity was employees' selection of collective-bargaining representatives. See 49 Stat. 453. The Act did not offer "specific guidance" about employees' rights to "form, join, or assist labor organizations." Nor did it set forth "specific guidance" for any activity falling within §7's "other concerted activities" clause. The only

provision that touched upon an activity falling within that clause stated: "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike." *Id.,* at 457. That provision hardly offered "specific guidance" regarding employees' right to strike.

Without much in the original Act to support its "structure" argument, the Court cites several provisions that Congress added later, in response to particular concerns. Compare 49 Stat. 449-457 with 61 Stat. 142-143 (1947) (adding §8(d) to provide guidance regarding employees' and employers' collective-bargaining obligations); 61 Stat. 141-142 (amending §8(a) and adding §8(b) to proscribe specified labor organization practices); 73 Stat. 544 (1959) (adding §8(b)(7) to place restrictions on labor organizations' right to picket employers). It is difficult to comprehend why Congress' later inclusion of specific guidance regarding some of the activities protected by §7 sheds any light on Congress' initial conception of §7's scope.
….

E

Because I would hold that employees' §7 rights include the right to pursue collective litigation regarding their wages and hours, I would further hold that the employer-dictated collective-litigation stoppers, *i.e.,* "waivers," are unlawful. §8(a)(1) makes it an "unfair labor practice" for an employer to "interfere with, restrain, or coerce" employees in the exercise of their §7 rights. 29 U. S. C. §158(a)(1). Beyond genuine dispute, an employer "interfere[s] with" and "restrain[s]" employees in the exercise of their §7 rights by mandating that they prospectively renounce those rights in individual employment agreements. The law could hardly be otherwise: Employees' rights to band together to meet their employers' superior strength would be worth precious little if employers could condition employment on workers signing away those rights. See *National Licorice Co.* v. *NLRB*, 309 U. S. 350, 364 (1940). Properly assessed, then, the "waivers" rank as unfair labor practices outlawed by the NLRA, and therefore unenforceable in court.
….

III

The inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers. See generally Sternlight, Disarming Employees: How American Employers Are Using Mandatory Arbitration To Deprive Workers of Legal Protections, 80 Brooklyn L. Rev. 1309 (2015).

The probable impact on wage and hours claims of the kind asserted in the cases now before the Court is all too evident. Violations of minimum-wage and overtime laws are widespread. See

Ruan 1109-1111; A. Bernhardt et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities 11-16, 21-22 (2009). One study estimated that in Chicago, Los Angeles, and New York City alone, low-wage workers lose nearly $3 billion in legally owed wages each year. *Id*., at 6. The U. S. Department of Labor, state labor departments, and state attorneys general can uncover and obtain recoveries for some violations. See EPI, B. Meixell & R. Eisenbrey, An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year 2 (2014), available at https://www.epi.org/files/2014/wage-theft.pdf. Because of their limited resources, however, government agencies must rely on private parties to take a lead role in enforcing wage and hours laws.

If employers can stave off collective employment litigation aimed at obtaining redress for wage and hours infractions, the enforcement gap is almost certain to widen. Expenses entailed in mounting individual claims will often far outweigh potential recoveries.
….

Fear of retaliation may also deter potential claimants from seeking redress alone. Further inhibiting single-file claims is the slim relief obtainable, even of the injunctive kind. The upshot: Employers, aware that employees will be disinclined to pursue small-value claims when confined to proceeding one-by-one, will no doubt perceive that the cost-benefit balance of underpaying workers tips heavily in favor of skirting legal obligations.
…

If these untoward consequences stemmed from legislative choices, I would be obliged to accede to them. But the edict that employees with wage and hours claims may seek relief only one-by-one does not come from Congress. It is the result of take-it-or-leave-it labor contracts harking back to the type called "yellow dog," and of the readiness of this Court to enforce those unbargained-for agreements. The FAA demands no such suppression of the right of workers to take concerted action for their "mutual aid or protection." Accordingly, I would reverse the judgment of the Fifth Circuit in No. 16-307 and affirm the judgments of the Seventh and Ninth Circuits in Nos. 16-285 and 16-300.

5.4.1. Timeline

Date	Case Name	Decision	Notes
Decided September 10, 2015 **Filed September 14, 2015**	*Lewis v. Epic Systems Corp* United States District Court for the Western District of Wisconsin (2015)	Denied of the employer's motion to compel arbitration	**First filed in 2015** • Link

Argued February 12, 2016 **Decided May 26, 2016**	*Lewis v. Epic Systems Corp* United States Court of Appeals for the Seventh Circuit (2016)	Affirmed the denial of the employer's motion to compel arbitration	Violated the NLRA and not enforceable by the FAA • Link
Decided & Filed October 13, 2016	*Lewis v. Epic Systems Corp* United States District Court for the Western District of Wisconsin (2016)	Plaintiff's motion for conditional class certification is granted.	• Link
January 13, 2017	*Epic Sys. Corp. v. Lewis* Supreme Court of the United States (2017)	Petition for writ of certiorari granted.	• Link
Argued October 2, 2017 **Decided May 21, 2018**	*Epic Systems Corp. v. Lewis* Supreme Court of the United States (2018)	Overturned the lower courts' decisions (reversed and remanded).	The NLRA does not override the FAA; compelling arbitration by the employer is enforceable • Link
Decided January 24, 2019 **Filed January 25, 2019**	*Lewis v. Epic Systems Corp* United States District Court for the Western District of Wisconsin (2019)	Plaintiff's motion to proceed in the district court is denied. Plaintiff's claims must be resolved through arbitration.	• Link

5.4.2. Notes

i. Comparing *Washington Alum.* with *Epic Sys.*

In *Washington Alum*. (1962) the Court describes the determination of the scope of Section 7 as guided by:

> [T]he policy of the Act to protect the right of workers to act together to better their working conditions. [A narrow] interpretation of § 7 might place burdens upon employees so great that it would effectively nullify the right to engage in concerted activities which that section protects.

Wash. Alum., as a reminder, dealt with a non-union workplace, where workers walked out in concert with no direct connection to unions or to the establishment of a collective bargaining agreement. In *Epic*, on the other hand, Justice Gorsuch tells us that: "Section 7 focuses on the right to organize unions and bargain collectively." Are those two rulings in tension?

One source of tension between the two decisions is about the scope and aim of Section 7. *Wash. Alum.* constructs Section 7's language as conferring protections over "[W]orkers [acting] together" and *Epic Sys*. constructs Section 7's language as focusing on the "right to organize unions and bargain collectively," two activities (organizing unions and bargaining collectively) that the workers in *Wash. Alum* were certainly not doing.

How can we settle this contrast? Was *Washington Alum.* overruled by *Epic Sys*.? Another way to ask this question is if a situation identical to *Wash. Alum.* arrived at the Supreme Court today, how would it be decided? In your thought process, examine the way the Court itself cites *Wash. Alum.* in its *Epic Sys.* Decision.

ii. The epic Stakes of Epic - Arbitration and Drift

Epic Systems was a case with immeasurable stakes. Private individualized arbitration is now the dominant forum of dispute resolution in the workplace. Section 7 challenges were one of the final nails in the coffin of traditional employment court-based litigation. With this massive change in forum, there are massive uncertainties and possible shifts in the content and meaning of the law as well.

Outside of this immediate effect, the Court placed a legal obstacle in the path of those seeking to utilize Section 7 outside of the union context. If the meaning and aim of Section 7 is to protect union-based activities, and not collective arbitration, all other possible extensions of Section 7 outside of the unionized workplace (a meager 6% of the private sector labor market) are in jeopardy.

By killing new legal arguments that aim to refurbish and re-utilize Section 7 claims to a non-union labor market, the court blocks the ability of plaintiffs and their lawyers to modify Section 7 claims to the ever-changing world around them. This world is becoming increasingly non-

union and non-unionizable, if you will. Section 7 in this vision is a remnant of days past, a relic. This situation is called "policy drift" by political scientists, a situation where policy change is blocked (via court interpretation here), and the changing reality leads to significantly less effective (and even opposite) policy outcomes.

The Supreme Court deciding on labor is now a textbook example for a policy-drift agent.

iii. Epic and Board Charges

Workers can waive their rights to file a class action in lieu of an arbitration agreement. But can workers waive their rights to file a charge with the NLRB? No. Statutory procedures for asserting rights are protected and carved out of the scope of the FAA.

For example, in a 2020 Board decision a charge was brought by Uber engineers (not drivers) where workers claimed that their employment arbitration agreements can be "reasonably construed" to limit access to the Board's procedures.

The contractual clause's complicated structure fed into the workers' claims. See if you can follow its logic:

> **Class Action Waiver:** You and the Company agree to bring any dispute in arbitration on an individual basis only, and not on a class, collective, or private attorney general representative basis. There will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective, representative or private attorney general action, or as a member in any purported class, collective, representative or private attorney general proceeding, including without limitation pending but not certified class actions ("Class Action Waiver")
>
> . . . .
>
> Although an Employee will not be retaliated against, disciplined or threatened with discipline as a result of his or her exercising his or her rights under Section 7 of the National Labor Relations Act by the filing of or participation in a class, collective or representative action in any forum, the Company may lawfully seek enforcement of this Agreement and the Class Action Waiver, Collective Action Waiver and Private Attorney General Waiver under the Federal Arbitration Act and seek dismissal of such class, collective or representative actions or claims. . . .

A lot of words, bizarre mention of Section 7 in the context of class actions and the mention of "representative actions" in the clauses' latter part triggered the claim that this clause chill protected section 7 activities.

The Board rejected those claims, stating that in order to chill non-class-action concerted activities and be unlawful an agreement must explicitly prohibit employee rights.

Do you agree?

iv. Other borderline cases

Consider the following cases of defining the scope of Section 7:

- *Waters of Orchard Park*, 341 NLRB 642 (Apr. 30, 2004) (submitting complaints about excessive heat in a nursing home – not covered by Section 7).

v. Arbitration Agreements at Work: Two Origin Stories

There are two complementary origin stories about the growing role of arbitration agreements in the labor market: an institutional story and an organizational one.

In the institutional story, two significant bodies of doctrine and policy – those of consumer and labor arbitrations were coalescing onto a body of law shielding private-sector individual workplace arbitration. Both sources of arbitration – the consumer context and the labor one – followed distinct logics that made courts and regulators to prefer privatized forms of dispute resolution. However, in this story over the course of the early 2000s, the Supreme Court, the federal administration and Congress applied those policies with a vengeance to private workplace arbitration.

The institutional story is one of layering policies and doctrines upon one-another in a way that changed the trajectory of the law to shield and immune privatized forms of workplace arbitration.

The organizational story treats the law as a secondary, yet enabling, role. In the organizational story, HR professionals, raised in labor-relations HR departments translated a labor-oriented

dispute resolution procedure to a privatized workplace. That translation followed multiple private-employer internal struggles about C-suite domination between various stakeholders (namely HR personnel v. Lawyers) where HR officials were triumphant. Their triumph enabled HR personnel to dominate the manner and means with which workplace disputes are resolved – outside of court, in arbitration. And in a way that would allow to reduce costs and litigation related risks.

In the organizational story, the courts and Congress play a secondary role. At most, courts "defer" to private employers to decide how workplace dispute resolution is done. That deferral is than struggled over by internal warring factions across the labor market and in its surrounding institutions.

For the institutional story I would recommend:

- Staszak, Sarah L. Privatizing Justice: Arbitration and the Decline of Public Governance in the US. Oxford University Press, 2024.

For the organizational story I would recommend:

- Edelman, Lauren B. Working law: Courts, corporations, and symbolic civil rights. University of Chicago Press, 2020.
- Dobbin, Frank. *Inventing Equal Opportunity*. Princeton University Press, 2009.

And my own two cents in:

- Gali Racabi, *DEI: Son of Deference*, Berkeley J. of Lab. & Emp. L. (forthcoming 2025) (link).

5.4a NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 103 S. Ct. 2469 (1983).

JUSTICE **WHITE** delivered the opinion of the Court.

The National Labor Relations Act (NLRA or Act), 29 U. S. C. § 151. makes unlawful the discharge of a worker because of union activity, §§ 8(a)(1), (3), but employers retain the right to discharge workers for any number of other reasons unrelated to the employee's union activities. When the General Counsel of the National Labor Relations Board (Board) files a complaint alleging that an employee was discharged because of his union activities, the employer may assert legitimate

motives for his decision. In *Wright Line*, 251 N. L. R. B. 1083 (1980), enf'd, 662 F.2d 899 (CA1 1981), cert. denied, 455 U.S. 989 (1982), the Board reformulated the allocation of the burden of proof in such cases. It determined that the General Counsel carried the burden of persuading the Board that an antiunion animus contributed to the employer's decision to discharge an employee, a burden that does not shift, but that the employer, even if it failed to meet or neutralize the General Counsel's showing, could avoid the finding that it violated the statute by demonstrating by a preponderance of the evidence that the worker would have been fired even if he had not been involved with the union. The question presented in this case is whether the burden placed on the employer in *Wright Line* is consistent with §§ 8(a)(1) and 8(a)(3), as well as with § 10(c) of the NLRA, which provides that the Board must find an unfair labor practice by a "preponderance of the testimony."

Prior to his discharge, Sam Santillo was a busdriver for respondent Transportation Management Corp. On March 19, 1979, Santillo talked to officials of the Teamster's Union about organizing the drivers who worked with him. Over the next four days Santillo discussed with his fellow drivers the possibility of joining the Teamsters and distributed authorization cards. On the night of March 23, George Patterson, who supervised Santillo and the other drivers, told one of the drivers that he had heard of Santillo's activities. Patterson referred to Santillo as two-faced, and promised to get even with him.

Later that evening Patterson talked to Ed West, who was also a busdriver for respondent. Patterson asked, "What's with Sam and the Union?" Patterson said that he took Santillo's actions personally, recounted several favors he had done for Santillo, and added that he would remember Santillo's activities when Santillo again asked for a favor. On Monday, March 26, Santillo was discharged. Patterson told Santillo that he was being fired for leaving his keys in the bus and taking unauthorized breaks.

Santillo filed a complaint with the Board alleging that he had been discharged because of his union activities, contrary to §§ 8(a)(1) and 8(a)(3) of the NLRA. The General Counsel issued a complaint. The Administrative Law Judge (ALJ) determined by a preponderance of the evidence that Patterson clearly had an antiunion animus and that Santillo's discharge was motivated by a desire to discourage union activities. The ALJ also found that the asserted reasons for the discharge could not withstand scrutiny. Patterson's disapproval of Santillo's practice of leaving his keys in the bus was clearly a pretext, for Patterson had not known about Santillo's practice until after he had decided to discharge Santillo; moreover, the practice of leaving keys in buses was commonplace among respondent's employees. Respondent identified two types of unauthorized breaks, coffeebreaks and stops at home. With respect to both coffeebreaks and stopping at home, the ALJ found that Santillo was never cautioned or admonished about such behavior, and that the employer had not followed its customary practice of issuing three written warnings before discharging a driver. The ALJ also found that the taking of coffeebreaks during working hours was normal practice, and that respondent tolerated the practice unless the breaks interfered with the driver's performance of his duties. In any event, said the ALJ, respondent had never taken any adverse personnel action against an employee because of such behavior. While acknowledging that Santillo had engaged in some unsatisfactory conduct, the ALJ was not persuaded that Santillo would have been fired had it not been for his union activities.

The Board affirmed, adopting with some clarification the ALJ's findings and conclusions and expressly applying its *Wright Line* decision. It stated that respondent had failed to carry its burden of persuading the Board that the discharge would have taken place had Santillo not engaged in

activity protected by the Act. The Court of Appeals for the First Circuit, relying on its previous decision rejecting the Board's *Wright Line* test, *NLRB* v. *Wright Line*, 662 F.2d 899 (1981), refused to enforce the Board's order and remanded for consideration of whether the General Counsel had proved by a preponderance of the evidence that Santillo would not have been fired had it not been for his union activities. 674 F.2d 130 (1982). We now reverse.

Employees of an employer covered by the NLRA have the right to form, join, or assist labor organizations. NLRA § 7. It is an unfair labor practice to interfere with, restrain, or coerce the exercise of those rights, NLRA § 8(a)(1), or by discrimination in hire or tenure "to encourage or discourage membership in any labor organization," NLRA § 8(a)(3).

Under these provisions it is undisputed that if the employer fires an employee for having engaged in union activities and has no other basis for the discharge, or if the reasons that he proffers are pretextual, the employer commits an unfair labor practice. He does not violate the NLRA, however, if any antiunion animus that he might have entertained did not contribute at all to an otherwise lawful discharge for good cause. . . . .

The Courts of Appeals were not [] satisfied with the Board's approach to dual-motive cases. The Board's *Wright Line* decision in 1980 was an attempt to restate its analysis in a way more acceptable to the Courts of Appeals. The Board held that the General Counsel of course had the burden of proving that the employee's conduct protected by § 7 was a substantial or a motivating factor in the discharge. Even if this was the case, and the employer failed to rebut it, the employer could avoid being held in violation of §§ 8(a)(1) and 8(a)(3) by proving by a preponderance of the evidence that the discharge rested on the employee's unprotected conduct as well and that the employee would have lost his job in any event. It thus became clear, if it was not clear before, that proof that the discharge would have occurred in any event and for valid reasons amounted to an affirmative defense on which the employer carried the burden of proof by a preponderance of the evidence. "The shifting burden merely requires the employer to make out what is actually an affirmative defense . . . ." *Wright Line*, 2.

. . . .

As we understand the Board's decisions, they have consistently held that the unfair labor practice consists of a discharge or other adverse action that is based in whole or in part on antiunion animus -- or as the Board now puts it, that the employee's protected conduct was a substantial or motivating factor in the adverse action. The General Counsel has the burden of proving these elements under § 10(c). But the Board's construction of the statute permits an employer to avoid being adjudicated a violator by showing what his actions would have been regardless of his forbidden motivation. It extends to the employer what the Board considers to be an affirmative defense but does not change or add to the elements of the unfair labor practice that the General Counsel has the burden of proving under § 10(c). We assume that the Board could reasonably have construed the Act in the manner insisted on by the Court of Appeals. We also assume that the Board might have considered a showing by the employer that the adverse action would have occurred in any event as not obviating a violation adjudication but as going only to the permissible remedy, in which event the burden of proof could surely have been put on the employer. The Board has instead chosen to recognize, as it insists it has done for many years, what it designates as an affirmative defense that the employer has the burden of sustaining. We are unprepared to hold that this is an impermissible

construction of the Act. "[The] Board's construction here, while it may not be required by the Act, is at least permissible under it . . . ," and in these circumstances its position is entitled to deference. *NLRB* v. *J. Weingarten, Inc*., 420 U.S. 251, 266-267 (1975).

The Board's allocation of the burden of proof is clearly reasonable in this context, for the reason stated in *NLRB* v. *Remington Rand, Inc*., 94 F.2d 862, 872 (CA2), cert. denied, 304 U.S. 576 (1938), a case on which the Board relied when it began taking the position that the burden of persuasion could be shifted. *E. g., Eagle-Picher Mining & Smelting*, 16 N. L. R. B., at 801. The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.

In *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977), we found it prudent, albeit in a case implicating the Constitution, to set up an allocation of the burden of proof which the Board heavily relied on and borrowed from in its *Wright Line* decision. There, we held that the plaintiff had to show that the employer's disapproval of his First Amendment protected expression played a role in the employer's decision to discharge him. If that burden of persuasion were carried, the burden would be on the defendant to show by a preponderance of the evidence that he would have reached the same decision even if, hypothetically, he had not been motivated by a desire to punish plaintiff for exercising his First Amendment rights. The analogy to *Mt. Healthy* drawn by the Board was a fair one.

For these reasons, we conclude that the Court of Appeals erred in refusing to enforce the Board's orders, which rested on the Board's *Wright Line* decision.

The Board was justified in this case in concluding that Santillo would not have been discharged had the employer not considered his efforts to establish a union. At least two of the transgressions that purportedly would have in any event prompted Santillo's discharge were commonplace, and yet no transgressor had ever before received any kind of discipline. Moreover, the employer departed from its usual practice in dealing with rules infractions; indeed, not only did the employer not warn Santillo that his actions would result in being subjected to discipline, it also never even expressed its disapproval of his conduct. In addition, Patterson, the person who made the initial decision to discharge Santillo, was obviously upset with Santillo for engaging in such protected activity. It is thus clear that the Board's finding that Santillo would not have been fired if the employer had not had an antiunion animus was "supported by substantial evidence on the record considered as a whole," 29 U. S. C. § 160(f).

Accordingly, the judgment is

Reversed.

5.4a.1. Timeline

Date	Case Name	Decision	Notes
May 20, 1981	*Transportation Management Corp* National Labor Relations Board	Respondent discharged employee in violation of the	• Link

		NLRA Section 8(a)(3) and (1). Sought enforcement.	• Link
Argued January 8, 1982 **Decided April 1, 1982**	*NLRB v. Transportation Management Corp.* US Court of Appeals for the First Circuit	Enforcement denied and remanded to the Board for reconsideration pursuant to its decision.	• Link
Novembe r 15, 1982	*NLRB v. Transportation Management Corp.* Supreme Court of the United States	Certiorari granted.	
Argued March 28, 1983 **Decided June 15, 1983**	*NLRB v. Transportation Management Corp.* Supreme Court of the United States	Reversed the judgment of lower court, erred in refusing to enforce the order of the petitioner in an unfair labor practice case.	The court found that petitioner was justified in concluding that an employee would not have been discharged had the employer not considered his efforts to establish a union. • Link
Novembe r 15, 1985	*Transportation Management Corp.* National Labor Relations Board	General Counsel's motion for summary judgment in part is granted and is remanded to a regional judge.	• Link

5.5. Tesla, Inc. (N.L.R.B. August 29, 2022)

Full decision: (link); **Docket**: (); **Oral argument**: ()

SUPPLEMENTAL DECISION AND ORDER

By Lauren McFerran, Chairman, Gwynne A. Wilcox, Member, David M. Prouty, Member

In this case, we examine the standard to be applied to evaluate the lawfulness of workplace rules or policies that restrict the display of union insignia by requiring employees to wear uniforms or other designated clothing, implicitly prohibiting employees from substituting union attire for the required uniform or clothing. The Supreme Court of the United States long ago affirmed that employees have a protected right to display union insignia under Section 7 of the National Labor Relations Act. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-803 (1945). Thereafter, whenever an employer interfered with its employees' right to display union insignia, it had the burden to show that its interference was justified by special circumstances. If it could not meet that burden, the National Labor Relations Board would find that the employer violated the Act. See, e.g., *Boch Honda*, 362 NLRB 706, 707 (2015), enfd. sub nom. *Boch Imports, Inc. v. NLRB*, 826 F.3d 558 (1st Cir. 2016).

In *Stabilus, Inc.*, the Board stated that "[a]n employer cannot avoid the 'special circumstances' test simply by requiring its employees to wear uniforms or other designated clothing, thereby precluding the wearing of clothing bearing union insignia." 355 NLRB 836, 838 (2010). Subsequently, however, a divided Board in *Wal-Mart Stores, Inc.*, 368 NLRB No. 146 (2019), declined to apply the "special circumstances" test to evaluate the lawfulness of an employer's dress code policy that partially restricted the display of union buttons and insignia. As explained below, the Board's decision in *Wal-Mart* upset the proper balance struck by the Supreme Court in *Republic Aviation*, ignored decades of Board precedent holding that *any* limitation on the display of union insignia is presumptively unlawful regardless of whether an employer permits other related Section 7 activity, and created uncertainty in this previously well-settled area of the law.

Accordingly, we overrule *Wal-Mart* and reaffirm that under *Republic Aviation* and its progeny, when an employer interferes *in any way* with its employees' right to display union insignia, the employer must prove special circumstances that justify its interference. Applying that standard here, we agree with the judge that the Respondent violated Section 8(a)(1) of the Act by maintaining its team-wear policy, which requires employees to wear shirts imprinted with the Respondent's logo and implicitly prohibits employees from substituting any shirt with a logo or emblem, including a shirt bearing union insignia, for the required team wear.

I. PROCEDURAL HISTORY

On September 27, 2019, Administrative Law Judge Amita Baman Tracy issued a decision in this proceeding. The judge found, inter alia, that the Respondent violated Section 8(a)(1) by maintaining its team-wear policy because it failed to establish that the policy is justified by special circumstances under *Republic Aviation*. The Respondent filed exceptions, arguing that the special circumstances test should not apply because its production associates freely and openly display union insignia and are merely prohibited from substituting union shirts for the required team wear.

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The Board has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm her rulings, findings, and conclusions regarding that issue and to adopt the recommended Order as modified and set forth in full below. For the reasons discussed below, we agree with the judge that the Respondent failed to establish special circumstances that justify its team-wear policy's implicit prohibition on employees wearing union shirts and therefore violated Section 8(a)(1) by maintaining the team-wear policy.

II. BACKGROUND

The Respondent manufactures electric vehicles at its facility in Fremont, California. The vehicles are assembled in General Assembly (GA) by production associates, who install parts in and on the bodies of the vehicles. When an unfinished vehicle enters GA, its paint is cured sufficiently for light touching and general handling but is not cured as completely as when the vehicle is finished.

The Respondent's "General Assembly Expectations" include the following team-wear policy:

> Team Wear: It is mandatory that all Production Associates and Leads wear the assigned team wear.
>
> On occasion, team wear may be substituted with all black clothing if approved by supervisor. Alternative clothing must be mutilation free, work appropriate and pose no safety risks (no zippers, yoga pants, hoodies with hood up, etc.).

The team-wear policy applies only to employees in GA.

For production associates, team wear consists of black cotton shirts with the Respondent's logo and black cotton pants with no buttons, rivets, or exposed zippers. The Respondent provides newly hired production associates with two pairs of pants, two short-sleeve shirts, two long-sleeve shirts, and a sweater. The shirts and sweater are imprinted with the Respondent's logo. Production leads and supervisors wear red shirts imprinted with the Respondent's logo, while line inspectors wear white shirts imprinted with the Respondent's logo, and they all wear the same black cotton pants as the production associates.

During the Union's organizing campaign in the spring of 2017, employees, including production associates, began wearing black cotton shirts that had a small logo with the Union's campaign slogan--"Driving a Fair Future at Tesla"--on the front and a larger logo with that slogan and "UAW" on the back. Before August 2017, production associates regularly wore shirts that were not black or had logos and emblems unrelated to the Respondent. In August 2017, the Respondent began to strictly enforce its team-wear policy by having supervisors and managers

audit production associates during startup meetings and "walk the line" to ensure compliance with the team-wear policy. Since then, supervisors and managers have occasionally allowed production associates to wear plain black cotton shirts instead of team-wear shirts or to cover non-Respondent logos and emblems on black shirts with black mutilation-protection tape.

On August 10, 2017, production associate Jayson Henry was wearing a black union shirt when an unidentified production supervisor told Henry that he would be sent home if he wore the union shirt again. Henry asked to see the Respondent's dress code, and Associate Production Manager Topa Ogunniyi gave him a copy of the "General Assembly Expectations." That same day, production associate Sean Jones was also wearing a black union shirt, and Production Supervisor Timothy Fenelon told Jones that he would be sent home if he did not change out of the union shirt because the shirt did not comply with the Respondent's team-wear policy. Jones protested but ultimately changed his shirt. Later that day, Jones complained to Ogunniyi about this incident, and Ogunniyi responded that the policy had changed and that employees could no longer wear shirts with emblems. From that point forward, the Respondent prohibited production associates from wearing the black union shirts in place of team-wear shirts but continued to allow them to wear union stickers on the required team wear.

Production Manager Mario Penera testified that the team-wear policy is intended to aid in the "visual management" of GA and to lower the risk of employees' clothing causing mutilations to the vehicles. Penera described visual management as the ability to easily determine that employees are in their assigned work areas and to distinguish among the different categories of employees in GA based on shirt color. Penera added that requiring production associates to dress in team wear makes it easier for supervisors to verify that employees' clothes do not present a high risk of causing mutilations. Penera testified that he did not know of a black union shirt--or any other non-team-wear shirt with a logo--causing a mutilation to a vehicle. Production Manager Kyle Martin generally confirmed Penera's testimony regarding the purpose of the team-wear policy. Additionally, Martin testified about a specific incident in which a raised metal emblem on a production associate's shirt caused a mutilation by brushing against a fender, and Martin admitted that he could still visually manage GA if production associates wore plain black shirts. Associate Manager Ogunniyi testified that, to her knowledge, a cotton shirt had never damaged a vehicle and that, although the black union shirt previously worn by production associates does not comply with the team-wear policy, it is not a mutilation risk. Production Supervisor Fenelon also testified that he did not know of any cotton shirt causing a mutilation to a vehicle.

III. DISCUSSION

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B. The Board's Decision in Stabilus

In *Stabilus, Inc.*, the employer maintained a uniform policy that required employees to wear shirts bearing the employer's name. 355 NLRB 836, 837 (2010). During a union campaign, the employer told several employees that they could not wear union shirts. The administrative law judge found that the employer unlawfully prohibited employees from wearing union shirts because it failed to establish that this application of its uniform policy was justified by special circumstances under *Republic Aviation. Stabilus*, 355 NLRB at 837-838. The employer excepted to that finding, arguing that "nondiscriminatory enforcement of a uniform policy does not violate the Act."

The *Stabilus* Board found it unnecessary to reach the judge's finding that the employer failed to establish special circumstances because it found that even if the employer had made that showing, its conduct was unlawful for two independent reasons: (1) it "enforced its policy in a selective and overbroad manner against union supporters," and (2) "the policy was applied in a disparate manner to Section 7 activity relative to comparable non-Section 7 activity." However, the Board still analyzed the applicability of the special circumstances test, noting as follows:

> As the Supreme Court has held, employees have a Section 7 right to wear union insignia on their employer's premises, which may not be infringed, absent a showing of "special circumstances." These protections of Section 7 expression have always extended to articles of clothing, including prounion T-shirts. There is no basis in precedent for treating clothes displaying union insignia as categorically different from other union insignia, such as buttons.
>
> An employer cannot avoid the "special circumstances" test simply by requiring its employees [*16] to wear uniforms or other designated clothing, thereby precluding the wearing of clothing bearing union insignia. The Board has consistently applied that test where employers have required employees to wear particular articles of clothing and have correspondingly prohibited them from wearing clothing displaying union insignia. . . . The many Board cases finding that special circumstances existed amply illustrate that there is no need to depart from existing precedent to ensure that employers' legitimate interests, for example, in maintaining a particular public image, are accorded proper weight.

Id. at 838.

Former Member Schaumber disagreed that the special circumstances test was applicable in *Stabilus* and instead would have found that the employer lawfully enforced its preexisting uniform policy. Member Schaumber considered *Stabilus* to be a "case of first impression" and asserted that the Board had "never held that, where an employer lawfully maintains and consistently enforces a policy requiring employees to wear a company uniform, its employees

have a right under Section 7 to disregard the policy and wear union attire in place of the required uniform." To the contrary, he argued that the Board had instead "implicitly recognized that an employer may promulgate and enforce a nondiscriminatory uniform rule." Noting that the right to display union insignia is predicated on employees' right to communicate with each other regarding self-organization at the workplace, Member Schaumber maintained that the employer in *Stabilus* had not interfered with its employees' Section 7 rights in that regard because, although employees could not wear union shirts, they were able to display union buttons, pins, and stickers, and other union insignia. Member Schaumber ultimately concluded as follows:

> [I]n balancing employee and employer rights as required under *Republic Aviation*, supra, a "special circumstances" analysis is inappropriate here. If employees have the right to wear union attire *instead* of a company uniform, the employer's right to promulgate and enforce reasonable, nondiscriminatory apparel rules is negated entirely. Such a result would not strike a balance between employee and employer rights; rather, it would completely submerge the employer's rights. Thus, I would hold that where, as here, an employer maintains and consistently enforces a lawful uniform rule, Section 7 does not guarantee employees the right to wear union attire in place of the required company uniform.
>
> Id. at 843-844.

….

D. Stabilus Correctly Specifies That the Republic Aviation Special Circumstances Test Applies Here

Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C § 157. In Section 1 of the Act, Congress explained that it created these new rights for workers because "[e]xperience ha[d] proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce." 29 U.S.C. § 151. Section 8(a)(1) protects these rights by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." 29 U.S.C. § 158(a)(1). As the Supreme Court has approvingly observed, since the earliest days of the Act, "the Board [has] recognized the importance of freedom of communication to the free exercise of organization rights," because "organization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others." *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972); see also *LeTourneau Co. of Georgia*, 54 NLRB 1253, 1260 (1944) ("It is clear that employees cannot realize the benefits of the right to self-organization guaranteed them by the Act, unless

there are adequate avenues of communication open to them whereby they may be informed or advised as to the precise nature of their rights under the Act and of the advantages of self-organization, and may have opportunities for the interchange of ideas necessary to the exercise of their right to self-organization."), revd. 143 F.2d 67 (5th Cir. 1944), revd. sub nom. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

In *Republic Aviation Corp. v. NLRB*, the Supreme Court affirmed that "the right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity, and the [employer's] curtailment of that right is clearly violative of the Act." 324 U.S. 793, 802-803 (1945); see also *In-N-Out Burger, Inc. v. NLRB*, 894 F.3d 707, 714 (5th Cir. 2018) ("Since the Act's earliest days, it has been recognized that Sec[.] 7 protects the right of employees to wear items--such as buttons, pins, and stickers--relating to terms and conditions of employment (including wages and hours), unionization, and other protected matters."), cert. denied 139 S. Ct. 1259 (2019). The display of union insignia has proven to be a critical form of protected communication, as employees have displayed union insignia in many ways in furtherance of Section 7 rights, including to support organizing campaigns, demonstrate solidarity, and advocate for issues during collective bargaining.

Employees' Section 7 right to display union insignia at work is not absolute, however. As the Supreme Court explained in *Republic Aviation*, the Board must balance "the undisputed right of self-organization assured to employees under the [] Act and the equally undisputed right of employers to maintain discipline in their establishments." 324 U.S. at 797-798 ("[T]hese rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society."). *Republic Aviation* established the Board's longstanding approach to balancing these rights: a presumption that any employer limitation on the display of union insignia is invalid, with the burden on the employer to establish special circumstances to justify its action. See *Republic Aviation*, 324 U.S. at 803-804 & fn. 10; see also *Boeing Airplane Co.*, 103 NLRB 1025, 1026 & fn. 4 (1953) (citing *Republic Aviation* to support the proposition that "[i]t has long been recognized that rules such as the foregoing, [including a rule prohibiting union steward and committeemen buttons,] which clearly interfere with employee's concerted activity, are presumptively invalid, in the absence of special circumstances which make them necessary in order to maintain production and discipline"), enfd. 217 F.2d 369 (9th Cir. 1954). As Professors Robert A. Gorman and Matthew W. Finkin have explained, this approach "reflect[s] a substantive judgment that inhibitions on employee activities on behalf of the union inherently do 'interfere' with and 'restrain' the exercise of their [S]ection 7 rights and that the burden to justify that inhibition should properly lie with the employer when its needs are not immediately obvious." Gorman & Finkin, *Basic Text on Labor Law* § 8.2 (2d ed. 2004).

The Board has treated clothes displaying union insignia the same as union insignia that employees attach to their clothing, such as buttons and pins. See *Great Plains Coca-Cola Bottling Co.*, 311 NLRB 509, 515 (1993). Thus, Section 7's protection of employees' right to display union insignia "extends to prounion T-shirts," and the Board will find that an employer's interference with such a display of union insignia violates the Act unless the employer proves special circumstances that outweigh the employees' right to wear the insignia and that its prohibition is narrowly tailored to address those circumstances. See *Wal-Mart Stores*, 340 NLRB 637, 638 (2003) (citing cases), enfd. in relevant part 400 F.3d 1093 (8th Cir. 2005).

Relatedly, although the Board's discussion of the special circumstances test in *Stabilus* was dicta, the Board correctly stated there that "[a]n employer cannot avoid the 'special circumstances' test simply by requiring its employees to wear uniforms or other designated clothing, thereby precluding the wearing of clothing bearing union insignia." 355 NLRB at 838. The Board has consistently applied the *Republic Aviation* special circumstances test when an employer has prohibited an employee from wearing an article of clothing bearing union insignia based on a policy requiring employees to wear certain clothing. For example, in *Great Plains Coca-Cola*, the Board found that an employer violated Section 8(a)(1) where, in the absence of special circumstances, a supervisor told an employee that his union jacket was unacceptable and that only company jackets were allowed. See 311 NLRB at 515. Similarly, in *Meijer, Inc.*, the Board found that, in the absence of special circumstances, an employer violated Section 8(a)(1) by prohibiting an employee from wearing a jacket with a union logo--instead of the employer-provided freezer jacket that was considered part of the established uniform in the store--in noncustomer areas. See 318 NLRB 50, 52, 56-57 (1995), enfd. 130 F.3d 1209 (6th Cir. 1997). In *Quantum Electric, Inc.*, the Board found that, in the absence of special circumstances, an employer unlawfully discharged an employee for violating its clothing policy--which prohibited employees from wearing clothing with "graphics or printed text other than [employer] approved or issued clothing"--where the employee wore a union shirt and refused to turn it inside out. See 341 NLRB 1270, 1270 fn. 1, 1274, 1277, 1280 (2004). Conversely, on several occasions, the Board has found that employers established special circumstances that justified applying a uniform policy or dress code to prohibit employees from wearing an article of clothing displaying union insignia.

In the present case, the Respondent's team-wear policy allows production associates to wear only black team-wear shirts with the Respondent's logo--or on occasion, with their supervisor's permission, all-black shirts--and thus prohibits them from wearing union shirts in place of the required team wear or other approved shirts. As a result, the team-wear policy interferes with production associates' Section 7 right to display union insignia. Accordingly, under *Republic Aviation* and its progeny, the team-wear policy is presumptively invalid, and the Respondent has the burden to establish special circumstances that justify its interference with production associates' protected right to display union insignia. In other words, *Stabilus* correctly specifies that the present case requires nothing more than the application of the Board's longstanding,

Supreme Court-approved special circumstances test to an employer restriction on the display of union insignia.

E. Our Colleagues' Dissenting Position and the Stabilus Dissent Are Contrary to Republic Aviation

As discussed above, in *Stabilus*, former Member Schaumber argued that where an employee attempts to substitute union attire for attire required by an employer's nondiscriminatory uniform policy or dress code, application of the *Republic Aviation* special circumstances test would be inappropriate. *Stabilus*, 355 NLRB at 843 (Member Schaumber, dissenting in part). Instead, he argued that "where . . . an employer maintains and consistently enforces a lawful uniform rule, Section 7 does not guarantee employees the right to wear union attire in place of the required company uniform." Id. at 844. Our dissenting colleagues agree with the *Stabilus* dissent. They would not apply the special circumstances test to "facially neutral, nondiscriminatory employer dress codes that [ ] provide a meaningful opportunity to display union insignia." Instead, they would hold that such policies are categorically lawful to maintain and enforce if they are not discriminatorily promulgated in response to union activity or disparately enforced against employees wearing union attire. We disagree.

….

…. [T]he standard first proposed by the *Stabilus* dissent and expanded upon by our dissenting colleagues today is fundamentally in conflict with the principles of *Republic Aviation*, as announced and applied by the Supreme Court and the Board for decades, in the following three respects: (1) by essentially asserting that an employer is free to prohibit statutorily protected means of communication among employees so long as some alternative means remains open; (2) by suggesting that an employer restriction on the exercise of Section 7 rights is lawful if it is "nondiscriminatory" and "consistently enforced"; and (3) by effectively rejecting the principle that employees' Section 7 rights and employers' legitimate interests must be balanced.

We consider each of these errors below.

1. Alternative means of communication

The *Stabilus* dissent relied in part on a claim that the employer did not interfere with its employees' right to communicate regarding self-organization at the workplace because employees could display union insignia by means other than a union shirt (such as buttons, pins, and stickers). *Stabilus*, 355 NLRB at 843 (Member Schaumber, dissenting in part). Our dissenting colleagues have gone further and explicitly stated that a facially neutral, nondiscriminatory dress code that requires employees to wear specific apparel "should be lawful as long as the dress code affords employees a meaningful opportunity to display union insignia."

However, an employer is not free to restrict one statutorily protected means of communication among employees, so long as some alternative means remains unrestricted. Indeed, in *Republic Aviation* the employer advanced this very argument, but the Supreme Court's decision leaves it without force. *Republic Aviation* involved an employer that banned only some union buttons but permitted employees to wear others. The Board found that the employer unlawfully discharged three employees for wearing union-steward buttons, even though the employer gave "assurance that employees were free to wear other types of union buttons." *Republic Aviation Corp.*, 51 NLRB 1186, 1188 (1943), enfd. 142 F.2d 193 (2d Cir. 1944), affd. 324 U.S. 793 (1945). On review before the Supreme Court, the employer made the following argument:

> Petitioner freely permitted the wearing of other types of U. A. W. buttons, and there is no showing that the privilege of displaying the steward buttons would have legitimately aided the self-organization of the employees. The Board's failure to perform its required function of balancing the conflicting interests on this issue is underlined by its conclusion that the prohibition was a "curtailment" of the employees' right "to wear union insignia at work".

Brief for Republic Aviation Corporation at 10,

The Supreme Court adopted the Board's conclusion that the employer violated the Act by prohibiting employees from wearing the union steward buttons and thus implicitly rejected the employer's argument that its toleration of other union buttons made its ban of union-steward buttons lawful. See *Republic Aviation*, 324 U.S. at 802-803 & fn. 7.

Consistent with *Republic Aviation*, the Board has required an employer to establish special circumstances to justify restrictions on employees' right to display union insignia, even if the employer permitted employees to display union insignia in other ways, and has not analyzed whether the employer affords employees "a meaningful opportunity to display union insignia" before applying the special circumstances test in those situations. Thus, "[u]nder Board law, it is irrelevant that the [employer] allowed employees to wear other union insignia that it deemed acceptable." *Caterpillar*, 321 NLRB at 1181 fn. 10; see also *Page Avjet Corp.*, 275 NLRB 773, 777 (1985) (finding, in the absence of special circumstances, that the employer's "proposal to post photographs of the stewards on the union bulletin board [was] not an acceptable alternative to wearing steward badges" because "in the absence of a justification for the prohibition, there is no need for the [u]nion to accept any alternative").
More generally, it is well established that, consistent with the Act's language, an employer can violate Section 8(a)(1) by interfering with employees' exercise of the Section 7 right to communicate with each other at work, even if alternative means of exercising their rights remain. Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with" employees' Section 7 rights. Plainly, it is possible to interfere with the employee exercise of Section 7 rights even without completely preventing that exercise. As the Board has observed, "[i]t certainly does

not lie in the mouth of [the employer] to tell the [u]nion, or [the employer's] employees, how to exercise their rights under the Act." *Monarch Machine Tool Co.*, 102 NLRB 1242, 1249 (1953) (rejecting special circumstances argument in support of no-distribution rule that "employees have adequate means of communication with other employees--the [u]nion meeting hall, newspaper announcements, mailing lists, the bulletin boards provided by the [c]ompany"), enfd. 210 F.2d 183 (6th Cir. 1954), cert. denied 347 U.S. 967 (1954). In *Republic Aviation*, the Supreme Court endorsed the Board's determinations in two separate cases that employers had unlawfully prohibited employees from soliciting union membership and distributing union literature on company property, respectively, notwithstanding the absence in either case of "evidence or a finding that the plant's physical location made solicitation away from company property ineffective to reach prospective union members." 324 U.S. at 798-799, 801-803 & fns. 6, 8.

On several subsequent occasions, the Supreme Court has reaffirmed the principle that the availability of alternative means of communication is irrelevant in determining whether an employer has unlawfully interfered with the exercise of employees' Section 7 rights. See, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 572-574 (1978) (rejecting the employer's argument that "the *Republic Aviation* rule" should not apply to certain types of protected distributions "in the absence of a showing by employees that no alternative channels of communication with fellow employees are available"); *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 505 (1978) (observing that "outside of the health-care context, the availability of alternative means of communication is not, with respect to employee organizational activity, a necessary inquiry"); *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322, 324-327 (1974) (declining to consider "the availability of alternative channels of communication" where it held that the union could not waive employees' right to distribute union literature on company property). Not surprisingly, decisions of the federal circuit courts are in accord. See, e.g., *Casino Pauma v. NLRB*, 888 F.3d 1066, 1084 (9th Cir. 2018) ("'[I]nquiry into such considerations [of alternative forms of communication] is made only when *nonemployees* are on the employer's property.'" (emphasis and alteration in original) (quoting *ITT Industries, Inc. v. NLRB*, 413 F.3d 64, 76 (D.C. Cir. 2005))). In fact, the United States Court of Appeals for the District of Columbia Circuit has approvingly observed that "[t]he NLRB has consistently ruled that the presence of alternative methods of communication is not relevant in determining the rights of employees." *Helton v. NLRB*, 656 F.2d 883, 896, 897 fn. 71 (D.C. Cir. 1981).

Our dissenting colleagues claim that our decision today is inconsistent with Board precedent regarding solicitation and distribution by employees on company property because we fail to make a distinction between policies that completely prohibit the exercise of Section 7 rights and policies that only limit the exercise of Section 7 rights. They are mistaken. Indeed, it is their proposed "meaningful opportunity" standard that is inconsistent with that precedent.

The Board has long held that a no-solicitation rule that prohibits union solicitation on company property only during working time is presumptively lawful in the absence of evidence that it was promulgated for a discriminatory purpose, while a no-solicitation rule that prohibits union solicitation on company property during nonworking time is unlawful in the absence of evidence that special circumstances make such a rule necessary to maintain production or discipline. See *Our Way, Inc.*, 268 NLRB 394, 394-395 (1983); *Peyton Packing Co.*, 49 NLRB 828, 843-844 (1943), enfd. 142 F.2d 1009 (5th Cir. 1944), cert. denied 323 U.S. 730, 65 S. Ct. 66, 89 L. Ed. 585 (1944); see also *Republic Aviation*, 324 U.S. at 803 & fn. 10 (approving the Board's standard for no-solicitation rules [*50] as set forth in *Peyton Packing*). The Board treats no-distribution rules similarly, as such rules are unlawful in the absence of special circumstances if they prohibit employees from distributing union literature in nonwork areas during nonworking time. See *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 619-621 (1962). Contrary to our dissenting colleagues' suggestion, the Board does not apply the above standards only when an employer *completely* prohibits solicitation or distribution. For example, an employer is not free to prohibit solicitation during certain nonworking times even if it provides employees a "meaningful opportunity" to engage in solicitation during other nonworking times; instead, the Board will find that any restriction on employees' ability to engage in union solicitation during nonworking times is unlawful in the absence of special circumstances. See, e.g., *Globe Shopping City*, 204 NLRB 663, 665 (1973) (finding that an employer violated Sec. 8(a)(1) by telling an employee that he could engage in solicitation during his lunchbreak but could not do so during his 15-minute coffeebreak); *Exide Alkaline Battery Division of ESB, Inc.*, 177 NLRB 778, 778 (1969) (finding that an employer "unlawfully restricted solicitation" by allowing "solicitation during times when the [*51] employees were on scheduled nonwork time such as coffee and lunch breaks, but not when they were on other nonwork time"), enfd. per curiam 423 F.2d 663 (4th Cir. 1970). Likewise, an employer cannot prohibit union distribution in certain nonwork areas during nonworking time merely because it provides a "meaningful opportunity" for union distribution in other nonwork areas during nonworking time. See, e.g., *Aqua-Aston Hospitality, LLC d/b/a Aston Waikiki Beach Hotel and Hotel Renew*, 365 NLRB No. 53, slip op. at 12 fn. 36 (2017) (rejecting the employer's argument that its prohibition on union distribution in its open-air lobby, which the Board determined to be a nonwork area, was lawful because it allowed distribution in alternative nonwork areas during nonworking time), enfd. mem. per curiam Nos. 17-1117 2018 U.S. App. LEXIS 7068, 2018 WL 11416606 (D.C. Cir. Mar. 20, 2018).

Thus, the application of the special circumstances test to employer policies that restrict but do not completely prohibit employees' ability to display union insignia is consistent with Board precedent regarding employee solicitation and distribution. In fact, that precedent supports our decision today because just as employers are not free to restrict employees' ability to engage in union solicitation in the workplace during nonworking time or union distribution in nonwork areas during nonworking time in the absence of special circumstances, employers may not restrict employees' ability to display union insignia in the workplace in the absence of special circumstances. Moreover, application of the special circumstances test to partial restrictions on

the display of union insignia is consistent with the Supreme Court's understanding of *Republic Aviation*, as the Court subsequently observed that "*[n]o restriction* may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) (citing *Republic Aviation*, 324 U.S. at 803). We therefore adhere to *Republic Aviation* by requiring an employer to justify through a showing of special circumstances any restriction on the important Section 7 right to display union insignia--a right which allows employees to, in the words of our dissenting colleagues, "communicate their own support for the union and implicitly encourage other employees to join them." ….

In sum, the Supreme Court, the federal circuit courts, and the Board have rejected the proposition that an employer's willingness to tolerate the display of some union insignia by its employees gives it a free hand to restrict other protected displays of union insignia. To hold otherwise would effectively treat the display of union insignia as a privilege to be granted by the employer on the terms it chooses rather than as an essential Section 7 right that the employer is required to accommodate. Accordingly, our dissenting colleagues' position that an employer is free effectively to prohibit employees from wearing union clothing or any other item displaying union insignia (forms of protected Section 7 communication)--without any justification--so long as the employer leaves open an alternative method to display union insignia--which they characterize as the employer providing a "meaningful opportunity to display union insignia"--is clearly contrary to *Republic Aviation* and decades of subsequent court and Board precedents.

2. Nondiscriminatory and consistently enforced prohibition

Our dissenting colleagues, despite their claim to the contrary, also suggest, just as the *Stabilus* dissent did, that any "nondiscriminatory" and "consistently enforced" uniform policy or dress code that does not completely prohibit the display of union insignia is lawful, regardless of its effect on the exercise of employees' Section 7 rights. See *Stabilus*, 355 NLRB at 843-844.

However, under the Act, it is axiomatic that if employees have a Section 7 right to engage in certain protected activity, an employer is *not* free to prohibit that activity simply because it prohibits all similar activities by employees, including activities that are not statutorily protected. Thus, in *Republic Aviation*, the Court explicitly rejected the employer's argument that application of its facially neutral no-solicitation rule to employees engaged in union solicitation was not unlawful "because the rule was not discriminatorily applied against union solicitation but was impartially enforced against all solicitors." 324 U.S. at 805; see also *Boch Imports, Inc. v. NLRB*, 826 F.3d 558, 574-575 (1st Cir. 2016) (rejecting an employer's argument that it neither promulgated its dress ban in response to union activity nor enforced it in a discriminatory manner because "while the presence of these circumstances may constitute grounds for invalidating a dress ban, it does not necessarily follow that the absence of these circumstances

constitutes a ground for upholding a dress ban" (internal citation and emphasis omitted)); *Texas Instruments Inc. v. NLRB*, 599 F.2d 1067, 1072 (1st Cir. 1979) (explaining that enforcement of an unlawful rule to restrict Sec. 7 activity "could not support a discharge even if the motivation to enforce the rule, a neutral not an anti-union objective, were the employer's only motivation for that discharge"). That an employer's uniform policy or dress code effectively prohibits employees from wearing *all* clothing other than the clothing prescribed by the employer (including, but not limited to, union clothing) does not make the employer's action lawful, any more than an employer's no-solicitation rule is lawful because it bars all solicitation (not just union solicitation) on nonworking time. See, e.g., *Cordúa Restaurants, Inc.*, 368 NLRB No. 43, slip op. at 5 (2019) (finding an employer's no-solicitation rule unlawful because it banned "*all* solicitation on the [employer's] premises regardless of when the solicitation occurs"), enfd. 985 F.3d 415 (5th Cir. 2021).

3. Rejection of balancing principle

The *Stabilus* dissent's primary argument was that "[i]f employees have the right to wear union attire *instead* of a company uniform, the employer's right to promulgate and enforce reasonable, nondiscriminatory apparel rules is negated entirely." 355 NLRB at 843 (Member Schaumber, dissenting in part); see also id. at 843 & fn. 7 (asserting that application of the special circumstances test in that context would "completely submerge" and "totally ignore[]" employers' right to establish workplace rules and policies and would thus be contrary to *Republic Aviation*). Our dissenting colleagues similarly claim that our decision today "effectively nullifies the legitimate interests served by employer dress codes." On the contrary, it is the standard first proposed by the *Stabilus* dissent and expanded upon by our dissenting colleagues today that would abandon the balancing principle established in *Republic Aviation*.

To say that an employer's prerogative must yield to employees' statutory rights--unless special circumstances are shown--is to say only that employer interests and employee rights must be accommodated as required by *Republic Aviation*. As the Board has explained, "[i]n cases where the employer argues that special circumstances justify a ban on union insignia, the Board and courts balance the employee's right to engage in union activities against the employer's right to maintain discipline or to achieve other legitimate business objectives, under the existing circumstances." *Albis Plastics*, 335 NLRB 923, 924 (2001); see also *Sam's Club*, 349 NLRB 1007, 1010 (2007) ("[A]n employer may limit or ban the display or wearing of union insignia at work if special circumstances exist and if those circumstances outweigh the adverse effect on employees' Section 7 rights resulting from the limitation or ban."); *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982) (explaining that in applying the special circumstances test, "the entire circumstances of a particular situation must be examined to balance the potentially conflicting interests of an employee's right to display union insignia and an employer's right to limit or prohibit such display"). In such cases, the employer's prerogative is limited--not, as claimed by the *Stabilus* dissent and our dissenting colleagues, "negated entirely," "completely submerge[d]," "totally ignore[d]," or "effectively nullifie[d]"--just as employees' rights are

limited (but not negated or nullified) by the possibility that they may have to yield if special circumstances are shown.

Our dissenting colleagues echo the assertions of the Respondent and amici CDW and HRPA that the special circumstances test places a nearly insurmountable burden on employers to justify uniform policies or dress codes that implicitly limit or restrict the display of union insignia. This view is simply inconsistent with decades of Board experience in applying the special circumstances test. Indeed, contrary to the view adopted by our dissenting colleagues, the Respondent, and supporting amici, the Board has found the existence of special circumstances that justify employer restrictions on union insignia and apparel in many different situations, such as "when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees." *Komatsu America Corp.*, 342 NLRB 649, 650 (2004). In fact, the Board has previously found that employers established special circumstances that justified prohibiting employees from wearing attire displaying union insignia in place of attire required by a uniform policy or dress code. Thus, the special circumstances test allows employers the opportunity to show that restrictions on employees' display of union insignia that result from uniform policies or dress codes--and would otherwise be unlawful--are justified based on the specific circumstances existing in their workplaces. Further, the special circumstances test appropriately places the burden on the employer because, as the party asserting that employees' Section 7 rights must be restricted to achieve a legitimate business objective, it "logically is in the best position to offer evidence on the point." *Beth Israel Hospital*, 437 U.S. at 502. Accordingly, consistent with Supreme Court precedent, beginning with *Republic Aviation*, the special circumstances test has proven to be an effective balancing approach for accommodating employee rights and employer interests "'with as little destruction of one as is consistent with the maintenance of the other.'" *Beth Israel Hospital*, 437 U.S. at 492 (quoting *Babcock & Wilcox*, 351 U.S. at 112).

Ironically, it is the standard first proposed in the *Stabilus* dissent and expanded upon by our dissenting colleagues today that would "negate[]," "submerge," "ignore," and "nullif[y]" one side of the balance--specifically, employees' right to display union insignia through attire when it is addressed by their employer's uniform policy or dress code. Contrary to *Republic Aviation*, this proposed standard would provide no opportunity for the Board to "work[] out an adjustment between the undisputed right of self-organization assured to employees under the [ ] Act and the equally undisputed right of employers to maintain discipline in their establishments." 324 U.S. at 797-798. Instead, an employer's managerial prerogative to establish a uniform policy or dress code would, in all circumstances, override employees' Section 7 right to display union insignia through attire covered by such a policy so long as the employer otherwise provides "a meaningful opportunity to display union insignia." This proposed standard therefore leaves no

room for the Board to assess whether the policy actually furthers any legitimate business interest asserted by the employer and, if so, whether that business interest outweighs employees' Section 7 right to display union insignia.

Neither our dissenting colleagues nor the *Stabilus* dissent cite any particular employer interest or objective that a uniform policy or dress code that implicitly restricts the display of union insignia universally furthers regardless of the specific circumstances in which an employer operates. To the contrary, the Board's experience in applying the special circumstances test has demonstrated that employers establish restrictions on the display of union insignia to further many different business interests and objectives depending on the specific circumstances in which they operate. Therefore, the Board is not able to strike a balance between employee rights and employer interests in this context that is generally applicable regardless of the circumstances or that would support the establishment of a categorical rule. As the Board has previously recognized, "it is inherent in *Republic Aviation* that balances will have to be struck case by case; the alternative is simply eliminating the protection of Sec[tion] 7 activity." *Capital Medical Center*, 364 NLRB 887, 890 fn. 12 (2016), enfd. 909 F.3d 427, 439 U.S. App. D.C. 1, 741 Fed. Appx. 1 (D.C. Cir. 2018), cert. denied 139 S. Ct. 1445, 203 L. Ed. 2d 681 (2019). For the reasons discussed above, we find that the Board is not free to choose that alternative.

In sum, contrary to our dissenting colleagues, *Stabilus* correctly specifies that the Board should apply the special circumstances test when a restriction on employees' right to display union insignia has resulted from an employer's nondiscriminatory, consistently enforced uniform policy or dress code. Our dissenting colleagues' proposed holding that employers do not have to provide any justification for such restrictions on the display of union insignia if they otherwise provide employees with a "meaningful opportunity to display union insignia," i.e., an alternative method of the employers' choosing, is contrary to the principles of *Republic Aviation* and decades of Board and court precedent applying those principles.

F. Application of Boeing Would Be Contrary to Republic Aviation and Wal-Mart Is Therefore Overruled

The Respondent and CDW have argued that the standard established in *Boeing Co.*, 365 NLRB No. 154 (2017), rather than the *Republic Aviation* special circumstances test, applies in this case pursuant to the Board's recent decision in *Wal-Mart Stores, Inc.*, 368 NLRB No. 146 (2019). In *Wal-Mart*, the Board found that "[w]here . . . the [e]mployer maintains a facially neutral rule that limits the size and/or appearance of union buttons and insignia that employees can wear but does not prohibit them," the Board should apply the *Boeing* standard rather than the *Republic Aviation* special circumstances test. *Wal-Mart*, 368 NLRB No. 146, slip op at 2-3. The Respondent's team-wear policy is essentially a uniform policy and not a size-and-appearance policy. However, the *Wal-Mart* Board made a more general distinction between rules that completely prohibit the display of union insignia (to which the special circumstances test applies) and rules that partially restrict the display of union insignia (to which

the *Boeing* standard applies). See *Wal-Mart*, 368 NLRB No. 146, slip op. at 2-3 & fns. 10, 13. Here, while the team-wear policy implicitly prohibits production associates from wearing union shirts in place of the required team-wear shirts and thus partially restricts the display of union insignia, it does not prohibit them from wearing *all* union insignia, as the policy does not restrict employees from wearing union stickers on their team-wear shirts. Therefore, in order to be consistent with *Wal-Mart* the Board would arguably be required to apply the *Boeing* standard rather than the special circumstances test in the present case. For that reason, and because *Wal-Mart* is contrary to *Republic Aviation* and decades of Board and court precedent applying it, we overrule *Wal-Mart* and restore clarity to this area of Board law.
….

The *Wal-Mart* Board also mischaracterized the nature of the special circumstances test. According to the *Wal-Mart* Board, "determining whether a special circumstance exists justifying a particular insignia ban obviates the need to conduct an open-ended balancing analysis anew in every case. If the prohibition falls within the scope of a recognized special circumstance, it is lawful." Id., slip op. at 2 (internal footnotes omitted). The Board has certainly acknowledged broad categories of cases in which employers established special circumstances that justify restrictions on the display of union insignia. See, e.g., *Komatsu America Corp.*, 342 NLRB 649, 650 (2004) ("The Board has previously found such special circumstances justifying the proscription of union slogans or apparel when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees."). However, in cases involving a restriction on the display of union insignia, the Board engages in a rigorous, fact-specific inquiry to determine whether the employer actually established the presence of special circumstances in the context of its workplace. See *Nordstrom*, 264 NLRB at 700 (explaining that in applying the special circumstances test, "the entire circumstances of a particular situation must be examined to balance the potentially conflicting interests of an employee's right to display union insignia and an employer's right to limit or prohibit such display").

Overall, the *Wal-Mart* Board upended the traditional framework in this area of Board law. It shifted to an analysis that plainly tips the balance toward employer interests by requiring that the General Counsel first prove that an employer's partial restriction on the display of union insignia adversely affected employees' Section 7 rights and by holding that an employer may then produce some lesser justification for its conduct. However, the *Wal-Mart* Board cited no union insignia precedent and made no persuasive argument to support the premise that an employer's willingness to tolerate the display of some union insignia gives it more leeway to restrict the display of other union insignia that it considers less favorable and renders that interference with employees' Section 7 rights "less severe." See *Wal-Mart*, 368 NLRB No. 146, slip op. at 2-3. The decision in *Wal-Mart* shares a fundamental defect with the standard proposed by our dissenting

colleagues today: it effectively treats the display of union insignia more as a privilege to be granted by the employer on the terms it chooses, rather than as an essential Section 7 right that--pursuant to federal labor law--the employer is required to accommodate absent a showing of special circumstances. Accordingly, the Board's decision in *Wal-Mart* cannot be squared with *Republic Aviation* and its progeny and therefore must be overruled.
….

H. The Respondent Did Not Establish Special Circumstances

Pursuant to the Respondent's team-wear policy, production associates are required to wear assigned team wear--i.e., black cotton shirts with the Respondent's logo and black cotton pants with no buttons, rivets, or exposed zippers. On occasion, production associates, with their supervisor's approval, may substitute for team wear all-black clothing that is "mutilation free" and "work appropriate" and that poses no safety risks. Given the specific apparel requirements, the team-wear policy prohibits production associates from substituting any shirt with a logo or emblem, including a shirt bearing union insignia, for a team-wear shirt. Thus, the team-wear policy restricts production associates' ability to display union insignia, and the Respondent has the burden to establish special circumstances. The Respondent claims that the team-wear policy is justified by special circumstances because it is intended to lower the risk of employees' clothing causing mutilations to the unfinished vehicles and to aid in the visual management of GA. We agree with the judge that the Respondent failed to establish special circumstances on either ground.

As discussed above, an employer can establish special circumstances that justify restrictions on the display of union insignia if their display may cause damage to the employer's products. See, e.g., *Hanes Hosiery*, 219 NLRB 338, 347 (1975) (finding that an employer established special circumstances to justify prohibiting employees from wearing a union pin because the pin could have caused defects in the hosiery produced by the employer). However, the Respondent has not shown that cotton shirts with non-Respondent logos, such as union logos, pose a mutilation risk to the unfinished vehicles in GA. Although production associates regularly wore shirts with logos prior to August 2017, Production Manager Penera, Associate Manager Ogunniyi, and Production Supervisor Fenelon all testified that they did not have any knowledge of a shirt with a logo causing [*87] a mutilation to a vehicle. Further, none of them testified how a shirt with a logo might possibly cause a mutilation to a vehicle. To the contrary, Ogunniyi testified that while the black cotton shirt with union logos previously worn by production associates is not team-wear compliant, it is not a mutilation risk. The only evidence of any shirt being involved in a mutilation was Production Manager Martin's testimony that a raised metal emblem on a shirt once caused a mutilation to a vehicle. Thus, at most, the Respondent has shown that it has a legitimate interest in preventing raised metal emblems on shirts from causing mutilations to vehicles. However, the team-wear policy goes far beyond simply prohibiting employees from wearing shirts with metal emblems and therefore is not narrowly tailored to address that concern as required under the special circumstances test. See *Boch Honda*, 362 NLRB 706, 707 (2015)

("[A] rule that curtails employees' Sec[.] 7 right to wear union insignia in the workplace must be narrowly tailored to the special circumstances justifying maintenance of the rule . . . .").

The team-wear policy is also not narrowly tailored to address the Respondent's claimed interest in maintaining visual management in GA, even assuming special circumstances could be established on that basis. Production Manager Martin testified that the Respondent could maintain visual management in GA as long as production associates are wearing black shirts. Martin's testimony is consistent with the fact that the team-wear policy allows production associates to wear, with their supervisor's permission, all-black shirts in place of the team-wear shirts. Therefore, while the Respondent may have a legitimate interest in requiring production associates to wear black shirts (and requiring production leads and line inspectors to wear red and white shirts, respectively), it has not demonstrated special circumstances that justify prohibiting production associates from wearing black union shirts. See *Malta Construction*, 276 NLRB 1494, 1495 (1985) (finding that an employer "failed to prove that its complete prohibition [*90] of insignia on its hardhats was necessary to enable it to identify its employees" where a manager testified that he could still identify its employees' orange hardhats even with union stickers on them).

In sum, the Respondent has failed to establish special circumstances that justify the team-wear policy's implicit prohibition on employees wearing black union shirts. Accordingly, we adopt the judge's finding that the Respondent violated Section 8(a)(1) by maintaining the team-wear policy in its "General Assembly Expectations."

ORDER

….

MEMBERS KAPLAN and RING, dissenting.

We could not agree more wholeheartedly with our colleagues that displaying union insignia in the workplace is an important way employees exercise their rights under Section 7 of the National Labor Relations Act. Employees who display union insignia communicate their own support for the union and implicitly encourage other employees to join them. Effective protection of this right is therefore vital to our national labor policy, and the Supreme Court has long so instructed. It does not follow, however, that to be effective, the protection of this right requires holding any limitation on the display of union insignia, no matter how slight, to be presumptively unlawful. Here, we part ways with the majority.

For a variety of legitimate reasons, some employers maintain dress codes or require their employees to wear a uniform. Such policies indirectly prohibit employees from substituting union apparel in place of required clothing. Tesla's dress code is one such policy. It requires

employees, for legitimate business reasons, to wear employer-issued "team wear" consisting of black cotton shirts imprinted with Tesla's logo and black cotton pants with no buttons, rivets, or exposed zippers. Without stating so, the uniform policy's requirements prohibit employees from wearing other clothing, including clothing with union insignia. It does not, however, prohibit employees from displaying union insignia in other ways, such as by attaching to their team wear a sticker with the Union's logo and/or a prounion slogan.

The Supreme Court long ago instructed the Board how such conflicts between employee and employer rights must be resolved. Neither right, the Court held in *Republic Aviation*, is "unlimited in the sense that [it] can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society." Indeed, the Court has repeatedly emphasized that the Board's duty is to strike a "proper balance" between employee and employer rights, and it has described the carrying out of that duty as a "delicate task." Thus, in formulating an appropriate standard here, the Board must accommodate the rights of both parties, "with as little destruction of one as is consistent with the maintenance of the other." And "[t]he locus of that accommodation [ ] may fall at differing points along the spectrum depending on the nature and strength of the respective . . . rights . . . ."

Consistent with these principles, the Board has long held that employer policies that *prohibit* the display of union insignia are presumptively unlawful and must be justified by special circumstances. Over time, Board precedent has evolved a limited set of circumstances that constitute "special circumstances" justifying a ban on union insignia. In practice, the existence of special circumstances is exceedingly difficult for employers to establish--rightly so, given the significant impact of such an outright prohibition on the exercise of Section 7 rights. Today, however, the majority extends the same presumption of unlawfulness and the same stringent "special circumstances" defense standard to *all* employer-apparel policies, including the less restrictive, facially neutral, and nondiscriminatory policy at issue in this case. The result of this holding is that, in effect, no employer may lawfully maintain any dress code unless that employer can demonstrate special circumstances. They take this step for all uniform policies and dress codes, even those that permit the display of many types of union insignia and are thus significantly less restrictive of Section 7 rights than the broad prohibitions on which the special circumstances standard was based and to which it properly applies.

Nothing in the Act suggests that Congress intended to make all employer dress codes presumptively unlawful. No policy of the Act supports the majority's position. Rather, the fundamental point made by the Supreme Court in *Republic Aviation* and repeated in *Babcock* is that the Board, in each case, must strike an *accommodation* between employee rights and legitimate employer interests that ensures "as little destruction of one as is consistent with the maintenance of the other." The majority's decision today fails this test. It effectively nullifies the legitimate interests served by employer dress codes by requiring that employees be permitted to

disregard the dress code whenever they wish to substitute an item of union apparel, unless special circumstances are shown, and their reliance on dicta in *Stabilus* is misguided.
….

C. The Majority's Special Circumstances Standard Fails to Strike the Appropriate Balance Between Employee and Employer Rights

We also disagree with the majority's contention that the special circumstances standard strikes the appropriate balance between employee and employer rights with respect to uniform policies and dress codes under which employees retain meaningful opportunities to display union insignia in the workplace. Our colleagues posit that this standard satisfies the *Republic Aviation* balancing requirement because it allows for consideration of the nature and extent of an employer's legitimate interests in maintaining a challenged restriction on Section 7 activity. Our colleagues are mistaken, for several reasons.

First, the special circumstances standard is predicated on, and follows from, a prior determination that a particular employer rule is presumptively unlawful. As explained, that presumption is unwarranted in the case of facially neutral, nondiscriminatory dress codes that permit meaningful opportunities to display union insignia in the workplace. The majority's holding requires finding presumptively unlawful legitimate and, in some cases, business-necessitated dress codes. For instance, manufacturing employers, like the Respondent, would presumptively violate the Act by requiring employees to wear particular clothing, such as a factory jumpsuit, to prevent damage during production because it would prevent employees from wearing union clothing. In an office setting, typical "business casual" dress codes, often established to maintain a level of decorum, would be presumptively unlawful because they would prohibit union t-shirts. Similarly, the majority's approach would make presumptively unlawful relatively common employer policies prohibiting employees from wearing certain clothing--t-shirts, exercise outfits, tube tops or muscle shirts--because the policy would prohibit such attire inscribed with a union-related message. We cannot agree that Congress intended to condemn such rules as presumptively unlawful to maintain, yet that is the inevitable consequence of the majority's decision today.

Second, the special circumstances test places a very heavy burden on employers seeking to justify uniform policies or dress codes. Contrary to the majority, that burden, in practice, will prove nearly insurmountable. The Board has found special circumstances justifying union-insignia bans in very limited circumstances: when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees. Indeed, the Board has emphasized that "the 'special circumstances' exception is narrow." Most uniform policies and dress codes could not be justified under the

standard. Take, for example, an employer that requires its employees to wear blue polo shirts with the company logo. Although its employees work on-site at the employer's facility and rarely if ever interact in person with the public on the job, the employer believes the "blue polo" policy maintains an atmosphere of professionalism and mutual respect. Implicitly, this policy prohibits the wearing of union shirts of any kind, and although the employer allows employees to affix buttons, pins, or stickers to the blue polo shirt, including union buttons, pins, and stickers, the majority would find the policy presumptively unlawful because it precludes employees from wearing a t-shirt with a union logo, and the employer violates the Act by maintaining the "blue polo" policy unless it can establish that the policy is justified by special circumstances. And it cannot do so. Obviously, substituting a union t-shirt in place of the blue polo shirt would not jeopardize employee safety or damage machinery or products. A typical union t-shirt would not exacerbate employee dissension or undermine decorum or discipline--special circumstances that have been found where a particular union insignia is inflammatory, offensive, vulgar, or obscene. Since these employees are not customer-or public-facing, wearing a union t-shirt could not possibly interfere with the employer's public image.

Moreover, where a uniform policy has been upheld under the special circumstances test, the employer had to prove that union insignia would interfere with the public image the employer had established as part of its business plan through consistently enforced appearance rules for its customer-facing employees. For example, in *W San Diego*, a Board majority found that the employer's business plan of creating a "wonderland" atmosphere for patrons of the hotel justified a policy that prohibited all uniform adornments other than a small "W" pin. In *In-N-Out Burger*, on the other hand, the employer's standard white uniforms and other unique features of its business model were found insufficient to justify a restriction on adorning the uniforms with personal buttons under the "public image" prong of the special circumstances standard. As the Board has held in other cases, "a uniform requirement alone is not a special circumstance." While we have no quarrel with that proposition, as a general matter, in circumstances where the uniform is relied upon to ban all union insignia, we disagree with our colleagues' determination to apply the same standard to policies that preclude substituting union apparel for a required uniform but do not prohibit employees from affixing union insignia to that uniform. We also cannot agree that Congress intended to deny employers any right to establish a dress code for non-customer-facing employees or to require that policies banning all insignia be treated the same as policies that do not. Yet that is the result of the majority's decision today.

.....

5.5.1. Further Reading

- Peter Morgan, *Towards Digital Insignia*, OnLabor, https://onlabor.org/towards-digital-insignia (last visited Jan 11, 2023).
- Black Lives Matter wear as protected concerted activity: https://aboutblaw.com/7LP.

5.5a. *Tesla, Inc. v. NLRB*, 86 F.4th 640 (5th Cir. 2023)

Full decision: (link); **Docket**: (link); **Oral argument**: ()

JERRY E. SMITH, *Circuit Judge*:

Tesla requires its employees to wear uniforms to minimize damage to vehicles throughout the production process. When employees wore union t-shirts instead, Tesla informed them they were violating the uniform policy and threatened to send them home. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO ("Union" or "UAW"), filed an unfair labor practice charge, and a divided National Labor Relations Board ("Board" or "NLRB") ruled that Tesla was infringing on its employees' rights to unionize under the National Labor Relations Act ("NLRA" or "Act"). In its order, the Board explicitly overruled its precedent and proclaimed that "when an employer interferes *in any way* with its employees' right to display union insignia, the employer must prove special circumstances that justify its interference." 371 N.L.R.B. No. 131, slip op. at 1 (2022). Tesla petitioned for review, claiming that the Board's decision irrationally made all company uniforms presumptively unlawful. The NLRB cross-applied for enforcement.

We agree with Tesla. The NLRA does not give the NLRB the authority to make all company uniforms presumptively unlawful. We grant Tesla's petition for review, deny the NLRB's application for enforcement, and vacate the Board's decision.

I.

Tesla manufactures electric vehicles at a facility in Fremont, California. There, "production associates" install parts in and on the bodies of vehicles in "General Assembly" ("GA"). When an employee begins working in GA, Tesla gives him or her four black shirts and a sweater as part of the employee's uniform, each with Tesla's name and logo. Tesla refers to these and the accompanying pants as "Team Wear."

By the time a car reaches GA, its paint has cured sufficiently for light touching and general handling, but not completely. So, Tesla requires employees in GA to follow the "Team Wear policy" regarding what they wear on the job. That policy states,

> It is mandatory that all Production Associates and Leads wear the assigned Team Wear.
>
> > • On occasion, Team Wear may be substituted with all black clothing if approved by supervisor.

• Alternative clothing must be mutilation free, work appropriate and pose no safety risks (no zippers, yoga pants, hoodies with hood up, etc.).

This policy applies only to GA employees.

In spring 2017, as part of union organizing efforts, Tesla employees (both production associates and non-GA employees) began wearing black, cotton UAW shirts rather than Team Wear. Tesla permitted that for several months. In August 2017, however, having discovered several mutilations, Tesla began strictly enforcing its Team Wear policy. Supervising employees began to "walk the line" during startup meetings to ensure compliance. Since then, Tesla has not allowed production associates to wear union shirts (including black, cotton ones) but has allowed them to affix any number or size of union stickers to their Team Wear. Supervising employees have, on occasion, granted exceptions to the Team Wear requirement for production associates to wear plain, black, cotton shirts or to cover non-Tesla logos and emblems on black shirts with black mutilation-protection tape.

Tesla justified the Team Wear policy in two main ways. First, it minimizes mutilation of the vehicles in GA. Second, the Team Wear policy facilitates "visual management": enabling team leads to distinguish among different types of GA employees based on shirt color and to ensure that GA employees are in their proper work areas—and that only GA employees are present in GA.

The Union charged Tesla with unfair labor practices over the Team Wear policy and its enforcement. In September 2019, an administrative law judge ("ALJ") ruled that the Team Wear policy violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1). She found that no special circumstances justified the prohibition against employees' wearing union shirts, meaning that the two bases for the policy described above were insufficient.

Tesla filed exceptions, contending that the special-circumstances test derived from *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 65 S. Ct. 982, 89 L. Ed. 1372 (1945), should not apply because the Team Wear policy was neutral and production associates could display union insignia freely—just not by wearing a union shirt. The Board rejected Tesla's position 3-2 and affirmed the ALJ's findings. 371 N.L.R.B. No. 131, slip op. at 20 (2022). The Board summarized its decision by stating that "when an employer interferes *in any way* with its employees' right to display union insignia, the employer must prove special circumstances that justify its interference." In other words, all uniforms are presumptively unlawful and must pass the special circumstances test.

….

The Board adopted that reasoning, explaining that it "has treated clothes displaying union insignia the same as union insignia that employees attach to their clothing, such as buttons and pins." *Id.*, slip op. at 7. Therefore, by not permitting union shirts, Tesla's Team Wear policy interfered with its employees' right to display union insignia and must be justified by special circumstances.

Board Members Kaplan and Ring dissented. They characterized the majority's holding as "mak[ing] all employer dress codes presumptively unlawful." *Id.*, slip op. at 21. They maintained that, under Supreme Court precedent, the Board "must strike an *accommodation* between employee rights and legitimate employer interests that ensures 'as little destruction of one as is consistent with the maintenance of the other,'" and this ruling was nothing of the sort. *Id.*, slip op. at 21 (quoting *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112 (1956)). To comply with that precedent, they recommended that the Board distinguish between dress codes that ban all union insignia and those, like Tesla's, that provide "meaningful opportunities for employees to display union insignia." *Id.*, slip op. at 23. The dissenters reasoned that the "presumption" that a dress code is unlawful "is unwarranted in the case of facially neutral, nondiscriminatory dress codes that permit meaningful opportunities to display union insignia in the workplace." *Id.*, slip op. at 26. And they explained that overcoming that presumption would "prove nearly insurmountable." *Id.*

The majority responded to the dissent's points in detail:

First, they decried a "meaningful opportunity to display union insignia" standard as unworkable, overly vague, and setting the bar too low for employers. Instead, the special-circumstances test should apply regardless of employees' "alternative means of exercising their rights . . . ."

Second, the majority claimed that the fact that a dress code is facially neutral, nondiscriminatory, and consistently enforced is irrelevant. Analogizing to rulings involving bans on solicitation, the majority stated,

> That an employer's uniform policy or dress code effectively prohibits employees from wearing *all* clothing other than the clothing prescribed by the employer (including, but not limited to, union clothing) does not make the employer's action lawful, any more than an employer's no-solicitation rule is lawful because it bars all solicitation (not just union solicitation) on nonworking time.

Third, the majority rejected the idea that there are generalized (and generalizable) employer interests in uniform policies and dress codes that "implicitly restrict[] the display of union insignia . . . ." That lack of "any particular employer interest or objective[,]" the majority posited, means that the Board must apply the special-circumstances test when considering *any* dress code. *Id.*

….

II.

Section 7 of the NLRA provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157. And

Section 8 makes it "an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of" those Section 7 rights. *Id.* § 158(a)(1). But the Act does not explicate the extent of those rights, leaving "to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms." *Republic Aviation*, 324 U.S. at 798. In other words, the Board has "administrative flexibility within appropriate statutory limitations."

Our review of "NLRB decisions and orders is limited and deferential." *In-N-Out Burger, Inc. v. NLRB*, 894 F.3d 707, 714 (5th Cir. 2018). And we generally affirm the Board's conclusions "if they have a reasonable basis in the law and are not inconsistent with the [NLRA].". But we still review the Board's legal conclusions *de novo*. *El Paso Elec. Co. v. NLRB*, 681 F.3d 651, 656 (5th Cir. 2012).

The NLRB has "authority to formulate rules to fill the interstices of the [Act's] broad statutory provisions." *Beth Isr. Hosp. v. NLRB*, 437 U.S. 483, 501 (1978). But even in these interstices, we are "more than a mere rubber stamp" of the Board's decisions. The Board may "adopt, in light of its experience, a rule that, absent special circumstances, a particular employer restriction is presumptively an unreasonable interference with [Section] 7 rights . . . ." *Beth Isr.*, 437 U.S. at 493 (discussing *Republic Aviation*, 324 U.S. at 804-05). But when evaluating such a sweeping rule as today's, we must ask "whether the Board's new rule exceeds the Board's statutory authority." And we do not give deference to the NLRB's interpretation of Supreme Court rulings.

In other words, we cannot "abdicate the conventional judicial function" when determining whether "the Board ke[pt] within reasonable grounds." Instead, we must confirm that the NLRB's interpretation is "rational and consistent with the Act." "[W]here . . . the review is not of a question of fact but of a judgment as to the proper balance to be struck between conflicting interests," our deference "'to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.'

III.

The Board's ruling relies heavily on its application of *Republic Aviation*, so we begin there before proceeding to its progeny. In *Republic Aviation*, the Supreme Court reviewed two decisions by the NLRB. Republic Aviation had prohibited an employee from passing out union application cards during his lunch and discharged three other employees for wearing union steward buttons. Le Tourneau Company had suspended two employees for passing out union literature on their own time but while on company property. The Board found that both companies had violated their employees' Section 7 rights as protected in Section 8(a)(1) and (3). Reviewing *Republic Aviation*, the Second Circuit had affirmed. But reviewing *Le Tourneau*, this court had reversed. The Supreme Court took up the consolidated cases to resolve the circuit split.

Affirming the Second Circuit and reversing this court, the Supreme Court declared that the NLRB must balance the "undisputed right of self organization . . . and the equally undisputed right of employers to maintain discipline in their establishments." And it ruled that the NLRB had appropriately (1) found the companies had violated those rights and (2) explained its reasoning that these companies had upset that balance. The Supreme Court and this court have considered and applied *Republic Aviation* many times. The most relevant description of *Republic Aviation*'s holding comes from Justice Powell's concurrence in *Beth Israel*. He quotes *Republic Aviation* for the rule that companies may prohibit union solicitation during working time "in the absence of evidence that it was adopted for a discriminatory purpose[,]" but must permit solicitation during nonworking time without "evidence that special circumstances make the rule necessary to maintain production or discipline." Other decisions have also cited specifically to the balancing of rights discussed in *Republic Aviation*.

Thirty years after *Republic Aviation*, the Court took up *Beth Israel* and reviewed a Board ruling on a near-complete prohibition on solicitation and distribution of union literature. Under the hospital's policy, employees could solicit or distribute solely in employee-only locker rooms, and no one else could solicit or distribute in any area of the petitioner-hospital "to which patients or visitors ha[d] access[,]" including the cafeteria. The Board found that the prohibition violated Section 7 because it made employee solicitation and distribution during nonworking time effectively impossible. Relying heavily on the balance of rights described in *Republic Aviation* and *Babcock & Wilcox*, the Court affirmed, finding that the Board acted rationally and within the scope of its NLRA powers to hold prohibitions against solicitation in nonworking areas, or of employees during nonworking time, presumptively unlawful.

More recently, in *In-N-Out*, this court reviewed an NLRB decision that held unlawful the employer's prohibition of pins or stickers on uniforms, except for company-mandated buttons twice a year. Employees wanted to wear buttons indicating their support for the "Fight for $15," but the company refused to make an exception. The Board ruled that the "no pins or stickers" rule violated Section 8(a)(1), and this court affirmed. We began by confirming that under *Republic Aviation*, "Section 7 protects the right of employees to wear items—such as buttons, pins, and stickers—relating to terms and conditions of employment . . ., unionization, and other protected matters." And then we quickly turned to the Board's special-circumstances test as the "'narrow' exception to this rule." Applying special circumstances and the deference we give to the Board's factual findings, we upheld its conclusion as reasonable.

….

IV.

The cases described above, and the other cases relied on by the Board, invariably lack one or more of the elements present here: content neutrality, nondiscrimination, and freedom to attach any expressive union insignia to any piece of the uniform, including any number of, and any size of, such insignia. Thus, those precedents are, at best, instructive.

The deference the Court showed to the NLRB's analysis in *Republic Aviation* turned primarily on factual issues. And the factual situation in *Republic Aviation* is entirely disanalogous from the reality here. In *Republic Aviation*, no employees could wear union steward buttons. Here, employees could wear *any* sticker they wanted—steward, member, or otherwise. There, employees could not solicit during lunch or other nonworking time. Here, employees can wear union insignia *during* working time. In other words, Tesla's Team Wear policy places no prohibition on union insignia nor limitations on the solicitation of Production Associates by the union, during working or nonworking time. Thus, though *Republic Aviation* remains good law, the factual dissimilarities mean the NLRB's rule here cannot possibly have been derived directly from *Republic Aviation* or its progeny.

In that vein, *Beth Israel* does no more than guide us. In its opinion, the Board likens its new rule to rules on solicitation, such as that in *Beth Israel*. But the Board ignores that Tesla's Team Wear policy does not apply to nonworking hours, whereas the rule in *Beth Israel* did. Thus, as Members Kaplan and Ring's dissent aptly points out, this new rule contradicts those rulings' finding "no-solicitation rule[s] that prohibit[] union solicitation on company property only during working time . . . *presumptively lawful* in the absence of evidence that it was promulgated for a discriminatory purpose . . . ." Further, in *Beth Israel*, the Board's rule addressed neither partial limitations nor working time limitations in work areas.

Tesla's rule is both a partial limitation *and* applicable only during working time in work areas. Therefore, the Board's decision cannot rest on the entirely different facts presented in *Beth Israel*.

....

Finally, though we base our ruling primarily on the lack of balance shown by the NLRB's new rule, *see infra* Part V, we also note that the Board has exceeded its statutory authority in crafting the rule. This extremely broad rule would make all company uniforms presumptively unlawful, whether for white-collar workers or blue.[18] Congress likely would not have intended to permit such a major decision without clearer statutory indication. For these reasons, it is well beyond the scope of the NLRA for the NLRB to declare *all* uniforms and dress codes presumptively unlawful and thus subject to a special-circumstances test. Rather, we join the D.C. Circuit and conclude that, despite the special-circumstances test's applicability in cases containing piecemeal components of the Team Wear policy, the test does not automatically apply when *all* components are present. In other words, we endorse the position of the Board in *Wal-Mart Stores Inc.*, 368 N.L.R.B. No. 146 (2019).

V.

To the degree that *Republic Aviation* applies, the Board failed to balance properly the competing interests "of self-organization" and the "right of employers to maintain discipline in their establishments."

The Board mischaracterizes Tesla's argument as requiring "the board [to] treat the employees' side of the scale as empty when a restriction on union insignia is content neutral and permits employees to wear insignia in some form." By inaccurately describing Tesla's position, the Board explicitly demonstrates that it has not weighed Tesla's interests rationally. Tesla does not ask the NLRB to ignore the *employees*' "side of the scale"; it merely asks the Board not to ignore the *employer's*. The Board has not "balanc[ed] the conflicting legitimate interests"—instead, it has elevated employee interests at the expense of legitimate employer interests.[20]

….

A.

"[I]t is only when the interference with [Section] 7 rights outweighs the business justification for the employer's action that [Section] 8(a)(1) is violated." The Board claims that the special-circumstances test is a balance, and, therefore, one they may apply at any point. But that misses the point of balancing and repeats the Board's mistake of conflating separate but similar issues. If the Board subjects every infringement to a special-circumstances test, it cannot adjust the level of scrutiny when it considers comparatively lesser or greater infringements—instead, the Board scrutinizes every infringement as strictly as the next. For there to be balance, some infringements must be subject to lesser scrutiny than are others.

The Team Wear policy—or any hypothetical company's uniform policy—advances a legitimate interest of the employer and neither discriminates against union communication nor affects nonworking time.[22] And a prohibition is a greater infringement than is a restriction. Therefore, by treating any restriction as *per se* equivalent to a prohibition, the NLRB has failed to balance—or even strike a reasonable accommodation of—the employer's and employees' rights. In other words, in citing *Republic Aviation* without balancing the interests, the Board's ruling "rest[s] on erroneous legal foundations." *Babcock & Wilcox Co.*, 351 U.S. at 112. Thus, the rule is irrational.

Our decision also aligns with the policy justifications for a company uniform that this court identified in *Communications Workers of America v. Ector County Hospital District*, 467 F.3d 427, 432 (5th Cir. 2006). There, we upheld a hospital district's dress code against a carpenter's desire to wear a "Union Yes" button because the hospital's legitimate, nondiscriminatory concerns supported the uniform policy. In so holding, we adopted the Ninth Circuit's observation "that a 'uniform requirement fosters discipline, promotes uniformity, encourages *esprit de corps*, and

increases readiness' and [that] having '*standardized* uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission.'" *Id.* at 439 (quoting *INS v. FLRA*, 855 F.2d 1454, 1464 (9th Cir. 1988)). Considering those benefits, the NLRB cannot fairly claim to have rationally struck a balance between the employer's and the employees' interests by presumptively declaring every uniform requirement unlawful.

* * * *

Where the Board's decision "rest[s] on erroneous legal foundations[,]"and "had no 'reasonable basis in law,'" we decline enforcement. We are left "[w]ith the firm belief that the Board here struck the balance incorrectly." Therefore, we GRANT Tesla's petition for review, DENY the NLRB's cross-application for enforcement, and VACATE its opinion, thus reinstating *Wal-Mart*, 368 N.L.R.B. No. 146.

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[18] Even the way we describe such employees is derivative of the dress codes and uniforms they traditionally wear. *See White-collar Worker*, WIKIPEDIA (Oct. 7, 2023, 4:59 AM), https://en.wikipedia.org/wiki/White-collar_worker ("The term refers to the white dress shirts of male office workers common through most of the nineteenth and twentieth centuries in Western countries, as opposed to the blue overalls worn by many manual laborers.").

[20] *See also D.R. Horton*, 737 F.3d at 356 ("Section 7 effectuated Congress's intent to *equalize* bargaining power between employees and employers . . . ." (emphasis added)); 371 N.L.R.B. No. 131, slip op. at 21 (2022) (Members Kaplan and Ring, dissenting) (This rule "effectively nullifies the legitimate interests served by employer dress codes . . . .").

[22] The Board's refusal to engage with the "blue polo hypothetical" is demonstrative of the Board's ruling's irrationality. *See* 371 NLRB No. 131, slip op. at 13-14 n.29 (2022); *id.* at 26-27 (Members Ring and Kaplan, dissenting). The NLRB lays out a rule—all uniform policies are presumptively unlawful—that applies to all future Section 7 uniform disputes. But, the Board says, we need not consider how this wide-ranging rule will apply in the abstract because each employer's special circumstances will differ. That rationale proves the irrationality of the standard.

5.5a.1. Timeline

Date	Case Name	Decision	Notes
July 16, 2018	*Tesla, Inc.* National Labor Relations Board (2018)	Request for permission to appeal Judge's amended order denying the Counsel's motion to allow X to testify is granted.	**First filed in 2018** • Link
September 27, 2019	*Tesla, Inc.*	Found that the respondent violated	Failed to establish that the policy is

	National Labor Relations Board (2019)	Section 8(a)(1) of the NLRA	justified by special circumstances. • Link
March 5, 2021	*Tesla, Inc.* National Labor Relations Board (2021)	Request for extension of time to file briefs is partially granted.	• Link
March 25, 2021	*Tesla, Inc.* National Labor Relations Board (2021)	Resolved some issues but severed and retained for further consideration the question of whether the Respondent violated Section 8(a)(1) of the NLRA	• Link
August 29, 2022	*Tesla, Inc.* National Labor Relations Board (2022)	Upheld the finding that the respondent violated Section 8(a)(1)	• Link
November 14, 2023	*Tesla, Inc. v. NLRB* United States Court of Appeals for the Fifth Circuit (2023)	The Court granted the employer's petition for review, denied the NLRB's cross- application for enforcement, and vacated its opinion.	Policy advanced a legitimate interest of the employer and neither discriminated against union communication, and thus did not violate Section 8(a)(1) • Link

5.5a.2. Notes

i. *Balancing – A second look*

The *Tesla* Court tells us that a proper labor law rule is one that properly balances workers' Section 7 rights and employers' interests. Balancing is a judicial decision-making practice, often juxtaposed to rule-based decision-making. In all balancing tests, the Court places its ability to weigh competing values, interests, and rights at the center stage. In rule-based decision-

making, the Court steps back and presents at least a mirage of low discretion and obedience to authority.

Indeed, legal philosopher Joseph Raz contrasts authority and balancing of reason as forms of decision making. “To be subjected to authority, it is argued, is incompatible with reason, for reason requires that one should always act on the balance of reasons of which one is aware.”

Joseph Raz, The Authority of Law: Essays on Law and Morality 3 (1979).

Raz then refutes this alleged paradox, recognizing the people can have balanced, 2nd-order reasons to crowd-out balancing of interests in particular cases (*id*. at 26-27).

In real life, the distinction between balancing and rule-based adjudication is murky. And any mature view of the law cannot escape the conclusion that any rule-based decision-making is not immune from discretion and that balancing is yet another type of constrained endeavor. Both ways of making a legal decision have some degree of constraint and freedom for the deciding actor (be it a court, agency, etc.).

ii. *Balancing – Three Views*

There are three ways to conceptualize balancing in practice. Which I draw (loosely) from reading some cool work by Mitchell Chervu Johnston.

The first understanding of balancing is, as a decision-making system, sensitive to particularities. Balancing avoids the rigidity of rule-based systems and allows a decision-maker to consider the unique and ever-changing fact patterns before the judge. A balancing judge can consider more information, values, and possible frames than a judge bound by a rule-based system. This contextual aspect of balancing is, perhaps, the reason the *Tesla* court embraces Tesla's argument that the Board’s rule will not be context-sensitive and, therefore, not balanced.

The second understanding of balancing is as a common law analogy-based endeavor. Here, balancing works by comparing and contrasting a set of facts in a case with a set of facts in previously decided cases. The balancing aspect in this traditional work law assumes that the previously decided cases were “balanced,” finding a balance in new cases is one of analogizing relevant factors in the precedent cases with relevant factors in the case at hand. This is clearly what the *Tesla* Court does in providing the shift-time union material distribution case. The *Tesla* Court assumes that this previous case was balanced correctly and suggests that this case is analogous to the *Tesla* case here.

A third, more critical view of balancing is as comparing incommensurables. Here, judges and other legal decision-makers are trying to weigh two values, rights, or interests against each other without any matrix or basis for doing so. So, when the *Tesla* court is balancing workers' rights under Section 7 and employers' interests, the court lacks a basis for saying when, what, and which form a proper "balance" between those two legal goods.

From an institutional design perspective, it would seem that we should choose to balance when we need sensitivity for particularities, when precedent is diverse and persuasive, and when the legal interests or rights have some legitimate matrix or basis of comparison.

Does labor law fit these requirements?

iii. Balancing and Analogies: One More Look

There are always two arguments to be made when making an argument from analogy. One is about similarity/difference, and the other is about relevance. One question will be about facts; the other will be about law. A factual difference between cases can be legally relevant to making the conclusion or legally irrelevant.

For example, in a case that would follow *Tesla*, we might have another UAW campaign now with blue, instead of black, shirts. That is a factual difference. The parties can argue and prove whether a fact pattern differs from the *Tesla* case.

After the UAW establishes that this is indeed a factual difference between *Tesla*, the question will then turn to whether this factual distinction makes a legal difference. In other words, if it's legally relevant. How can we tell if a distinguished fact pattern makes a legal difference? To do that, we must look at the factors the court considers relevant. Sometimes, the court would list those out, like in the *Borello* tests; often it would not. For example, in *Tesla*, the court placed great importance on the question of alternative means of communication. Does the factual distinction between black and blue shirts make a difference regarding workers' communication about unions? Parties can argue about it, and their argument's strength can prove legally weak or strong depending on context.

Factual distinctions and legal relevance are common law adjudication's bread and butter. How does balancing modify understanding? In one read, it does not. A balanced labor law is just a

"good" labor law in this reading. Tesla is an example for a good [balanced] labor law, and thus analogues cases are also good [balanced] labor law.

But then, why use "balance" as the term for good? The other option is that a balancing requirement asks the decision maker to do something other than analogize the cases. For example, add another factor or an overall estimation of the outcome of the analogy. Sure, a blue-shirt-Tesla case should turn up like a black-shirt-Tesla case, but is it a balanced outcome?

It is unclear which of those two ways labor law goes. What do you think?

iv. The Source of Employers' Interests under the NLRA

Even if we follow the *Tesla* Court in saying that the proper way of deciding which labor rule is the proper one we need to engage in balancing, it is not clear where those two competing legal values/norms came from.

We know where employees' rights came from. Employees gained the right to engage in concerted activity from Section 7 of the NLRA. That right was not there before the NLRA was enacted and is not there for (the many) workers excluded from the NLRA. Thus, one side of the balance has a clear legal source. What about employers' interests? The *Tesla* court cites *Republic Aviation,* 324 U.S. at 797-798 (link) for the proposition that the "NLRB must balance the undisputed right of self organization . . . and the equally undisputed right of employers to maintain discipline in their establishments."

OK, again, employees' rights are indeed undisputed. We have a law that states that. We can look it up. But where did *Republic Aviation* get employers' "undisputed right" to discipline?

In *Republic Aviation* the above citation is without a source to support it. But the same paragraph ends with the following proposition: "Opportunity to organize and proper discipline are both essential elements in a balanced society." *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945)(link). This statement is also not anchored in anything. Hence, those two competing rights seem to stem from the same source: the "elements of a balanced society." Hmmm. A nice phrase, but how is that a legal source? Does that mean that workers have a right to organize outside of the NLRA? No. But does that mean that employers' right to discipline is now in the NLRA? Apparently, yes.

v. The Harms of Balancing

Ok, so balancing is perhaps not a great fit for labor law, and perhaps one side of the balance is more anchored in the legal text than the other. What is the big deal?

I laid out some of the implications of balancing Section 7 rights in an article, best read as a response to *Tesla* and *Tesla*-like decisions. Below is a relevant citation from the article.

From: Gali Racabi, Balancing is for Suckers, 69-71, Cornell Law Review (2023):

> ….
>
> Balancing is the common doctrinal thread among all the legal obstacles workers face when organizing. Balancing is the legal technique with which courts and employers killed the NLRA, one doctrinal balancing act at a time. From day one of the NLRA, worker-hostile courts adhered to employers' pleas and balanced this monumental political victory with unenumerated employers' legal prerogatives. U.S. labor law is a textbook example of how political losers in the democratic sphere use courts and legal arguments to snatch away a majority-supported policy win.
>
> Some work-law comparisons might enlighten the absurdity of labor law's special treatment of written rights. courts do not balance the Fair Labor Standards Act or equivalent state minimum wage laws with employers' business interests. if an employer has a legitimate business interest not to pay minimum wage, and if there is no statutory exemption they can claim, they still must pay their workers a minimum wage. Alas, a viable business must afford to pay the statutory minimum wage. Courts do not balance workers' statutory rights to overtime pay with employers' common law prerogatives because overtime legislation trumps the common law-originated employer interests. Courts do not balance unemployment insurance payment mandates with employers' state law-based property interests. Again, unemployment insurance laws trump those property interests. Employers also must abide by antidiscrimination laws about race, religion, sex, military service, age, and disability, even when they really, really don't want to.
>
> ….
>
> I find two harms of balancing on the micro-scale, i.e., that of the particular case. First, balancing is inherently destructive to workers' rights. Balancing makes workers' claims weaker in the concrete case. It makes organizing or engaging in concerted activities riskier. ….
>
> In terms of big-picture harms, the damage done by balancing is unparalleled to other doctrinal features of labor law. In the effects of law on the broader political economy, I claim that …. against work law instincts, the balancing of rights is expected to exacerbate

> conflict—not reduce it. Balancing facilitates courts' and agencies' engagement with employers' arguments and encourages attempts to thwart workers' actions; this makes direct coordination between workers and employers more difficult— not easier. Balancing stifles industrial peace and a balanced economy.

vi. Why employment policies?

There is a strange thread of reasoning in various courts and administrative procedures as if workplace policies are mostly originate and dependent on the legal landscape. Meaning, that the existence of workplace policies depend mostly on whether they pose a legal risk, or may provide a legal benefit to the employer. This line of reasoning is flawed by significantly exaggerating the role of law in workplace decision making. A typical lawyerly mistake is to overstate law's importance.

For example, in Boeing Company, NLRB 19–CA–090932 (2017) the Board was debating the validity of a neutral workplace rule that interferes with Section 7 rights under the NLRA. In one of its arguments against a broad rule that would pose more Section 7 scrutiny of neutral workplace rules, the Conservative majority of the Board walks us through the following logic:

> Nothing in the NLRA requires employers to adopt policies, rules and handbook provisions. Employees in the United States remain generally subject to the doctrine of employment at will, which means employees can be discharged for any reason or no reason any time. Therefore, it would be lawful for employers to make all decisions regarding the potential discipline or discharge of employees on a case-by-case basis, with no expectations or requirements communicated in advance. This would impose substantial hardship on employers that strive for consistency and fairness when making such decisions, and employees would not know what standards of conduct they must satisfy to keep their jobs. This would also be irreconcilable with the Act's emphasis on stability, certainty and predictability.
>
> *Boeing*, at 10.

The logic here is as such:

1. US Employment is at will. And in addition,

2. There is nothing in the NLRA making employers adopt broad policies. So,

3. If the NLRB will increase its scrutiny of workplace policies, then

4. Employers will stop creating workplace policies. Which is bad for workers.

The critical jump is from step 3 to step 4. It is mistaken by lacking any reason for why employers install workplace policies to begin with, and perhaps because of that, over-emphasizing the role of law and legal scrutiny (in general) and the NLRA and the Board in particular. This mismatch is glaring considering the roughly 6.5% coverage rate of the NLRA in 2017 and the poor remedial options of the Board.

5.6. N.L.R.B. v. Yeshiva Univ., 444 U.S. 672 (1980)

Full decision: (link); **Docket**: (link); **Oral argument**: (link)

Opinion
Mr. Justice POWELL delivered the opinion of the Court.

Supervisors and managerial employees are excluded from the categories of employees entitled to the benefits of collective bargaining under the National Labor Relations Act. The question presented is whether the full-time faculty of Yeshiva University fall within those exclusions.

I

Yeshiva is a private university which conducts a broad range of arts and sciences programs at its five undergraduate and eight graduate schools in New York City. On October 30, 1974, the Yeshiva University Faculty Association (Union) filed a representation petition with the National Labor Relations Board (Board). The Union sought certification as bargaining agent for the full-time faculty members at 10 of the 13 schools. The University opposed the petition on the ground that all of its faculty members are managerial or supervisory personnel and hence not employees within the meaning of the National Labor Relations Act (Act).

The evidence at the hearings showed that a central administrative hierarchy serves all of the University's schools. Ultimate authority is vested in a Board of Trustees, whose members (other than the President) hold no administrative positions at the University. The President sits on the Board of Trustees and serves as chief executive officer, assisted by four Vice Presidents who oversee, respectively, medical affairs and science, student affairs, business affairs, and academic affairs. An Executive Council of Deans and administrators makes recommendations to the President on a wide variety of matters.

University-wide policies are formulated by the central administration with the approval of the Board of Trustees, and include general guidelines dealing with teaching loads, salary scales, tenure, sabbaticals, retirement, and fringe benefits. The budget for each school is drafted by its

Dean or Director, subject to approval by the President after consultation with a committee of administrators. The faculty participate in University-wide governance through their representatives on an elected student-faculty advisory council. The only University-wide faculty body is the Faculty Review Committee, composed of elected representatives who adjust grievances by informal negotiation and also may make formal recommendations to the Dean of the affected school or to the President. Such recommendations are purely advisory.
The individual schools within the University are substantially autonomous. Each is headed by a Dean or Director, and faculty members at each school meet formally and informally to discuss and decide matters of institutional and professional concern. At four schools, formal meetings are convened regularly pursuant to written bylaws. The remaining faculties meet when convened by the Dean or Director. Most of the schools also have faculty committees concerned with special areas of educational policy. Faculty welfare committees negotiate with administrators concerning salary and conditions of employment. Through these meetings and committees, the faculty at each school effectively determine its curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules.

Faculty power at Yeshiva's schools extends beyond strictly academic concerns. The faculty at each school make recommendations to the Dean or Director in every case of faculty hiring, tenure, sabbaticals, termination and promotion. Although the final decision is reached by the central administration on the advice of the Dean or Director, the overwhelming majority of faculty recommendations are implemented. Even when financial problems in the early 1970's restricted Yeshiva's budget, faculty recommendations still largely controlled personnel decisions made within the constraints imposed by the administration. Indeed, the faculty of one school recently drew up new and binding policies expanding their own role in these matters. In addition, some faculties make final decisions regarding the admission, expulsion, and graduation of individual students. Others have decided questions involving teaching loads, student absence policies, tuition and enrollment levels, and in one case the location of a school.

II

A three-member panel of the Board granted the Union's petition in December 1975, and directed an election in a bargaining unit consisting of all full-time faculty members at the affected schools. 221 N.L.R.B. 1053 (1975). The unit included Assistant Deans, senior professors, and department chairmen, as well as associate professors, assistant professors, and instructors. Deans and Directors were excluded. The Board summarily rejected the University's contention that its entire faculty are managerial, viewing the claim as a request for reconsideration of previous Board decisions on the issue. Instead of making findings of fact as to Yeshiva, the Board referred generally to the record and found no "significan[t]" difference between this faculty and others it had considered. The Board concluded that the faculty are professional employees entitled to the protection of the Act because "faculty participation in collegial decision making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than 'in the interest of the employer,' and final authority rests with the board of trustees." *Id.*, at 1054.

The Union won the election and was certified by the Board. The University refused to bargain, reasserting its view that the faculty are managerial. In the subsequent unfair labor practice proceeding, the Board refused to reconsider its holding in the representation proceeding and ordered the University to bargain with the Union. 231 N.L.R.B. 597 (1977). When the University still refused to sit down at the negotiating table, the Board sought enforcement in the Court of Appeals for the Second Circuit, which denied the petition. 582 F.2d 686 (1978).

Since the Board had made no findings of fact, the court examined the record and related the circumstances in considerable detail. It agreed that the faculty are professional employees under § 2(12) of the Act. 29 U.S.C. § 152(12). But the court found that the Board had ignored "the extensive control of Yeshiva's faculty" over academic and personnel decisions as well as the "crucial role of the full-time faculty in determining other central policies of the institution." 582 F.2d, at 698. The court concluded that such power is not an exercise of individual professional expertise. Rather, the faculty are, "in effect, substantially and pervasively operating the enterprise." *Ibid*. Accordingly, the court held that the faculty are endowed with "managerial status" sufficient to remove them from the coverage of the Act. We granted certiorari, and now affirm.

III

There is no evidence that Congress has considered whether a university faculty may organize for collective bargaining under the Act. Indeed, when the Wagner and Taft-Hartley Acts were approved, it was thought that congressional power did not extend to university faculties because they were employed by nonprofit institutions which did not "affect commerce." See *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).[9] Moreover, the authority structure of a university does not fit neatly within the statutory scheme we are asked to interpret. The Board itself has noted that the concept of collegiality "does not square with the traditional authority structures with which th[e] Act was designed to cope in the typical organizations of the commercial world." *Adelphi University*, 195 N.L.R.B. 639, 648 (1972).

The Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry. In contrast, authority in the typical "mature" private university is divided between a central administration and one or more collegial bodies. This system of "shared authority" evolved from the medieval model of collegial decisionmaking in which guilds of scholars were responsible only to themselves. See N. Fehl, The Idea of a University in East and West 36–46 (1962); D. Knowles, The Evolution of Medieval Thought 164–168 (1962). At early universities, the faculty were the school. Although faculties have been subject to external control in the United States since colonial times, J. Brubacher & W. Rudy, Higher Education in Transition: A History of American Colleges and Universities, 1636–1976, pp. 25–30 (3d ed. 1976), traditions of collegiality continue to play a significant role at many

universities, including Yeshiva. For these reasons, the Board has recognized that principles developed for use in the industrial setting cannot be "imposed blindly on the academic world." *Syracuse University*, 204 N.L.R.B. 641, 643 (1973).

The absence of explicit congressional direction, of course, does not preclude the Board from reaching any particular type of employment. See *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 124–131 (1944). Acting under its responsibility for adapting the broad provisions of the Act to differing workplaces, the Board asserted jurisdiction over a university for the first time in 1970. *Cornell University*, 183 N.L.R.B. 329 (1970). Within a year it had approved the formation of bargaining units composed of faculty members. *C. W. Post Center*, 189 N.L.R.B. 904 (1971). The Board reasoned that faculty members are "professional employees" within the meaning of § 2(12) of the Act and therefore are entitled to the benefits of collective bargaining. 189 N.L.R.B., at 905; 29 U.S.C. § 152(12).

Yeshiva does not contend that its faculty are not professionals under the statute. But professionals, like other employees, may be exempted from coverage under the Act's exclusion for "supervisors" who use independent judgment in overseeing other employees in the interest of the employer, or under the judicially implied exclusion for "managerial employees" who are involved in developing and enforcing employer policy. Both exemptions grow out of the same concern: That an employer is entitled to the undivided loyalty of its representatives. *Beasley v. Food Fair of North Carolina*, 416 U.S. 653, 661–662 (1974); see *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). Because the Court of Appeals found the faculty to be managerial employees, it did not decide the question of their supervisory status. In view of our agreement with that court's application of the managerial exclusion, we also need not resolve that issue of statutory interpretation.

IV

Managerial employees are defined as those who " 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.' " *NLRB v. Bell Aerospace Co., supra*, at 288. These employees are "much higher in the managerial structure" than those explicitly mentioned by Congress, which "regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary." 416 U.S., at 283. Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. See *id.*, at 286–287. Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.

The Board does not contend that the Yeshiva faculty's decisionmaking is too insignificant to be deemed managerial. Nor does it suggest that the role of the faculty is merely advisory and thus not managerial. Instead, it contends that the managerial exclusion cannot be applied in a

straightforward fashion to professional employees because those employees often appear to be exercising managerial authority when they are merely performing routine job duties. The status of such employees, in the Board's view, must be determined by reference to the “alignment with management” criterion. The Board argues that the Yeshiva faculty are not aligned with management because they are expected to exercise “independent professional judgment” while participating in academic governance, and because they are neither “expected to conform to management policies [nor] judged according to their effectiveness in carrying out those policies.” Because of this independence, the Board contends there is no danger of divided loyalty and no need for the managerial exclusion. In its view, union pressure cannot divert the faculty from adhering to the interests of the university, because the university itself expects its faculty to pursue professional values rather than institutional interests. The Board concludes that application of the managerial exclusion to such employees would frustrate the national labor policy in favor of collective bargaining.

…

V

The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On Occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.

The Board nevertheless insists that these decisions are not managerial because they require the exercise of independent professional judgment. We are not persuaded by this argument. There may be some tension between the Act's exclusion of managerial employees and its inclusion of professionals, since most professionals in managerial positions continue to draw on their special skills and training. But we have been directed to no authority suggesting that that tension can be resolved by reference to the “independent professional judgment” criterion proposed in this case.[24] Outside the university context, the Board routinely has applied the managerial and supervisory exclusions to professionals in executive positions without inquiring whether their decisions were based on management policy rather than professional expertise. Indeed, the Board has twice implicitly rejected the contention that decisions based on professional judgment cannot be managerial.[26] Since the Board does not suggest that the “independent professional judgment” test is to be limited to university faculty, its new approach would overrule *sub silentio* this body

of Board precedent and could result in the indiscriminate recharacterization as covered employees of professionals working in supervisory and managerial capacities.

Moreover, the Board's approach would undermine the goal it purports to serve: To ensure that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union. In arguing that a faculty member exercising independent judgment acts primarily in his own interest and therefore does not represent the interest of his employer, the Board assumes that the professional interests of the faculty and the interests of the institution are distinct, separable entities with which a faculty member could not simultaneously be aligned. The Court of Appeals found no justification for this distinction, and we perceive none. In fact, the faculty's professional interests—as applied to governance at a university like Yeshiva—cannot be separated from those of the institution.

In such a university, the predominant policy normally is to operate a quality institution of higher learning that will accomplish broadly defined educational goals within the limits of its financial resources. The “business” of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions. See K. Mortimer & T. McConnell, Sharing Authority Effectively 23–24 (1978). Faculty members enhance their own standing and fulfill their professional mission by ensuring that the university's objectives are met. But there can be no doubt that the quest for academic excellence and institutional distinction is a “policy” to which the administration expects the faculty to adhere, whether it be defined as a professional or an institutional goal. It is fruitless to ask whether an employee is “expected to conform” to one goal or another when the two are essentially the same.

The problem of divided loyalty is particularly acute for a university like Yeshiva, which depends on the professional judgment of its faculty to formulate and apply crucial policies constrained only by necessarily general institutional goals. The university requires faculty participation in governance because professional expertise is indispensable to the formulation and implementation of academic policy. It may appear, as the Board contends, that the professor performing governance functions is less “accountable” for departures from institutional policy than a middle-level industrial manager whose discretion is more confined. Moreover, traditional systems of collegiality and tenure insulate the professor from some of the sanctions applied to an industrial manager who fails to adhere to company policy. But the analogy of the university to industry need not, and indeed cannot, be complete. It is clear that Yeshiva and like universities must rely on their faculties to participate in the making and implementation of their policies. The large measure of independence enjoyed by faculty members can only increase the danger that divided loyalty will lead to those harms that the Board traditionally has sought to prevent.

We certainly are not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them. The Board has recognized that employees whose decisionmaking is limited to the routine discharge

of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty. Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management. We think these decisions accurately capture the intent of Congress, and that they provide an appropriate starting point for analysis in cases involving professionals alleged to be managerial.

VI

….

Affirmed.

Mr. Justice BRENNAN, with whom Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN join, dissenting.

In holding that the full-time faculty members of Yeshiva University are not covered employees under the National Labor Relations Act, but instead fall within the exclusion for supervisors and managerial employees, the Court disagrees with the determination of the National Labor Relations Board. Because I believe that the Board's decision was neither irrational nor inconsistent with the Act, I respectfully dissent.

I

Ten years ago the Board first asserted jurisdiction over private nonprofit institutions of higher education. *Cornell University*, 183 N.L.R.B. 329 (1970). Since then, the Board has often struggled with the Procrustean task of attempting to implement in the altogether different environment of the academic community the broad directives of a statutory scheme designed for the bureaucratic industrial workplace. See, *e. g., Adelphi University*, 195 N.L.R.B. 639, 648 (1972). Resolution of the particular issue presented in this case—whether full-time faculty members are covered "employees" under the Act—is but one of several challenges confronting the Board in this "unchartered area." *C. W. Post Center*, 189 N.L.R.B. 904, 905 (1971).
….

II

In any event, I believe the Board reached the correct result in determining that Yeshiva's full-time faculty is covered under the NLRA. The Court does not dispute that the faculty members are "professional employees" for the purposes of collective bargaining under § 2(12), but nevertheless finds them excluded from coverage under the implied exclusion for managerial employees." The Court explains that "[t]he controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably

would be managerial." *Ante*, at 864. But the academic community is simply not "any other context." The Court purports to recognize that there are fundamental differences between the authority structures of the typical industrial and academic institutions which preclude the blind transplanting of principles developed in one arena onto the other; yet it nevertheless ignores those very differences in concluding that Yeshiva's faculty is excluded from the Act's coverage. As reflected in the legislative history of the Taft-Hartley Amendments of 1947, the concern behind the exclusion of supervisors under § 2(11) of the Act is twofold. On the one hand, Congress sought to protect the rank-and-file employees from being unduly influenced in their selection of leaders by the presence of management representatives in their union. "If supervisors were members of and active in the union which represented the employees they supervised it could be possible for the supervisors to obtain and retain positions of power in the union by reason of their authority over their fellow union members while working on the job." *NLRB v. Metropolitan Life Ins. Co.*, 405 F.2d 1169, 1178 (CA2 1968). In addition, Congress wanted to ensure that employers would not be deprived of the undivided loyalty of their supervisory foremen. Congress was concerned that if supervisors were allowed to affiliate with labor organizations that represented the rank and file, they might become accountable to the workers, thus interfering with the supervisors' ability to discipline and control the employees in the interest of the employer.

Identical considerations underlie the exclusion of managerial employees. See *ante*, at 862. Although a variety of verbal formulations have received judicial approval over the years, see *Retail Clerks International Assn. v. NLRB*, 125 U.S.App.D.C. 63, 65–66 (1966), this Court has recently sanctioned a definition of "managerial employee" that comprises those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer.' " See *NLRB v. Bell Aerospace Co.*, 416 U.S., at 288, 94. The touchstone of managerial status is thus an alliance with management, and the pivotal inquiry is whether the employee in performing his duties represents his own interests or those of his employer.[4] If his actions are undertaken for the purpose of implementing the employer's policies, then he is accountable to management and may be subject to conflicting loyalties. But if the employee is acting only on his own behalf and in his own interest, he is covered under the Act and is entitled to the benefits of collective bargaining.

After examining the voluminous record in this case, the Board determined that the faculty at Yeshiva exercised its decisionmaking authority in its own interest rather than "in the interest of the employer." 221 N.L.R.B. 1053, 1054 (1975). The Court, in contrast, can perceive "no justification for this distinction" and concludes that the faculty's interests "cannot be separated from those of the institution." *Ante*, at 865. But the Court's vision is clouded by its failure fully to discern and comprehend the nature of the faculty's role in university governance.

Unlike the purely hierarchical decisionmaking structure that prevails in the typical industrial organization, the bureaucratic foundation of most "mature" universities is characterized by dual authority systems. The primary decisional network is hierarchical in nature: Authority is lodged

in the administration, and a formal chain of command runs from a lay governing board down through university officers to individual faculty members and students. At the same time, there exists a parallel professional network, in which formal mechanisms have been created to bring the expertise of the faculty into the decisionmaking process.

What the Board realized—and what the Court fails to apprehend—is that whatever influence the faculty wields in university decisionmaking is attributable solely to its collective expertise as professional educators, and not to any managerial or supervisory prerogatives. Although the administration may look to the faculty for advice on matters of professional and academic concern, the faculty offers its recommendations in order to serve its own independent interest in creating the most effective environment for learning, teaching, and scholarship. And while the administration may attempt to defer to the faculty's competence whenever possible, it must and does apply its own distinct perspective to those recommendations, a perspective that is based on fiscal and other managerial policies which the faculty has no part in developing. The University always retains the ultimate decisionmaking authority, see *ante*, at 858–859, and the administration gives what weight and import to the faculty's collective judgment as it chooses and deems consistent with its own perception of the institution's needs and objectives.[8]
The premise of a finding of managerial status is a determination that the excluded employee is acting on behalf of management and is answerable to a higher authority in the exercise of his responsibilities. The Board has consistently implemented this requirement—both for professional and non-professional employees—by conferring managerial status only upon those employees "whose interests are closely aligned with management *as true representatives of management.*" (Emphasis added.).

Yeshiva's faculty, however, is not accountable to the administration in its governance function, nor is any individual faculty member subject to personal sanction or control based on the administration's assessment of the worth of his recommendations. When the faculty, through the schools' advisory committees, participates in university decisionmaking on subjects of academic policy, it does not serve as the "representative of management."[10] Unlike industrial supervisors and managers, university professors are not hired to "make operative" the policies and decisions of their employer. Nor are they retained on the condition that their interests will correspond to those of the university administration. Indeed, the notion that a faculty member's professional competence could depend on his undivided loyalty to management is antithetical to the whole concept of academic freedom. Faculty members are judged by their employer on the quality of their teaching and scholarship, not on the compatibility of their advice with administration policy. Board Member Kennedy aptly concluded in his concurring opinion in *Northeastern University*, 218 N.L.R.B. 247, 257 (1975) (footnote omitted):

> [T]he influence which the faculty exercises in many areas of academic governance is insufficient to make them 'managerial' employees. Such influence is not exercised 'for management' or 'in the interest of the employer,' but rather is exercised in their own

> professional interest. The best evidence of this fact is that faculty members are generally not held accountable by or to the administration for their faculty governance functions. Faculty criticism of administration policies, for example, is viewed not as a breach of loyalty, but as an exercise in academic freedom. So, too, intervention by the university administration in faculty deliberations would most likely be considered an infringement upon academic freedoms. Conversely, university administrations rarely consider themselves bound by faculty recommendations.

It is no answer to say, as does the Court, that Yeshiva's faculty and administration are one and the same because their interests tend to coincide. In the first place, the National Labor Relations Act does not condition its coverage on an antagonism of interests between the employer and the employee. The mere coincidence of interests on many issues has never been thought to abrogate the right to collective bargaining on those topics as to which that coincidence is absent. Ultimately, the performance of an employee's duties will always further the interests of the employer, for in no institution do the interests of labor and management totally diverge. Both desire to maintain stable and profitable operations, and both are committed to creating the best possible product within existing financial constraints. Differences of opinion and emphasis may develop, however, on exactly how to devote the institution's resources to achieve those goals. When these disagreements surface, the national labor laws contemplate their resolution through the peaceful process of collective bargaining. And in this regard, Yeshiva University stands on the same footing as any other employer.

Moreover, the congruence of interests in this case ought not to be exaggerated. The university administration has certain economic and fiduciary responsibilities that are not shared by the faculty, whose primary concerns are academic and relate solely to its own professional reputation. The record evinces numerous instances in which the faculty's recommendations have been rejected by the administration on account of fiscal constraints or other managerial policies. Disputes have arisen between Yeshiva's faculty and administration on such fundamental issues as the hiring, tenure, promotion, retirement, and dismissal of faculty members, academic standards and credits, departmental budgets, and even the faculty's choice of its own departmental representative. The very fact that Yeshiva's faculty has voted for the Union to serve as its representative in future negotiations with the administration indicates that the faculty does not perceive its interests to be aligned with those of management. Indeed, on the precise topics which are specified as mandatory subjects of collective bargaining—wages, hours, and other terms and conditions of employment—the interests of teacher and administrator are often diametrically opposed.

Finally, the Court's perception of the Yeshiva faculty's status is distorted by the rose-colored lens through which it views the governance structure of the modern-day university. The Court's conclusion that the faculty's professional interests are indistinguishable from those of the administration is bottomed on an idealized model of collegial decisionmaking that is a vestige of the great medieval university. But the university of today bears little resemblance to the

"community of scholars" of yesteryear. Education has become "big business," and the task of operating the university enterprise has been transferred from the faculty to an autonomous administration, which faces the same pressures to cut costs and increase efficiencies that confront any large industrial organization.[15] The past decade of budgetary cutbacks, declining enrollments, reductions in faculty appointments, curtailment of academic programs, and increasing calls for accountability to alumni and other special interest groups has only added to the erosion of the faculty's role in the institution's decisonmaking process.

These economic exigencies have also exacerbated the tensions in university labor relations, as the faculty and administration more and more frequently find themselves advocating conflicting positions not only on issues of compensation, job security, and working conditions, but even on subjects formerly thought to be the faculty's prerogative. In response to this friction, and in an attempt to avoid the strikes and work stoppages that have disrupted several major universities in recent years, many faculties have entered into collective-bargaining relationships with their administrations and governing boards.[17] An even greater number of schools—Yeshiva among them—have endeavored to negotiate and compromise their differences informally, by establishing avenues for faculty input into university decisions on matters of professional concern.

Today's decision, however, threatens to eliminate much of the administration's incentive to resolve its disputes with the faculty through open discussion and mutual agreement. By its overbroad and unwarranted interpretation of the managerial exclusion, the Court denies the faculty the protections of the NLRA and, in so doing, removes whatever deterrent value the Act's availability may offer against unreasonable administrative conduct.[18] Rather than promoting the Act's objective of funneling dissension between employers and employees into collective bargaining, the Court's decision undermines that goal and contributes to the possibility that "recurring disputes [will] fester outside the negotiation process until strikes or other forms of economic warfare occur." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 499 (1979).

III

In sum, the Board analyzed both the essential purposes underlying the supervisory and managerial exclusions and the nature of the governance structure at Yeshiva University. Relying on three factors that attempt to encapsulate the fine distinction between those professional employees who are entitled to the NLRA's protections and those whose managerial responsibilities require their exclusion,[19] the Board concluded that Yeshiva's full-time faculty qualify as the former rather than the latter. I believe the Board made the correct determination. But even were I to have reservations about the specific result reached by the Board on the facts of this case, I would certainly have to conclude that the Board applied a proper mode of analysis to arrive at a decision well within the zone of reasonableness. Accordingly, in light of the

deference due the Board's determination in this complex area, I would reverse the judgment of the Court of Appeals.

5.6.1. Timeline

Date	Case Name	Decision	Notes
August 24, 1977	*Yeshiva University* National Labor Relations Board (1977)	NLRB granted a motion for summary judgment against respondent, and then applied for enforcement of its order directing respondent to bargain with intervenor.	**First filed in 1977** Respondent refused to bargain collectively with the Union as the exclusive bargaining representative • Link
Argued April 26, 1978 **Decided July 31, 1978**	*NLRB v. Yeshiva University* United States Court of Appeals for the Second Circuit (1978)	The court denied the application for enforcement of its order pursuant to the NLRA	Faculty members had supervisory roles, and were not "employees" eligible to form a bargaining unit under the Act • Link
Argued October 10. 1979 **Decided February 20, 1980**	*NLRB v. Yeshiva University* Supreme Court of the United States (1980)	Affirmed the decision of the appellate court	Extensive control of the faculty over academic and personnel decisions and its crucial role in determining other central policies remove them from the coverage of the NLRA. • Link

5.7. Trs. of Columbia Univ. , 364 N.L.R.B. 1080 (2016)

Full decision: (link); **Docket**: (link); **Oral argument**: ()

DECISION ON REVIEW AND ORDER

The question before us is whether students who perform services at a university in connection with their studies are statutory employees within the meaning of Section 2(3) of the National Labor Relations Act. Here, after a hearing directed by the Board, the Regional Director applied *Brown University*, 342 NLRB 483 (2004), where the Board found that graduate student assistants were not employees within the meaning of Section 2(3), and dismissed a petition filed by the Graduate Workers of Columbia-GWC, UAW, which seeks to represent both graduate and undergraduate teaching assistants, as well as graduate research assistants. The Board granted review ….

For the reasons that follow, we have decided to overrule *Brown University*, a sharply-divided decision, which itself overruled an earlier decision, *New York University*, 332 NLRB 1205 (2000) (*NYU*). We revisit the *Brown University* decision not only because, in our view, the Board erred as to a matter of statutory interpretation, but also because of the nature and consequences of that error. The *Brown University* Board failed to acknowledge that the Act does not speak directly to the issue posed here, which calls on the Board to interpret the language of the statute in light of its policies. The *Brown University* Board's decision, in turn, deprived an entire category of workers of the protections of the Act, without a convincing justification in either the statutory language or the policies of the Act.

As we will explain, our starting point in determining whether student assistants are covered by the Act is the broad language of Section 2(3), which provides in relevant part that "[t]he term 'employee' shall include any employee," subject to certain exceptions--none of which address students employed by their universities. The *Brown University* Board held that graduate assistants *cannot* be statutory employees because they "are primarily students and have a primarily educational, not economic, relationship with their university." We disagree. The Board has the statutory authority to treat student assistants as statutory employees, where they perform work, at the direction of the university, for which they are compensated. Statutory coverage is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach.

The unequivocal policy of the Act, in turn, is to "encourag[e] the practice and procedure of collective bargaining" and to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." Given this policy, coupled with the very broad statutory definitions of both "employee" and "employer," it is appropriate to extend statutory coverage to students working for universities covered by the Act unless there are strong reasons *not* to do so. We are not persuaded by the *Brown University* Board's self-described "fundamental belief that the imposition [sic] of collective bargaining on graduate students would improperly intrude into the educational process

and would be inconsistent with the purposes and policies of the Act." This "fundamental belief" is unsupported by legal authority, by empirical evidence, or by the Board's actual experience.

Thus, we hold today that student assistants who have a common-law employment relationship with their university are statutory employees under the Act. We will apply that standard to student assistants, including assistants engaged in research funded by external grants. Applying the new standard to the facts here, consistent with the Board's established approach in representation cases, we conclude (1) that all of the petitioned-for student-assistant classifications consist of statutory employees; (2) that the petitioned-for bargaining unit (comprising graduate students, terminal Master's degree students, and undergraduate students) is an appropriate unit; and (3) that none of the petitioned-for classifications consists of temporary employees who may not be included in the unit. Accordingly, we reverse the decision of the Regional Director and remand the proceedings to the Regional Director for further appropriate action.

I. OVERVIEW OF PRECEDENT

A. Board precedent prior to Brown University

The Board has exercised jurisdiction over private, nonprofit universities for more than 45 years. During that time, the Board has permitted collective bargaining by faculty members at private universities and has had frequent occasion to apply the Act in the university setting. ….. The Board first held that certain university graduate assistants were statutory employees in its 2000 decision in *NYU*, supra. In *NYU*, the Board examined the statutory language of Section 2(3) and the common law agency doctrine of the conventional master-servant relationship, which establishes that such a "relationship exists when a servant performs services for another, under the other's control or right of control, and in return for payment." In so doing, the Board determined that "ample evidence exists to find that graduate assistants plainly and literally fall within the meaning of 'employee' as defined in Section 2(3)" and by the common law. The Board's interpretation was based on the breadth of the statutory language, the lack of any statutory exclusion for graduate assistants, and the undisputed facts establishing that the assistants in that case performed services under the control and direction of the university for which they were compensated.

The *NYU* Board also relied on *Boston Medical Center* to support its policy determination that collective bargaining was feasible in the university context. In *Boston Medical Center*, the Board held that interns, residents and clinical fellows (collectively, house staff) at a teaching hospital were statutory employees entitled to engage in collective bargaining with the hospital over the terms and conditions of their employment. After 16 years, *Boston Medical Center* remains good law today--with no evidence of the harm to medical education predicted by the dissenters there--but *NYU* was overruled only a few years after it was decided, by a sharply divided Board's 2004 decision in *Brown University*.

B. Brown University

In *Brown University*, the majority described *NYU* as "wrongly decided," and invoked what it called the "underlying fundamental premise of the Act," i.e. that the Act is "designed to cover economic relationships. The Board further relied on its "longstanding rule" that the Board will decline to exercise its jurisdiction "over relationships that are 'primarily educational.'" In so deciding, the *Brown University* majority rejected *NYU*'s reliance on the existence of a common-law employment relationship between the graduate students and the university, stating that "[e]ven assuming arguendo" such a relationship existed, "it does not follow that [the graduate assistants] are employees within the meaning of the Act." That issue was "not to be decided purely on the basis of older common-law concepts," but rather by determining "whether Congress intended to cover the individual in question." Disavowing the need for empirical analysis, the *Brown University* majority instead relied on what it perceived to be a fundamental tenet of the Act and a prerequisite to statutory coverage: a relationship that is *primarily* economic in character, regardless of whether it constitutes common-law employment.

In addition to its declaration that graduate assistants, as primarily students, were necessarily excluded from statutory coverage, the *Brown University* Board also articulated a policy rationale based almost exclusively on the overruled decision in *St. Clare's Hospital*, supra, finding that the *St. Clare's* Board had correctly "determined that collective bargaining is not particularly well suited to educational decisionmaking and that any change in emphasis from quality education to economic concerns will 'prove detrimental to both labor and educational policies.'" That determination ostensibly was supported by several factors: (1) that the student-teacher relationship is based on mutual academic interests, in contrast to the conflicting economic interests that inform the employer-employee relationship; (2) that the educational process is a personal one, in contrast to the group character of collective bargaining; (3) that the goal of collective bargaining, promoting equality of bargaining power, is "largely foreign to higher education"; and (4) that collective bargaining would "unduly infringe upon traditional academic freedoms."

The *Brown University* dissenters, in stark contrast, noted that "[c]ollective bargaining by graduate student employees" was "increasingly a fact of American university life" and described the majority's decision as "woefully out of touch with contemporary academic reality." According to the dissenters, the majority had misapplied the appropriate statutory principles and erred "in seeing the academic world as somehow removed from the economic realm that labor law addresses." The dissenters emphasized that the majority's decision improperly disregarded "the plain language of the statute--which defines 'employees' so broadly that graduate students who perform services for, and under the control of, their universities are easily covered" and instead chose to exclude student assistants. This decision was based on "policy

concerns . . . not derived from the Act at all," reflecting "an abstract view of what is best for American higher education--a subject far removed from the Board's expertise." Contrary to the majority, the dissenters concluded, in line with the Board's decision in *NYU*, that the terms and conditions of graduate-student employment *were* adaptable to collective bargaining (as illustrated by experience at public-sector universities and at New York University itself) and that empirical evidence contradicted claims that "academic freedom" and educational quality were harmed by permitting collective bargaining.

We believe that the *NYU* Board and the *Brown University* dissenters were correct in concluding that student assistants who perform work at the direction of their university for which they are compensated are statutory employees. That view better comports with the language of Section 2(3) of the Act and common-law agency principles, the clear policy of the Act, and the relevant empirical evidence.

II. DISCUSSION

A. The Brown University *Board Erred by Determining that, as a Matter of Statutory Interpretation, Student Assistants Could Not Be Treated as Statutory Employees*

For reasons already suggested, the *NYU* Board was on very firm legal ground in concluding that student assistants could be employees of the university within the meaning of Section 2(3) of the Act, while also being students--and thus permitting collective bargaining when student assistants freely choose union representation. We now reaffirm that approach. Where student assistants have an employment relationship with their university under the common law test--which they do here--this relationship is sufficient to establish that the student assistant is a Section 2(3) employee for all statutory purposes. We do not hold that the Board is required to find workers to be statutory employees whenever they are common-law employees, but only that the Board may and should find here that student assistants are statutory employees.

1. Section 2(3)

Section 2(3) of the defines "employee" to "include any employee," subject to certain specified exceptions. The Supreme Court has observed that the "breadth of [Section] 2(3)'s definition is striking: the Act squarely applies to 'any employee.'" The "phrasing of the Act," the Court has pointed out, "seems to reiterate the breadth of the ordinary dictionary definition" of the term, a definition that "includes any 'person who works for another in return for financial or other compensation.'"

The Court has made clear, in turn, that the "task of defining the term 'employee' is one that 'has been assigned primarily to the agency created by Congress to administer the Act,'" the Board. None of the exceptions enumerated in Section 2(3) addresses students generally, student

assistants in particular, or private university employees of any sort. The absence of student assistants from the Act's enumeration of categories excluded from the definition of employee is itself strong evidence of statutory coverage. Although Section 2(3) excludes "individuals employed . . . by any . . . person who is not an employer . . . as defined" in Section 2(2) of the Act, private universities do not fall within any of the specified exceptions, and, indeed, as previously noted, the Board has chosen to exercise jurisdiction over private, nonprofit universities for more than 45 years.

The Act does not offer a definition of the term "employee" itself. But it is well established that "when Congress uses the term 'employee' in a statute that does not define the term, courts interpreting the statute 'must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning'" of the term, with reference to "'common-law agency doctrine.'" Not surprisingly, then, the Supreme Court has endorsed the Board's determination that certain workers were statutory employees where that determination aligned with the common law of agency. Other federal courts have done so as well. In accordance with the statute's broad definition and with the Supreme Court's approval, the Board has interpreted the expansive language of Section 2(3) to cover, for example, paid union organizers (salts) employed by a company, undocumented aliens, and "confidential" employees, among other categories of workers.

The most notable instance in which apparent commonlaw employees were found *not* to be employees under the Act, in spite of the absence of an explicit statutory exclusion, is the exception that proves the rule. In *Bell Aerospace*, cited by the *Brown University* Board, the Supreme Court held that "managerial employees" were not covered by the Act because Congress had clearly implied their exclusion by the Act's design and purpose to facilitate fairness in collective bargaining. As the Court concluded, giving employee status to *managers* would be contrary to this purpose: it would place managers, who would be expected to be on the side of the employer in bargaining, and non-managerial employees in the same bargaining "camp," "eviscerat[ing] the traditional distinction between labor and management." The exclusion of managers rested on legislative history, along with the intrinsic purpose and structure of the Act. No legislative history supports excluding student assistants from statutory coverage, nor does the design of the Act itself.

2. The *Brown* Board Did Not Adequately Consider the Text of Section 2(3)

The *Brown University* Board insisted that Section 2(3) of the Act must not be examined in isolation; rather, the Board must "look to the underlying fundamental premise of the Act, viz. the Act is designed to cover economic relationships." Certainly, the Supreme Court has suggested that, despite the centrality of common-law agency principles to employee status under the Act, "[i]n doubtful cases resort must still be had to economic and policy considerations to infuse

[Section] 2(3) with meaning." But we reject the *Brown University* Board's claim that finding student assistants to be statutory employees, where they have a common-law employment relationship with their university, is somehow incompatible with the "underlying fundamental premise of the Act." The Act *is* designed to cover a particular type of "economic relationship" (in the *Brown University* Board's phrase)--an employment relationship--and where that relationship exists, there should be compelling reasons before the Board excludes a category of workers from the Act's coverage.

The fundamental error of the *Brown University* Board was to frame the issue of statutory coverage not in terms of the existence of an employment relationship, but rather on whether some other relationship between the employee and the employer is the primary one--a standard neither derived from the statutory text of Section 2(3) nor from the fundamental policy of the Act. Indeed, in spite of the *Brown University* Board's professed adherence to "Congressional policies," we can discern no such policies that speak to whether a common-law employee should be excluded from the Act because his or her employment relationship co-exists with an educational or other non-economic relationship. The Board and the courts have repeatedly made clear that the extent of any required "economic" dimension to an employment relationship is the payment of tangible compensation. Even when such an economic component may seem comparatively slight, relative to other aspects of the relationship between worker and employer, the payment of compensation, in conjunction with the employer's control, suffices to establish an employment relationship for purposes of the Act. Indeed, the principle that student assistants may have a common-law employment relationship with their universities--and should be treated accordingly--is recognized in other areas of employment law as well.

In sum, we reject the *Brown* Board's focus on whether student assistants have a "primarily educational" employment relationship with their universities. The Supreme Court has cautioned that "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration." The crucial statutory text here, of course, is the broad language of Section 2(3) defining "employee" and the language of Section 8(d) defining the duty to bargain collectively. It seems clear to us, then, that the Act's text supports the conclusion that student assistants who are common-law employees are covered by the Act, unless compelling statutory and policy considerations require an exception. As we explain next, the relevant considerations strongly favor statutory coverage.

B. Asserting Jurisdiction over Student Assistants Promotes the Goals of Federal Labor Policy

1. Overview of Federal Labor Policy

Federal labor policy, in the words of Section 1 of the Act, is to "encourag[e] the practice and procedure of collective bargaining," and to protect workers' "full freedom" to express a choice for or against collective-bargaining representation. *Permitting* student assistants to choose

whether they wish to engage in collective bargaining--not prohibiting it--would further the Act's policies.

Although the *Brown University* Board held that student assistants were *not* statutory employees, it also observed that, even assuming they were, the Board would have "discretion to determine whether it would effectuate national labor policy to extend collective bargaining rights" to student assistants and that, in fact, it would "*not* effectuate the purposes and policies of the Act to do so." We disagree not with the claim that the Board has some discretion in this area, but with the conclusion reached by the *Brown University* Board, including its view that "empirical evidence" is irrelevant to the inquiry. We have carefully considered the arguments marshaled by the Board majority in *Brown University* (as well as the arguments advanced here by Columbia and supporting amici, as well as our dissenting colleague), but find that they do not outweigh the considerations that favor extending statutory coverage to student assistants.

The claims of the *Brown* majority are almost entirely theoretical. The *Brown University* Board failed to demonstrate that collective bargaining between a university and its employed graduate students cannot coexist successfully with student-teacher relationships, with the educational process, and with the traditional goals of higher education. Labor law scholars have aptly criticized the *Brown University* decision as offering "no empirical support" for its claims, even though "those assertions are empirically testable."

The National Labor Relations Act, as we have repeatedly emphasized, governs only the employee-employer relationship. For deciding the legal and policy issues in this case, then, it is not dispositive that student-teacher relationship involves different interests than the employee-employer relationship; that the educational process is individual, while collective bargaining is focused on the group; and that promoting equality of bargaining power is not an aim of higher education. Even conceded, all these points simply confirm that collective bargaining and education occupy different institutional spheres. In other words, a graduate student may be both a student *and* an employee; a university may be both the student's educator *and* employer. By permitting the Board to define the scope of mandatory bargaining over "wages, hours, and other terms and conditions of employment," the Act makes it entirely possible for these different roles to coexist--and for genuine academic freedom to be preserved. It is no answer to suggest, as the *Brown University* Board did, that permitting student assistants to bargain over their terms and conditions of employment (no more and no less) somehow poses a greater threat to academic freedom than permitting collective bargaining by non-managerial faculty members, "[b]ecause graduate student assistants are students." That the academic-employment setting poses special issues of its own--as the Board and the Supreme Court have both recognized --does not somehow mean that the Act cannot properly be applied there at all.
....

The Regional Director's Decision is reversed. The proceeding is remanded to the Regional Director for further appropriate action consistent with this Decision and Order.

MEMBER MISCIMARRA, dissenting.

In this case, my colleagues decide that college and university students are "employees" for purposes of collective bargaining under the National Labor Relations Act (NLRA or Act) when serving in a variety of academic assistant positions. An assortment of student positions are involved here: the petitioned-for bargaining unit includes all "student employees" who engage in "instructional services," including "graduate and undergraduate Teaching Assistants," "Teaching Fellows," "Preceptors," "Course Assistants," "Readers," and "Graders," plus "Graduate Research Assistants" and "Departmental Research Assistants." No distinctions are drawn based on subject, department, whether the student must already possess a bachelor's or master's degree, whether a particular position has other minimum qualifications, whether graduation is conditioned on successful performance in the position, or whether different positions are differently remunerated. As a result of today's decision, all of these university student assistant positions are made part of a single, expansive, multi-faceted bargaining unit.

I believe the issues raised by the instant petition require more thoughtful consideration than the Board majority's decision gives them. In particular, my colleagues disregard a fundamental fact that should be the starting point when considering whether to apply the NLRA to university students. Full-time enrollment in a university usually involves one of the largest expenditures a student will make in his or her lifetime, and this expenditure is almost certainly the most important financial investment the student will ever make. In the majority of cases, attending college imposes enormous financial burdens on students and their families, requiring years of preparation beforehand and, increasingly, years of indebtedness thereafter. Many variables affect whether a student will reap any return on such a significant financial investment, but three things are certain: (i) there is no guarantee that a student will graduate, and roughly 40 percent do not; (ii) college-related costs increase substantially the longer it takes a student to graduate, and roughly 60 percent of undergraduate students do not complete degree requirements within four years after they commence college; and (iii) when students do not graduate at all, there is likely to be no return on their investment in a college education.

I respect the views presented by my colleagues and by advocates on all sides regarding the issues in this case. However, Congress never intended that the NLRA and collective bargaining would be the means by which students and their families might attempt to exercise control over such an extraordinary expense. This is not a commentary on the potential benefits associated with collective bargaining in the workplace. Rather, it is a recognition that for students enrolled in a college or university, their instruction-related positions do not turn the academic institution they attend into something that can fairly be characterized as a "workplace." For students, the least important consideration is whether they engage in collective bargaining regarding their service as research assistants, graduate assistants, preceptors, or fellows, which is an incidental aspect of

their education. If one regards college as a competition, this is one area where "winning isn't everything, it is the only thing," and I believe winning in this context means fulfilling degree requirements, hopefully on time.

The Board has no jurisdiction over efforts to ensure that college and university students satisfy their postsecondary education requirements. However, Congress has certainly weighed in on the subject: an array of federal statutes and regulations apply to colleges and universities, administered by the U.S. Department of Education, led by the Secretary of Education. My colleagues disregard the Board's responsibility to accommodate this extensive regulatory framework. In addition, I believe collective bargaining and, especially, the potential resort to economic weapons protected by our statute fundamentally change the relationship between university students, including student assistants, and their professors and academic institutions. Collective bargaining often produces short-term winners and losers, and a student assistant in some cases may receive some type of transient benefit as a result of collective bargaining pursuant to today's decision. Yet there are no guarantees, and they might end up worse off.

Moreover, I believe collective bargaining is likely to detract from the far more important goal of completing degree requirements in the allotted time, especially when one considers the potential consequences if students and/or universities resort to economic weapons against one another. I also believe that the Board's processes and procedures are poorly suited to deal with representation and unfair labor practice cases involving students. Add these up, and the sum total is uncertainty instead of clarity, and complexity instead of simplicity, with the risks and uncertainties associated with collective bargaining--including the risk of breakdown and resort to economic weapons--governing the single most important financial decision that students and their families will ever make.

For these reasons, I agree with former Member Brame, who stated that the Board resembles the "foolish repairman with one tool--a hammer--to whom every problem looks like a nail; we have one tool--collective bargaining--and thus every petitioning individual looks like someone's 'employee.'" *Boston Medical Center Corp.*, 330 NLRB 152, 182 (1999) (Member Brame, dissenting). Accordingly, as explained more fully below, I respectfully dissent.

DISCUSSION

The Board here changes the treatment that has been afforded student assistants throughout the Act's history of 80 years, with the exception of a four-year period that was governed by the Board's divided opinion in *New York University* (*NYU*). Prior to *NYU*, the Board in *Adelphi University* and *The Leland Stanford Junior University* held that various student assistants could not be included in petitioned-for units. After *NYU*, the Board similarly held that various student assistants were not employees in *Brown University*.

I disagree with my colleagues' decision to apply the Act to college and university student assistants. In my view, this change is unsupported by our statute, and it is ill-advised based on substantial considerations, including those that far outweigh whether students can engage in collective bargaining over the terms and conditions of education-related positions while attempting to earn an undergraduate or graduate degree.

The Supreme Court has stated that "the authority structure of a university does not fit neatly within the statutory scheme" set forth in the NLRA. *NLRB v. Yeshiva University*, 444 U.S. 672, 680 (1980). Likewise, the Board has recognized that a university, which relies so heavily on collegiality, "does not square with the traditional authority structures with which this Act was designed to cope in the typical organizations of the commercial world." *Adelphi University*, 195 NLRB at 648. The obvious distinction here has been recognized by the Supreme Court and the Board: the lecture hall is not the factory floor, and the "industrial model cannot be imposed blindly on the academic world." *Syracuse University*, 204 NLRB 641, 643 (1973); see also *Yeshiva*, 444 U.S. at 680.

The Board has an uneven track record in its efforts to apply the NLRA to colleges, universities and other educational institutions. In *Yeshiva*, the Board summarily rejected the university's position that its faculty members were managerial employees who were exempt from the Act. The Supreme Court reversed, finding that the faculty members constituted managerial employees and that the Board's conclusions were neither consistent with the Act nor rationally based on articulated facts. 444 U.S. at 686-691.

In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Supreme Court rejected the Board's exercise of jurisdiction over lay faculty members at two groups of Catholic high schools, concluding that to do so would give rise to "serious First Amendment questions" involving church/state entanglement and that there was insufficient evidence Congress intended that "teachers in church-operated schools should be covered by the Act." Id. at 504-507; see also *Pacific Lutheran University*, 361 NLRB No. 157 (2014).

In *Boston Medical Center*, a divided Board found that interns, residents and fellows at a teaching hospital were employees under the Act. However, the majority did not change the status of university student assistants, whom the Board had previously determined not to be employees. And as noted previously, except for the four-year period governed by *NYU*, the Board has consistently held that university student assistants are *not* employees, most recently in *Brown University*, where the Board reaffirmed that a student assistant's relationship with a university is "primarily educational." *Brown*, 342 NLRB at 487.

I agree with the Board majority's reasoning in *Brown*. There, the Board considered whether "graduate student assistants who are admitted into, not hired by, a university, and for whom supervised teaching or research is an integral component of their academic development" should

be deemed employees under the Act. *Brown*, 342 NLRB at 483. The Board majority held that these individuals were not "employees," based on the conclusion that "graduate student assistants, who perform services at a university in connection with their studies, have a predominately academic, rather than economic, relationship with their school." Id. The Board majority stated that the "fundamental premise of the Act" was "to cover economic relationships," and the majority recognized "the simple, undisputed fact that all the petitioned-for individuals [were] students and must first be enrolled at Brown" before they could be graduate assistants. The majority emphasized that the work done by graduate assistants was "part and parcel of the core elements of the Ph.D. degree." In the case of most doctoral students who provided instruction, for example, the majority observed that "teaching is so integral to their education that they will not get the degree until they satisfy that requirement." Id.; see also *Leland Stanford*, 214 NLRB at 621, 622 (student research assistants who received stipends to perform research projects were not employees, since the research was "part of the learning process" and a step leading to the "thesis and . . . toward[s] the goal of obtaining the Ph.D. degree"). The Board majority in *Brown* concluded it was likely that collective bargaining would impermissibly interfere with academic freedom and be "detrimental to the educational process." The majority explained:

> Imposing collective bargaining would have a deleterious impact on overall educational decisions by the . . . faculty and administration. These decisions would include broad academic issues involving class size, time, length, and location, as well as issues over graduate assistants' duties, hours, and stipends. In addition, collective bargaining would intrude upon decisions over who, what, and where to teach or research--the principal prerogatives of an educational institution . . . .

Apart from my belief that the Board correctly addressed these issues in *Brown*, I especially disagree with several aspects of my colleagues' opinion to the contrary.

1. The Financial Investment Associated With a University Education, and the Mistake of Making Academic Success Subservient to the Risks and Uncertainties of Collective Bargaining and the Potential Resort to Economic Weapons.

Given the critical importance of higher education, I believe the time is long past when the question of whether to apply the NLRA to students can appropriately be decided based on the standard lines of division that are commonplace in matters that come before the Board. Many parties tend to favor union representation and collective bargaining generally, and one can reasonably expect many of these parties to support union representation and collective bargaining for university student assistants. Likewise, when some parties tend to oppose union representation or collective bargaining, it is unsurprising when they oppose these things for student assistants as well. The Board's role should be different. We administer a statute enacted by Congress that was adopted with a focus on conventional workplaces, not universities.

For this reason, as noted above, the Board and the courts have recognized that unique issues arise in applying the NLRA to academic work settings, even when dealing with college and university faculty. Moreover, the NLRB has no regulatory authority over efforts to ensure that undergraduates and graduate students at colleges and universities satisfy their degree requirements. And the Board should not ignore the fact that, for the vast majority of students, attendance at a college or university has a paramount goal--to obtain a degree--and this goal, if attained, is usually achieved at enormous expense. Neither should the Board disregard the unfortunate reality in the United States that many students never receive their degree.

I believe my colleagues--though armed with good intentions--engage in analysis that is too narrow, excluding everything that is unique about the situation of college and university students. In particular, my colleagues disregard what hangs in the balance when a student's efforts to attain an undergraduate or graduate degree are governed by the risks and uncertainties of collective bargaining and the potential resort to economic weapons by students and universities. What hangs in the balance has immense importance, and it does not come cheap for the great majority of undergraduate and graduate students and their families. As one commentator has explained, "college is for many people *the biggest financial decision they will ever make*," it "makes *more demands on our cognitive abilities than most of us will ever see again in our lives*," and the "*biggest cost associated with going to college* . . . is likely to be the risk that a student *does not graduate on time or, worse, drops out altogether. There is virtually no payoff from college if you don't graduate*."

My colleagues ignore these considerations, and they disclaim any responsibility to address anything other than the need to promote collective bargaining. In their words:

> We have put suppositions aside today and have instead carefully considered the text of the Act as interpreted by the Supreme Court, the Act's clearly stated policies, the experience of the Board, and the relevant empirical evidence drawn from collective bargaining in the university setting. This is *not* a case . . . where the Board must accommodate the National Labor Relations Act *with some other federal statute related to private universities that might weigh against permitting student assistants to seek union representation and engage in collective bargaining*.

Regarding examples where bargaining involving student assistants (according to Columbia University and other parties) "has proven detrimental to the pursuit of the school's educational goals," my colleagues state that "labor disputes *are a fact of economic life*," and "the Act is *intended to address them*." They conclude:

> The National Labor Relations Act . . . *governs only the employee-employer relationship*. For deciding the legal and policy issues in this case, then, *it is not dispositive that the student-teacher relationship involves different interests than the employee-employer relationship; that the educational process is individual, while collective bargaining is focused on the group; and that promoting equality of bargaining power is not an aim of*

> *higher education*. Even conceded, all these points simply confirm that collective bargaining and education *occupy different institutional spheres*.

I disagree with this analysis because it is contrary to what the Supreme Court has stated repeatedly is the "'primary function and responsibility of the Board,'" which is "'applying the general provisions of the Act to the complexities of industrial life.'" *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979).

The instant case does not involve "industrial life." Yet this only serves to reinforce the inappropriateness of "blindly" imposing collective bargaining and the rest of the NLRA on students in "the academic world." *Syracuse University*, 204 NLRB at 643. The Board has applied the NLRA to college and university faculty members, which has presented its own challenges, as noted previously. The best interests of *students*, however, necessarily revolves around whether they obtain the education that costs so much in time and money and means so much to their future. The Board has no expertise regarding these issues, and Congress did not adopt our statute to advance the best interests of college and university students. This makes it inappropriate to summarily dismiss concerns in this area as being "not dispositive."
….

Nor can the Board freely disregard the fact that the potential resort to economic weapons is part and parcel of collective bargaining. Therefore, applying our statute to university student assistants may prevent them from completing undergraduate and graduate degree requirements in the allotted time, which is the primary reason they attend colleges and universities at such great expense. It is not an adequate response to summarily dismiss this issue, as the majority does, with the commonplace observation that "labor disputes are a fact of economic life." For the students who may find themselves embroiled in them, labor disputes between universities and student assistants may have devastating consequences.

Conventional work settings feature many examples of constructive collective-bargaining relationships. Likewise, one cannot assume that all or most negotiations involving student assistants at universities would result in strikes, slowdowns, lockouts, and/or litigation. However, there is no doubt that economic weapons and the threatened or actual infliction of economic injury are central elements in collective bargaining to which resort may be made when parties are unable to reach agreement. As I stated in *American Baptist Homes of the West d/b/a Piedmont Gardens*, 364 NLRB No. 13, slip op. at 9 (2016) (Member Miscimarra, dissenting in part), ….:

> What one hopes to see in any collective-bargaining dispute is its successful resolution without any party's resort to economic weapons. But what Congress intended was for the Board to preserve the balance of competing interests--including potential resort to economic weapons--that Congress devised as the engine driving parties to resolve their differences and to enter into successful agreements. As the Supreme Court stated

> in *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 487-489 (1960), employers and unions in collective bargaining "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. . . . *The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized*."

When the Board transplants our statute into the university setting and places students in a bargaining relationship with the university, experience demonstrates that we cannot assume bargaining will be uneventful. Collective bargaining may evoke "extraordinarily strong feelings" and give rise to a "sharp clash between seemingly irreconcilable positions," and when parties resort to various tactics in support of their respective positions, "such tactics are indeed 'weapons,'" and "[n]obody can be confused about their purpose: they are exercised with the intention of inflicting severe and potentially irreparable injury, often causing devastating damage to businesses and terrible consequences for employees." As the court stated in *NLRB v. Wire Products Mfg. Corp.*, 484 F.2d 760, 765 (7th Cir. 1973), "[t]he strike is a potent economic weapon which may, and often is, wielded with disastrous effect on its employer target."

Of course, determining that student assistants are "employees" and have the right to be represented by a union under the NLRA does not mean they will choose to be represented. Likewise, as stated above, I am not predicting that most negotiations involving student assistants will involve resort to economic weapons. Nonetheless, in this particular context, I believe collective bargaining and its attendant risks and uncertainties will tend to detract from the primary reason that students are enrolled at a university--to satisfy graduation requirements, including in many cases the satisfactory completion of service in a student assistant position. And in some cases involving student assistants, it is predictable that breakdowns in collective bargaining will occur, and the resulting resort to economic weapons may have devastating consequences for the students, including, potentially, inability to graduate *after* paying $ 50,000 to $ 100,000 or more for the opportunity to earn a degree.

Now that, with today's decision, student assistants are employees under the NLRA, what economic weapons are available to student assistants and the universities they attend? They would almost certainly include the following:

> . *Strikes*. Student assistants could go on strike, which would mean that Teaching Assistants, Teaching Fellows, Preceptors, Course Assistants, Readers, Graders, Graduate Research Assistants and Departmental Research Assistants would cease working, potentially without notice, and the university could suspend all remuneration.
>
> . *Lockouts*. The university could implement a lockout, which would require student assistants to cease working, and all remuneration would be suspended.

. *Loss, Suspension or Delay of Academic Credit*. If a student assistant ceases work based on an economic strike or lockout, it appears clear they would have no entitlement to credit for requirements that are not completed, such as satisfactory work in a student assistant position for a prescribed period of time. For example, if a particular degree required two semesters of service as a Teaching Assistant, and a student assistant could not satisfy that requirement because of a strike or lockout that persisted for two semesters, it appears clear the student assistant would not be entitled to receive his or her degree.

. *Suspension of Tuition Waivers*. In the event of a strike or lockout where the university suspended tuition waivers or other financial assistance that was conditioned on the student's work as a student assistant, students would likely be foreclosed from attending classes unless they paid the tuition. Thus, the student assistant's attendance at university could require the immediate payment of tuition, which averages $ 32,410 annually at private universities.

. *Potential Replacement*. In the event of a strike, the university would have the right to hire temporary or permanent replacements. If permanent replacements were hired during an economic strike, this would mean that even if a student unconditionally offered to resume working at the end of the strike, the university could retain the replacements, and the student assistant would not be reinstated unless and until a vacancy arose through the departure of a replacement or the creation of a new position. Here as well, one would expect that the student would be required to pay full tuition in order to be permitted to attend classes, without regard to whatever tuition waiver or other financial aid was previously provided in consideration of the student's services as a student assistant. Similarly, any failure to satisfy degree requirements associated with a student assistant's work as a student assistant would preclude attainment of the degree.

. *Loss of Tuition Previously Paid*. If a student assistant paid his or her own tuition (again, currently averaging $ 32,410 per year at a private university) and only received a cash stipend as compensation for work as a student assistant, there appears to be little question that the student's tuition could lawfully be retained by the university even if a strike by student assistants persisted for an entire year, during which time the student was unable to satisfy any requirements for satisfactory work in his or her student assistant position.

. *Misconduct, Potential Discharge, Academic Suspension/ Expulsion Disputes*. During and after a strike, employees remain subject to discipline or discharge for certain types of strike-related misconduct. Correspondingly, there is little question that a student assistant engaged in a strike would remain subject to academic discipline, including possible

suspension or expulsion, for a variety of offenses. In such cases, I anticipate that parties will initiate Board proceedings alleging that students were unlawfully suspended or expelled for NLRA-protected activity, even though nothing in the Act permits the Board to devise remedies that relate to an individual's academic standing, separate and apart from his or her "employment."

It is also a mistake to assume that today's decision relates only to the creation of collective-bargaining rights. Our statute involves wide-ranging requirements and obligations. For example, existing Board cases require employers subject to the NLRA to tolerate actions by employees that most reasonable people would find objectionable, and it is unlawful for employers to adopt overly broad work rules to promote respect and civility by employees. Therefore, parents take heed: if you send your teenage sons or daughters to college, the Board majority's decision today will affect their "college experience" in the following ways:

. *Non-Confidential Investigations*. If your son or daughter is sexually harassed by a student assistant and an investigation by the university ensues, the university will violate federal law (the NLRA) if it routinely asks other student-assistant witnesses to keep confidential what is discussed during the university's investigation.

. *Witness Statement Disclosure*. In the above example, witness statements submitted by your son or daughter about sexual harassment by a student assistant must be disclosed to the union, unless (i) the university can prove that the statement's submission was conditioned on confidentiality, and (ii) even then, the statement must be disclosed unless the university can prove that your son or daughter needs protection, or other circumstances outweigh the union's need for the witness statement.

. *Invalidating Rules Promoting Civility*. The university will be found to have violated the NLRA if it requires student assistants to maintain "harmonious interactions and relationships" with other students.

. *Invalidating Rules Barring Profanity and Abuse*. The university cannot adopt a policy against "loud, abusive or foul language" or "false, vicious, profane or malicious statements" by student assistants.

. *Outrageous Conduct by Student Assistants*. The university must permit student assistants to have angry confrontations with university officials in grievance discussions, and the student assistant cannot be lawfully disciplined or removed from his or her position even if he or she repeatedly screams, "I can say anything I want," "I can swear if I want," and "I can do anything I want, and you can't stop me."

. *Outrageous Social Media Postings by Student Assistants*. If a student assistant objects to actions by a professor-supervisor named "Bob," the university must permit the student to

> post a message on Facebook stating: "Bob is such a nasty mother f***er, don't know how to talk to people. F**k his mother and his entire f***ing family."
>
> . *Disrespect and Profanity Directed to Faculty Supervisors*. The university may not take action against a student assistant who screams at a professor-supervisor and calls him a "***king crook," a "***king mother f***ing" and an "a**hole" when the student assistant is complaining about the treatment of student assistants.

The above examples constitute a small sampling of the unfortunate consequences that will predictably follow from the majority's decision to apply our statute to student assistants at colleges and universities. The primary purpose of a university is to educate students, and the Board should not disregard that purpose in finding that student assistants are employees and therefore subject to all provisions of the NLRA.

2. The Board's Processes and Procedures Are Incompatible with Applying the Act to University Student Assistants.

Another frailty associated with applying the NLRA to student assistants at universities relates to the cumbersome and time-consuming nature of the Board's processes and procedures, which makes those processes and procedures especially ill suited to students in a university setting.
….

The Board's handling of alleged unfair labor practices (ULPs) takes even more time. Our procedures require the filing of a ULP charge, which is investigated by one of the Board's regional offices, which decides whether to issue a complaint, and if complaint issues, this is followed by a hearing before an administrative law judge, with posthearing briefing in most cases. After the judge issues a decision, parties have the right to file exceptions to that decision with the Board (in other words, they may appeal), with further briefing by the parties. Ultimately, the Board renders a decision, which may be appealed to a federal court of appeals. In addition, when the Board has found a violation and has ordered backpay and other remedial measures, there are additional compliance proceedings handled by the Board's regional offices, which can result in additional hearings before administrative law judges, additional posthearing briefs, supplemental decisions by the judges, and further appeals to the Board and the courts. In spite of everyone's best efforts, this lengthy litigation process consumes substantial time and too often causes unacceptable delays before *any* Board-ordered relief becomes available to the parties. Unfair labor practice cases may easily be litigated for three to five years before the Board issues a decision, and some cases take even longer. See, e.g., *CNN America, Inc.*, 361 NLRB No. 47 (2014) (alleged ULPs requiring 82 days of trial, more than 1,300 exhibits, more than 16,000 transcript pages, and more than 10 years of Board litigation, and the case still remains pending on appeal); *Dubuque Packing Co.*, 287 NLRB 499 (1987), remanded sub nom. *UFCW Local*

150-A v. NLRB, 880 F.2d 1422, 279 U.S. App. D.C. 349 (D.C. Cir. 1989), on remand 303 NLRB 386 (1991), enfd. in relevant part sub nom. *UFCW Local 150-A v. NLRB*, 1 F.3d 24, 303 U.S. App. D.C. 65 (D.C. Cir. 1993), cert. granted 511 U.S. 1016, 114 S. Ct. 1395, 128 L. Ed. 2d 69 (1994), cert. dismissed 511 U.S. 1138, 114 S. Ct. 2157, 128 L. Ed. 2d 882 (1994) (alleged ULPs requiring 13 years of Board and court litigation).

In the time it takes a typical NLRA case to be litigated and decided by the Board and the courts, the academic world may experience developments that dramatically change or even eliminate entire fields of study. Moreover, not only does a student assistant's position have a fixed duration, but the student status of the individual occupying that position may itself come to an end long before a Board case affecting him or her is resolved. Students generally attend university for the purpose of doing something else--i.e., to obtain post-graduation employment, or to go on to post-doctoral or other post-graduate studies. Moreover, it is not uncommon for students to change majors, and faculty members also come and go. In these respects, treating student assistants as employees under the NLRA is especially poorly matched to the Board's representation and ULP procedures.

3. Other Considerations Undermine the Appropriateness of the Petitioned-For Bargaining Unit.

I believe the Board should find that student assistants are not employees for purposes of Section 2(3) of the Act. Therefore, I need not reach whether the bargaining unit sought in the instant case is an appropriate bargaining unit. Nonetheless, I will address two considerations that render the petitioned-for unit particularly problematic.

Preliminarily, however, I address an issue that is prior to appropriate-unit considerations: the majority's decision to reject not only *Brown University* but an unbroken, decades-old line of precedent holding that research assistants are not employees under Section 2(3) of the Act. ….

Turning to appropriate-unit considerations, I believe the Board cannot find that the broad array of student assistants here share a sufficient community of interests to warrant their inclusion in a single bargaining unit. The Petitioner seeks to represent all "student employees" who engage in "instructional services," including "graduate and undergraduate Teaching Assistants," "Teaching Fellows," "Preceptors," "Course Assistants," "Readers," "Graders," "Graduate Research Assistants" and "Departmental Research Assistants." The students within the various classifications in the petitioned-for unit vary considerably in terms of their duties, levels of responsibility, remuneration, and expected length of service. … the evidence in the record demonstrates that what various student officers do and how they are remunerated vary enormously.

For example, some student assistants teach, and research assistants perform research. Course assistants do neither: they perform clerical duties, such as filing and copying, to help faculty administer courses. Generally, doctoral students have greater autonomy and responsibility in

performing their instructional duties than do master's degree candidates and undergraduates. Some doctoral students serve as preceptors, fully designing and implementing their own courses. By contrast, non-doctoral students predominantly grade papers or provide tutoring to their fellow students in laboratory or discussion sections.

Course assistants perform work that is intermittent in nature, and they are paid from Columbia's casual payroll. Remuneration for master's degree students and undergraduates is awarded only during the semesters that the students actually perform duties as student assistants. By contrast, doctoral students receive the same funding during the entire time spent pursuing their degree, whether they are performing duties as a student assistant during a certain semester or academic year or not. In contrast to the intermittent tenure of the course assistants, doctoral students generally must spend at least one year teaching, and sometimes multiple years, in order to obtain their degree. Undergraduate and master's degree students are not required to serve as student assistants in connection with their degree requirements.
In view of these and other fundamental dissimilarities, I believe the petitioned-for unit would likely be inappropriate under any community-of-interest test, including the one stated in *Specialty Healthcare*.

The second consideration that, in my view, undermines the appropriateness of the petitioned-for unit relates to the Board's treatment of temporary employees, who are generally excluded from petitioned-for bargaining units.

CONCLUSION

There is a remarkable, life-changing procedure available for those fortunate enough to undergo it. During this procedure, the participants remain awake, they are closely evaluated while answering complex questions for an extended period of time, and they are monitored while performing other tasks as directed, which includes interacting with others. This life-changing procedure is enormously expensive, and many individuals receive financial assistance while undergoing it. The procedure is so demanding that many participants never complete it. Yet, research shows that successful completion of the procedure improves the rest of the person's life. It produces substantially more opportunities, higher compensation, enhanced satisfaction, and greater upward mobility both for the participants and for future generations.

This describes the role played by colleges and universities in the United States. My colleagues apply a distorted and highly selective lens to this life-changing procedure. Dismissing everything else as "not dispositive," they conclude that some participants satisfy the definition of an "employee" because (i) they perform tasks as directed, and (ii) they receive financial assistance. Even more erroneous, in my view, is the notion that public policy favors taking participants who are trying to complete this life-changing procedure and--while it is being conducted--having

them engage in collective bargaining, which is governed by leverage and the potential clash of economic interests. It will wreak havoc to have economic weapons wielded by or against participants during this expensive procedure, especially since the weapons include strikes and lockouts--which can stop the procedure in its tracks--and the permanent replacement of the participants themselves!

The Board has a responsibility to acknowledge the enormous complexity, demands and benefits associated with every student's potential graduation from a college and university. In particular, I believe my colleagues improperly focus on the NLRA and "wholly ignore other and equally important Congressional objectives," especially the overriding importance of facilitating each student's satisfaction of degree requirements. Given the importance of this policy objective--which is reflected in numerous federal statutes and regulations governing education, and as to which the Board has no expertise--I believe the Board cannot reasonably apply our statute to student assistants at colleges and universities "without a clear expression of an affirmative intention of Congress." No such evidence of Congressional intent exists.

"The 'business' of a university is education," and students are not the means of production--they are the "product." Their successful completion of degree requirements results from the combined commitment of faculty, administrators, and the students' own academic efforts. It is true that the Board has asserted jurisdiction over faculty members in private, non-exempt colleges and universities, notwithstanding the significant differences that exist between the academic and industrial worlds. In my view, however, obstacles to fitting the square peg of the NLRA into the round hole of academia become insuperable when the petitioned-for "employees" are university student assistants.

The question here is not whether colleges and universities should constructively engage their students, including student assistants, in a variety of ways. The question is whether Congress intended--and whether our statute can be reasonably interpreted--to make the NLRA govern the relationship between students and their universities merely because students may occupy a variety of academic positions in connection with their education. As noted above, for most students including student assistants, attending college is the most important investment they will ever make. I do not believe our statute contemplates that it should be governed by bargaining leverage, the potential resort to economic weapons, and the threat or infliction of economic injury by or against students, on the one hand, and colleges and universities, on the other.

For these reasons, and consistent with the Board's prior holding in *Brown University*, I believe the Board should find that the relationship between Columbia and the student assistants in the petitioned-for unit in this matter is primarily educational, and that student assistants are not employees under Section 2(3) of the Act.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. August 23, 2016

5.7.1. Timeline

Date	Case Name	Decision	Notes
March 13, 2015	*Columbia University* National Labor Relations Board (2015)	Petitioner's request for review of petition without hearing is granted as it raises issues warranting review. Regional Director's dismissal of the petition is reversed, the petition is reinstated, and the case is remanded to the Regional Director for a hearing and issuance of a decision.	**First filed in 2015** • Link
August 23, 2016	*Trs. of Columbia University* National Labor Relations Board (2016)	Paid students who have a common-law employment relationship with their universities qualify as statutory employees under the National Labor Relations Act.	• Link
December 16, 2017	*Trs. of Columbia University & Graduate Workers of Columbia-GWU* National Labor Relations Board (2017)	Certified that a majority of the valid ballots have been cast, and that it is the exclusive collective-bargaining representative of the employees in the appropriate unit.	• Link

5.7.2 Notes

i. Flip-o-Rama!

The Board is a notoriously fickle agency. With every change in Presidential administrations, so does the Board change federal labor law. And it's not like a lot is pending on the Board's decisions– just the laws governing collective action and bargaining for about 120 million workers. And yet the Board changes the fundamental elements of labor law routinely. Here, the Board describes the frequent changes to the most basic legal unit underlying our labor laws: who is an employee.

Labor law applies to covered employees per Section 2(3) of the NLRA, so defining who is a covered employee bears, well, everything the Act has to offer. The stakes are enormous and the implications are significant. And yet, over the course of about 30 years the Board decided, and flipped, and flopped, and flipped again on this question. And if this is how the Board treats fundamental questions like the basic definition of covered employee, one can only guess how less important issues are covered.

The implications of this flippiness of the Board cannot be understated. To know present labor law one must know "who the president is." To make sense of past decisions one must first determine whether that was an "Obama Board" or a "Bush Board?" We simply cannot say whether *Columbia* will be good law if a new president will win the elections. The state of labor law as a law is "SAD" as one president might put it.

Are we satisfied with this state of the law?

ii. Fickle but Good?

Is the *Columbia* decision a good decision? Considering how temporary Board decisions are, we might care more about this question than other, more stable, areas of law. How can we tell who is right or wrong? Is the majority, arguing for a broad coverage of the Act, rejecting all policy concerns with regards to the application of the Act on higher education correct? Or is the dissent, calling for a narrow interpretation of the term employee to exclude students, correct?

One possibility is to look at the dissent's list of doom-scenarios, which is a peculiar input that suggests that those considerations ought to be weighed to determine who is a covered employee under the Act. Which of those came into fruition, which of those didn't, and what were the policy upshots of including graduate students? Does the fact that graduate students (and some undergraduates) are winning board elections (by significant margins) and collective bargaining agreements, and the world has not collapsed mean that the decision was a good one? How will a future Republican-controlled Board treat those questions?

iii. There's Something in the Dissent (1)

There is something non-economical about the relationship between the University and graduate students. The relationship between me as a professor and my teaching assistant is not just an exchange of services for money (on my end at least). It is also educational. I owe my TAs and RAs more than the sum of their employment terms and conditions. And I do believe that this is a common experience for professors. It is true not just as a descriptive matter, but also as an ought. As students at the University they are owed more than just being employees; the relationship *ought* to be different.

The dissent seems to think that if a relationship is more complex, then the NLRA is not a good fit. Their point is, examined in the best possible light, that a law meant to overcome economic subordination is a poor fit for a system built on a different mode, an educational hierarchy, let's call it. Knock the hierarchy out of the university, and what you are left with is something different.

Assume, for the sake of the argument, that the dissent is correct, and my experience as a professor has some merit, *i.e.*, that the relationship between the TA and the university is more than just economic. What does it do to the outcome of the case?

iv. There's something in the Dissent (2)

One key difference between the dissent and the majority opinion revolves around the importance of effects. The dissent suggests over and over again the catastrophic resaults that would follow student worker unionization. This emphasis is unhinged from reality. Student workers have been organizing in the US for decades before Columbia, and in other countries, and in various forms for a long, long time before *Columbia* was decided.

But there is something to the dissent. That something is the importance of real-world outcomes of legal decisions. The majority is hyper legalistic in its decision, ignoring, almost entirely the effects of unionizing. This is bizarre in one important way: the National Labor Relations Board as an institution is unique in its labor relations *expertise*. Such expertise justifies a critique of the dissent in being unhinged but also underlie a critique of the majority for its own – legalistic form – unhingeness. If the Board has any added value to the adjudication of labor disputes (a questionable proposition) is in its labor relations expertise. One important form of expertise is

knowing, for example, about likely effects and outcomes of the resolving a dispute one way or another.

Over the last hundred years the Board have lost track of such an expertise. Which is, again, SAD.

Further reading:

- Hafiz, Hiba, and Ioana Marinescu. "Labor market regulation and worker power." *The University of Chicago Law Review* 90.2 (2023): 469-510.
- *Coal. of Graduate Workers v. Curators of the Univ. of Mo.*, 585 S.W.3d 809 (Mo. Ct. App. 2019)

5.8. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002)

Full decision: (link); **Docket**: (link); **Oral argument**: (link)

Reinquist, C.J.

The National Labor Relations Board (Board) awarded backpay to an undocumented alien who has never been legally authorized to work in the United States. We hold that such relief is foreclosed by federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986 (IRCA).

Petitioner Hoffman Plastic Compounds, Inc. (petitioner or Hoffman), custom-formulates chemical compounds for businesses that manufacture pharmaceutical, construction, and household products. In May 1988, petitioner hired Jose Castro to operate various blending machines that “mix and cook” the particular formulas per customer order. Before being hired for this position, Castro presented documents that appeared to verify his authorization to work in the United States. In December 1988, the United Rubber, Cork, Linoleum, and Plastic Workers of America, AFL–CIO, began a union-organizing campaign at petitioner's production plant. Castro and several other employees supported the organizing campaign and distributed authorization cards to co-workers. In January 1989, Hoffman laid off Castro and other employees engaged in these organizing activities.

Three years later, in January 1992, respondent Board found that Hoffman unlawfully selected four employees, including Castro, for layoff “in order to rid itself of known union supporters” in violation of § 8(a)(3) of the National Labor Relations Act (NLRA)…. To remedy this violation, the Board ordered that Hoffman (1) cease and desist from further violations of the NLRA, (2) post a detailed notice to its employees regarding the remedial order, and (3) offer reinstatement

and backpay to the four affected employees…. Hoffman entered into a stipulation with the Board's General Counsel and agreed to abide by the Board's order.

In June 1993, the parties proceeded to a compliance hearing before an Administrative Law Judge (ALJ) to determine the amount of backpay owed to each discriminatee. On the final day of the hearing, Castro testified that he was born in Mexico and that he had never been legally admitted to, or authorized to work in, the United States…. He admitted gaining employment with Hoffman only after tendering a birth certificate belonging to a friend who was born in Texas. He also admitted that he used this birth certificate to fraudulently obtain a California driver's license and a Social Security card, and to fraudulently obtain employment following his layoff by Hoffman. Neither Castro nor the Board's General Counsel offered any evidence that Castro had applied or intended to apply for legal authorization to work in the United States. Based on this testimony, the ALJ found the Board precluded from awarding Castro backpay or reinstatement as such relief would be contrary to *Sure–Tan, Inc. v. NLRB*, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984), and in conflict with IRCA, which makes it unlawful for employers knowingly to hire undocumented workers or for employees to use fraudulent documents to establish employment eligibility.

In September 1998, four years after the ALJ's decision, and nine years after Castro was fired, the Board reversed with respect to backpay. Citing its earlier decision in A.P.R.A. Fuel Oil Buyers Group, Inc., 320 N.L.R.B. 408, (1995), the Board determined that "the most effective way to accommodate and further the immigration policies embodied in [IRCA] is to provide the protections and remedies of the [NLRA] to undocumented workers in the same manner as to other employees." The Board thus found that Castro was entitled to $66,951 of backpay, plus interest. It calculated this backpay award from the date of Castro's termination to the date Hoffman first learned of Castro's undocumented status, a period of 4½ years. ….
….
This case exemplifies the principle that the Board's discretion to select and fashion remedies for violations of the NLRA, though generally broad, ….is not unlimited, …. Since the Board's inception, we have consistently set aside awards of reinstatement or backpay to employees found guilty of serious illegal conduct in connection with their employment. In *Fansteel*, the Board awarded reinstatement with backpay to employees who engaged in a "sit down strike" that led to confrontation with local law enforcement officials. We set aside the award, saying:

> We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work. ….

Though we found that the employer had committed serious violations of the NLRA, the Board had no discretion to remedy those violations by awarding reinstatement with backpay to employees who themselves had committed serious criminal acts. Two years later, in *Southern S.S. Co*., the Board awarded reinstatement with backpay to five employees whose strike on shipboard had amounted to a mutiny in violation of federal law. We set aside the award, saying:

> It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important [c]ongressional objectives." 316 U.S., at 47.

Although the Board had argued that the employees' conduct did not in fact violate the federal mutiny statute, we rejected this view, finding the Board's interpretation of a statute so far removed from its expertise merited no deference from this Court. Since *Southern S.S. Co*., we have accordingly never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA. Thus, we have precluded the Board from enforcing orders found in conflict with the Bankruptcy Code, see *Bildisco*, at 527–534, 529, n. 9 ("While the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel"), rejected claims that federal antitrust policy should defer to the NLRA, *Connell Constr. Co. v. Plumbers*, 421 U.S. 616, 626 (1975), and precluded the Board from selecting remedies pursuant to its own interpretation of the Interstate Commerce Act, *Carpenters v. NLRB*, 357 U.S. 93, 108–110 (1958).

Our decision in *Sure–Tan* followed this line of cases and set aside an award closely analogous to the award challenged here. There we confronted for the first time a potential conflict between the NLRA and federal immigration policy, as then expressed in the Immigration and Nationality Act (INA) 8 U.S.C. § 1101 et seq. Two companies had unlawfully reported alien-employees to the Immigration and Naturalization Service (INS) in retaliation for union activity. Rather than face INS sanction, the employees voluntarily departed to Mexico. The Board investigated and found the companies acted in violation of §§ 8(a)(1) and (3) of the NLRA. The Board's ensuing order directed the companies to reinstate the affected workers and pay them six months' backpay.
We affirmed the Board's determination that the NLRA applied to undocumented workers, reasoning that the immigration laws "as presently written" expressed only a " 'peripheral concern' " with the employment of illegal aliens. …. "For whatever reason," Congress had not "made it a separate criminal offense" for employers to hire an illegal alien, or for an illegal alien "to accept employment after entering this country illegally." ….Therefore, we found "no reason to conclude that application of the NLRA to employment practices affecting such aliens would necessarily conflict with the terms of the INA."

With respect to the Board's selection of remedies, however, we found its authority limited by federal immigration policy ("In devising remedies for unfair labor practices, the Board is obliged to take into account another 'equally important Congressional objective'. For example, the Board

was prohibited from effectively rewarding a violation of the immigration laws by reinstating workers not authorized to reenter the United States. *Sure–Tan*, 467 U.S., at 903. Thus, to avoid "a potential conflict with the INA," the Board's reinstatement order had to be conditioned upon proof of "the employees' legal reentry." "Similarly," with respect to backpay, we stated: "[T]he employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." "[I]n light of the practical workings of the immigration laws," such remedial limitations were appropriate even if they led to "[t]he probable unavailability of the [NLRA's] more effective remedies." Id., at 904.

The Board cites our decision in *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317 (1994), as authority for awarding backpay to employees who violate federal laws. In *ABF Freight*, we held that an employee's false testimony at a compliance proceeding did not require the Board to deny reinstatement with backpay. The question presented was "a narrow one," limited to whether the Board was obliged to "adopt a rigid rule" that employees who testify falsely under oath automatically forfeit NLRA remedies. There are significant differences between that case and this. First, we expressly did not address whether the Board could award backpay to an employee who engaged in "serious misconduct" unrelated to internal Board proceedings, such as threatening to kill a supervisor (citing *Precision Window Mfg. v. NLRB*, 963 F.2d 1105, 1110 (C.A.8 1992)), or stealing from an employer, 510 U.S., at 322, n. 7 (citing *NLRB v. Commonwealth Foods, Inc*., 506 F.2d 1065, 1068 (C.A.4 1974)). Second, the challenged order did not implicate federal statutes or policies administered by other federal agencies, a "most delicate area" in which the Board must be "particularly careful in its choice of remedy." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 172 (1962). Third, the employee misconduct at issue, though serious, was not at all analogous to misconduct that renders an underlying employment relationship illegal under explicit provisions of federal law. For these reasons, we believe the present case is controlled by the *Southern S.S. Co.* line of cases, rather than by *ABF Freight*.

It is against this decisional background that we turn to the question presented here. The parties and the lower courts focus much of their attention on *Sure–Tan*, particularly its express limitation of backpay to aliens "lawfully entitled to be present and employed in the United States." 467 U.S., at 903. All agree that as a matter of plain language, this limitation forecloses the award of backpay to Castro. Castro was never lawfully entitled to be present or employed in the United States, and thus, under the plain language of *Sure–Tan*, he has no right to claim backpay. The Board takes the view, however, that read in context, this limitation applies only to aliens who left the United States and thus cannot claim backpay without lawful reentry. …we think the question presented here better analyzed through a wider lens, focused as it must be on a legal landscape now significantly changed.

The *Southern S.S. Co*. line of cases established that where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield. Whether or not this was the situation at the time of *Sure–Tan*, it is precisely the situation today. In 1986, two years after *Sure–Tan*, Congress enacted IRCA, a comprehensive scheme prohibiting the employment of illegal aliens in the United States. § 101(a)(1) 8 U.S.C. § 1324a. As we have previously noted, IRCA "forcefully" made combating the employment of illegal aliens central to "[t]he policy of immigration law…. It did so by establishing an extensive "employment verification system," § 1324a(a)(1), designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States, § 1324a(h)(3).3 This verification system is critical to the IRCA regime. To enforce it, IRCA mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work. § 1324a(b). If an alien applicant is unable to present the required documentation, the unauthorized alien cannot be hired. § 1324a(a)(1).

Similarly, if an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's undocumented status. § 1324a(a)(2). Employers who violate IRCA are punished by civil fines, § 1324a(e)(4)(A), and may be subject to criminal prosecution, § 1324a(f)(1). IRCA also makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents. § 1324c(a). It thus prohibits aliens from using or attempting to use "any forged, counterfeit, altered, or falsely made document" or "any document lawfully issued to or with respect to a person other than the possessor" for purposes of obtaining employment in the United States. §§ 1324c(a)(1)-(3). Aliens who use or attempt to use such documents are subject to fines and criminal prosecution. 18 U.S.C. § 1546(b). There is no dispute that Castro's use of false documents to obtain employment with Hoffman violated these provisions.

Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations. The Board asks that we overlook this fact and allow it to award backpay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud. We find, however, that awarding backpay to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer. Therefore, as we have consistently held in like circumstances, the award lies beyond the bounds of the Board's remedial discretion. The Board contends that awarding limited backpay to Castro "reasonably accommodates" IRCA, because, in the Board's view, such an award is not "inconsistent" with IRCA. The Board argues that because the backpay period was closed as of the date Hoffman learned of Castro's illegal status, Hoffman could have employed Castro during the backpay period without violating IRCA.

The Board further argues that while IRCA criminalized the misuse of documents, "it did not make violators ineligible for back pay awards or other compensation flowing from employment secured by the misuse of such documents." This latter statement, of course, proves little: The mutiny statute in Southern S.S. Co., and the INA in Sure–Tan, were likewise understandably silent with respect to such things as backpay awards under the NLRA. What matters here, and what sinks both of the Board's claims, is that Congress has expressly made it criminally punishable for an alien to obtain employment with false documents. There is no reason to think that Congress nonetheless intended to permit backpay where but for an employer's unfair labor practices, an alien-employee would have remained in the United States illegally, and continued to work illegally, all the while successfully evading apprehension by immigration authorities. Far from "accommodating" IRCA, the Board's position, recognizing employer misconduct but discounting the misconduct of illegal alien employees, subverts it.

Indeed, awarding backpay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations. The Board admits that had the INS detained Castro, or had Castro obeyed the law and departed to Mexico, Castro would have lost his right to backpay. …. Castro thus qualifies for the Board's award only by remaining inside the United States illegally. …. Similarly, Castro cannot mitigate damages, a duty our cases require, …. without triggering new IRCA violations, either by tendering false documents to employers or by finding employers willing to ignore IRCA and hire illegal workers. The Board here has failed to even consider this tension. ….

We therefore conclude that allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations. However broad the Board's discretion to fashion remedies when dealing only with the NLRA, it is not so unbounded as to authorize this sort of an award.

Lack of authority to award backpay does not mean that the employer gets off scot-free. The Board here has already imposed other significant sanctions against Hoffman—sanctions Hoffman does not challenge. These include orders that Hoffman cease and desist its violations of the NLRA, and that it conspicuously post a notice to employees setting forth their rights under the NLRA and detailing its prior unfair practices. Hoffman will be subject to contempt proceedings should it fail to comply with these orders. We have deemed such "traditional remedies" sufficient to effectuate national labor policy regardless of whether the "spur and catalyst" of backpay accompanies them. …. As we concluded in Sure–Tan, "in light of the practical workings of the immigration laws," any "perceived deficienc[y] in the NLRA's existing remedial arsenal" must be "addressed by congressional action," not the courts. In light of IRCA, this statement is even truer today.

The judgment of the Court of Appeals is reversed.

It is so ordered.

BREYER, J. with whom STEVENS, J., SOUTER, J. and GINSBURG J., join, dissenting.

I cannot agree that the backpay award before us “runs counter to,” or “trenches upon,” national immigration policy. Ante, at 1282, 1283 (citing the Immigration Reform and Control Act of 1986 (IRCA)). As all the relevant agencies (including the Department of Justice) have told us, the National Labor Relations Board's limited backpay order will not interfere with the implementation of immigration policy. Rather, it reasonably helps to deter unlawful activity that both labor laws and immigration laws seek to prevent. Consequently, the order is lawful.

The Court does not deny that the employer in this case dismissed an employee for trying to organize a union—a crude and obvious violation of the labor laws. …. And it cannot deny that the Board has especially broad discretion in choosing an appropriate remedy for addressing such violations. Nor can it deny that in such circumstances backpay awards serve critically important remedial purposes. Those purposes involve more than victim compensation; they also include deterrence, i.e., discouraging employers from violating the Nation's labor laws. ….

Without the possibility of the deterrence that backpay provides, the Board can impose only future-oriented obligations upon law-violating employers—for it has no other weapons in its remedial arsenal. And in the absence of the backpay weapon, employers could conclude that they can violate the labor laws at least once with impunity. …. Hence the backpay remedy is necessary; it helps make labor law enforcement credible; it makes clear that violating the labor laws will not pay.

Where in the immigration laws can the Court find a “policy” that might warrant taking from the Board this critically important remedial power? Certainly not in any statutory language. The immigration statutes say that an employer may not knowingly employ an illegal alien, that an alien may not submit false documents, and that the employer must verify documentation. …. the statutes' language itself does not explicitly state how a violation is to effect the enforcement of other laws, such as the labor laws. What is to happen, for example, when an employer hires, or an alien works, in violation of these provisions? Must the alien forfeit all pay earned? May the employer ignore the labor laws? More to the point, may the employer violate those laws with impunity, at least once—secure in the knowledge that the Board cannot assess a monetary penalty? The immigration statutes' language simply does not say.

Nor can the Court comfortably rest its conclusion upon the immigration laws' purposes. For one thing, the general purpose of the immigration statute's employment prohibition is to diminish the attractive force of employment, which like a “magnet” pulls illegal immigrants toward the

United States. … To permit the Board to award backpay could not significantly increase the strength of this magnetic force, for so speculative a future possibility could not realistically influence an individual's decision to migrate illegally. ….

To deny the Board the power to award backpay, however, might very well increase the strength of this magnetic force. That denial lowers the cost to the employer of an initial labor law violation (provided, of course, that the only victims are illegal aliens). It thereby increases the employer's incentive to find and to hire illegal-alien employees. Were the Board forbidden to assess backpay against a knowing employer—a circumstance not before us today, …. this perverse economic incentive, which runs directly contrary to the immigration statute's basic objective, would be obvious and serious. But even if limited to cases where the employer did not know of the employee's status, the incentive may prove significant—for, as the Board has told us, the Court's rule offers employers immunity in borderline cases, thereby encouraging them to take risks, i.e., to hire with a wink and a nod those potentially unlawful aliens whose unlawful employment (given the Court's views) ultimately will lower the costs of labor law violations. …. The Court has recognized these considerations in stating that the labor laws must apply to illegal aliens in order to ensure that "there will be no advantage under the NLRA in preferring illegal aliens" and therefore there will be "fewer incentives for aliens themselves to enter." Sure–Tan, supra, at 893–894, 104 S.Ct. 2803. The Court today accomplishes the precise opposite.
....

5.8.1. Timeline

Date	Case Name	Decision	Notes
February 28, 1991	*Hoffman Plastic Compounds* National Labor Relations Board (1991)	Found that Hoffman Plastics had violated the NLRA by laying off its employees	**First filed in 1991** One employee was Jose Castro, who was an undocumented immigrant who forged his birth certificate • Link Supplemental decision filed **September 10, 1991;** Respondent failed to persuasively demonstrate that Castro would've been alid off

			regardless of union involvement, thus his layoff was discriminatory • Link
January 22, 1992	*Hoffman Plastic Compounds, Inc.* National Labor Relations Board (1992)	Board found Respondent in violation of Section 8(a)(1) and (3) of the NLRA.	• Link
November 12, 1993	*Hoffman Plastics Compounds, Inc.* National Labor Relations Board (1993)	Respondent must pay back pay plus interest, as required by the Board's order on January 22, 1992.	• Link
September 23, 1998	*Hoffman Plastic Compounds, Inc. and Casimiro Arauz* National Labor Relations Board (1998)	Found that not awarding backpay for employees (including Jose Castro) was a violation of the NLRA	• Link
Argued September 27, 2000 **Decided January 16, 2001**	*Hoffman Plastic v. NLRB* United States Court of Appeals for the District of Columbia Circuit (2001)	The court denied the petition for review and granted the cross-application for enforcement.	Backpay for undocumented employees under the NLRA did not violate the Immigration Reform and Control Act of 1986 or prior Supreme Court holdings. • Link
September 25, 2001	*Hoffman Plastic v. NLRB* Supreme Court of the United States (2002)	Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted.	• Link

Argued January 15, 2002 **Decided March 27, 2002**	*Hoffman Plastic v. NLRB* Supreme Court of the United States (2002)	Reversed the decision of the appellate court.	Back pay may not be awarded to aliens not authorized to work in the United States. • Link
August 27, 2002	*Hoffman Plastic v. NLRB* United States Court of Appeals for the District of Columbia Circuit (2002)	Vacated the NLRB's decision and order and denied the cross-application for enforcement.	• Link

5.9. Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992)
Full decision: (link); **Docket**: (link); **Oral argument**: (link)

JUSTICE THOMAS delivered the opinion of the Court.

This case requires us to clarify the relationship between the rights of employees under § 7 of the National Labor Relations Act (NLRA or Act), 49 Stat. 452, as amended, 29 U. S. C. § 157, and the property rights of their employers.

I

This case stems from the efforts of Local 919 of the United Food and Commercial Workers Union, AFL-CIO, to organize employees at a retail store in Newington, Connecticut, owned and operated by petitioner Lechmere, Inc. The store is located in the Lechmere Shopping Plaza, which occupies a roughly rectangular tract measuring approximately 880 feet from north to south and 740 feet from east to west. Lechmere's store is situated at the Plaza's south end, with the main parking lot to its north. A strip of 13 smaller "satellite stores" not owned by Lechmere runs along the west side of the Plaza, facing the parking lot. To the Plaza's east (where the main entrance is located) runs the Berlin Turnpike, a four-lane divided highway. The parking lot, however, does not abut the Turnpike; they are separated by a 46-foot-wide grassy strip, broken only by the Plaza's entrance. The parking lot is owned jointly by Lechmere and the developer of the satellite stores. The grassy strip is public property (except for a 4-foot-wide band adjoining the parking lot, which belongs to Lechmere).

The union began its campaign to organize the store's 200 employees, none of whom was represented by a union, in June 1987. After a full-page advertisement in a local newspaper drew

little response, nonemployee union organizers entered Lechmere's parking lot and began placing handbills on the windshields of cars parked in a corner of the lot used mostly by employees. Lechmere's manager immediately confronted the organizers, informed them that Lechmere prohibited solicitation or handbill distribution of any kind on its property, and asked them to leave. They did so, and Lechmere personnel removed the handbills. The union organizers renewed this handbilling effort in the parking lot on several subsequent occasions; each time they were asked to leave and the handbills were removed. The organizers then relocated to the public grassy strip, from where they attempted to pass out handbills to cars entering the lot during hours (before opening and after closing) when the drivers were assumed to be primarily store employees. For one month, the union organizers returned daily to the grassy strip to picket Lechmere; after that, they picketed intermittently for another six months. They also recorded the license plate numbers of cars parked in the employee parking area; with the cooperation of the Connecticut Department of Motor Vehicles, they thus secured the names and addresses of some 41 nonsupervisory employees (roughly 20% of the store's total). The union sent four mailings to these employees; it also made some attempts to contact them by phone or home visits. These mailings and visits resulted in one signed union authorization card.

Alleging that Lechmere had violated the NLRA by barring the nonemployee organizers from its property, the union filed an unfair labor practice charge with respondent National Labor Relations Board (Board). Applying the criteria set forth by the Board in *Fairmont Hotel Co.*, 282 N.L.R.B. 139 (1986), an Administrative Law Judge (ALJ) ruled in the union's favor. *Lechmere, Inc.*, 295 N.L.R.B. 92 (1988). He recommended that Lechmere be ordered, among other things, to cease and desist from barring the union organizers from the parking lot and to post in conspicuous places in the store signs proclaiming in part:

> "WE WILL NOT prohibit representatives of Local 919, United Food and Commercial Workers, AFL-CIO ('the Union') or any other labor organization, from distributing union literature to our employees in the parking lot adjacent to our store in Newington, Connecticut, nor will we attempt to cause them to be removed from our parking lot for attempting to do so."

The Board affirmed the ALJ's judgment and adopted the recommended order, applying the analysis set forth in its opinion in *Jean Country*, 291 N.L.R.B. 11 (1988), which had by then replaced the short-lived *Fairmont Hotel* approach. 295 N.L.R.B. 92 (1989). A divided panel of the United States Court of Appeals for the First Circuit denied Lechmere's petition for review and enforced the Board's order. 914 F.2d 313 (1990). This Court granted certiorari, 499 U.S. 918 (1991).

II

A

Section 7 of the NLRA provides in relevant part that "employees shall have the right to self-organization, to form, join, or assist labor organizations." 29 U. S. C. § 157. Section 8(a)(1) of the Act, in turn, makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7]." 29 U.S.C. § 158(a)(1). By its plain terms, thus, the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers. In *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), however, we recognized that insofar as the employees' "right of self-organization depends in some measure on [their] ability . . . to learn the advantages of self-organization from others," *id.*, at 113, § 7 of the NLRA may, in certain limited circumstances, restrict an employer's right to exclude nonemployee union organizers from his property. It is the nature of those circumstances that we explore today.

Babcock arose out of union attempts to organize employees at a factory located on an isolated 100-acre tract. The company had a policy against solicitation and distribution of literature on its property, which it enforced against all groups. About 40% of the company's employees lived in a town of some 21,000 persons near the factory; the remainder were scattered over a 30-mile radius. Almost all employees drove to work in private cars and parked in a company lot that adjoined the fenced-in plant area. The parking lot could be reached only by a 100-yard-long driveway connecting it to a public highway. This driveway was mostly on company-owned land, except where it crossed a 31-foot-wide public right-of-way adjoining the highway. Union organizers attempted to distribute literature from this right-of-way. The union also secured the names and addresses of some 100 employees (20% of the total) and sent them three mailings. Still other employees were contacted by telephone or home visit.

The union successfully challenged the company's refusal to allow nonemployee organizers onto its property before the Board. While acknowledging that there were alternative, nontrespassory means whereby the union could communicate with employees, the Board held that contact at the workplace was preferable. *The Babcock & Wilcox Co.*, 109 N.L.R.B. 485, 493-494 (1954). "The right to distribute is not absolute, but must be accommodated to the circumstances. Where it is impossible or unreasonably difficult for a union to distribute organizational literature to employees entirely off of the employer's premises, distribution on a nonworking area, such as the parking lot and the walkways between the parking lot and the gate, may be warranted." *Id.*, at 493. Concluding that traffic on the highway made it unsafe for the union organizers to distribute leaflets from the right-of-way and that contacts through the mails, on the streets, at employees' homes, and over the telephone would be ineffective, the Board ordered the company to allow the organizers to distribute literature on the company's parking lot and exterior walkways. *Id.*, at 486-487.

The Court of Appeals for the Fifth Circuit refused to enforce the Board's order, *NLRB* v. *Babcock & Wilcox Co.*, 222 F.2d 316 (1955), and this Court affirmed. While

recognizing that "the Board has the responsibility of 'applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms,'" 351 U.S. at 111-112 (quoting *NLRB* v. *Stowe Spinning Co.*, 336 U.S. 226, 231 (1949)), we explained that the Board had erred by failing to make the critical distinction between the organizing activities of employees (to whom § 7 guarantees the right of self-organization) and nonemployees (to whom § 7 applies only derivatively). Thus, while "no restriction may be placed on the employees' right to discuss self-organization *among themselves*, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline," 351 U.S. at 113 (emphasis added) (citing *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 803 (1945)), "no such obligation is owed nonemployee organizers," 351 U.S. at 113. As a rule, then, an employer cannot be compelled to allow distribution of union literature by nonemployee organizers on his property. As with many other rules, however, we recognized an exception. Where "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them," *ibid.*, employers' property rights may be "required to yield to the extent needed to permit communication of information on the right to organize," *id.*, at 112.

Although we have not had occasion to apply *Babcock's* analysis in the ensuing decades, we have described it in cases arising in related contexts. Two such cases, *Central Hardware Co.* v. *NLRB*, 407 U.S. 539 (1972), and *Hudgens* v. *NLRB*, 424 U.S. 507 (1976), involved activity by union supporters on employer-owned property. The principal issue in both cases was whether, based upon *Food Employees* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), the First Amendment protected such activities. In both cases we rejected the First Amendment claims, and in *Hudgens* we made it clear that *Logan Valley* was overruled. Having decided the cases on constitutional grounds, we remanded them to the Board for consideration of the union supporters' § 7 claims under *Babcock*. In both cases, we quoted approvingly *Babcock's* admonition that accommodation between employees' § 7 rights and employers' property rights "must be obtained with as little destruction of one as is consistent with the maintenance of the other," 351 U.S. at 112. See *Central Hardware, supra*, at 544; *Hudgens, supra*, at 521, 522. There is no hint in *Hudgens* and *Central Hardware*, however, that our invocation of *Babcock's* language of "accommodation" was intended to repudiate or modify *Babcock's* holding that an employer need not accommodate nonemployee organizers unless the employees are otherwise inaccessible. Indeed, in *Central Hardware* we expressly noted that nonemployee organizers cannot claim even a limited right of access to a nonconsenting employer's property until "after the requisite need for access to the employer's property has been shown." 407 U.S. at 545.

If there was any question whether *Central Hardware* and *Hudgens* changed § 7 law, it should have been laid to rest by *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. 180 (1978). As in *Central Hardware* and *Hudgens*, the substantive § 7 issue in *Sears* was a subsidiary one; the case's primary focus was on the circumstances under which the NLRA pre-empts state law. Among other things, we held in *Sears* that arguable § 7 claims do not pre-empt state trespass law, in large part because the trespasses of nonemployee union organizers are "far more likely to

be unprotected than protected," 436 U.S. at 205; permitting state courts to evaluate such claims, therefore, does not "create an unacceptable risk of interference with conduct which the Board, and a court reviewing the Board's decision, would find protected," *ibid.* This holding was based upon the following interpretation of *Babcock*:

> "While *Babcock* indicates that an employer may not always bar nonemployee union organizers from his property, his right to do so remains the general rule. To gain access, *the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists* or that the employer's access rules discriminate against union solicitation. That the burden imposed on the union is a heavy one is evidenced by the fact that the balance struck by the Board and the courts under the *Babcock* accommodation principle has rarely been in favor of trespassory organizational activity." 436 U.S. at 205.

We further noted that, in practice, nonemployee organizational trespassing had generally been prohibited except where "unique obstacles" prevented nontrespassory methods of communication with the employees. *Id.*, at 205-206, n.41.

B

Jean Country, as noted above, represents the Board's latest attempt to implement the rights guaranteed by § 7. It sets forth a three-factor balancing test:

> "In all access cases our essential concern will be [1] the degree of impairment of the Section 7 right if access should be denied, as it balances against [2] the degree of impairment of the private property right if access should be granted. We view the consideration of [3] the availability of reasonably effective alternative means as especially significant in this balancing process." 291 N.L.R.B. at 14.

The Board conceded that this analysis was unlikely to foster certainty and predictability in this corner of the law, but declared that "as with other legal questions involving multiple factors, the 'nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer.'" *Ibid.* (quoting *Electrical Workers* v. *NLRB*, 366 U.S. 667, 674 (1961)).
….

In *Babcock*, as explained above, we held that the Act drew a distinction "of substance," 351 U.S. at 113, between the union activities of employees and nonemployees. In cases involving *employee* activities, we noted with approval, the Board "balanced the conflicting interests of employees to receive information on self-organization on the company's property from fellow employees during nonworking time, with the employer's right to control the use of

his property." *Id.*, at 109-110. In cases involving *nonemployee* activities (like those at issue in *Babcock* itself), however, the Board was not permitted to engage in that same balancing (and we reversed the Board for having done so). …. *Babcock's* teaching is straightforward: § 7 simply does not protect nonemployee union organizers *except* in the rare case where "the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels," 351 U.S. at 112. Our reference to "reasonable" attempts was nothing more than a commonsense recognition that unions need not engage in extraordinary feats to communicate with inaccessible employees -- *not* an endorsement of the view (which we expressly rejected) that the Act protects "reasonable" trespasses. Where reasonable alternative means of access exist, § 7's guarantees do not authorize trespasses by nonemployee organizers, *even* (as we noted in *Babcock, ibid.*) "under . . . reasonable regulations" established by the Board.

Jean Country, which applies broadly to "all access cases," 291 N.L.R.B. at 14, misapprehends this critical point. Its principal inspiration derives not from *Babcock*, but from the following sentence in *Hudgens:* "The locus of the accommodation [between § 7 rights and private property rights] may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." 424 U.S. at 522. From this sentence the Board concluded that it was appropriate to approach every case by balancing § 7 rights against property rights, with alternative means of access thrown in as nothing more than an "especially significant" consideration. As explained above, however, *Hudgens* did not purport to modify *Babcock*, much less to alter it fundamentally in the way *Jean Country* suggests. To say that our cases require accommodation between employees' and employers' rights is a true but incomplete statement, for the cases also go far in establishing the *locus* of that accommodation where nonemployee organizing is at issue. So long as nonemployee union organizers have reasonable access to employees outside an employer's property, the requisite accommodation has taken place. It is *only* where such access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employers' rights as described in *Hudgens*. At least as applied to nonemployees, *Jean Country* impermissibly conflates these two stages of the inquiry -- thereby significantly eroding *Babcock's* general rule that "an employer may validly post his property against nonemployee distribution of union literature," 351 U.S. at 112. We reaffirm that general rule today, and reject the Board's attempt to recast it as a multifactor balancing test.

C

The threshold inquiry in this case, then, is whether the facts here justify application of *Babcock's* inaccessibility exception. The ALJ below observed that "the facts herein convince me that reasonable alternative means [of communicating with Lechmere's employees] *were* available to the Union," 295 N.L.R.B., at 99 (emphasis added). Reviewing the ALJ's decision under *Jean Country*, however, the Board reached a different conclusion on this

point, asserting that "there was no reasonable, effective alternative means available for the Union to communicate its message to [Lechmere's] employees." *Id.*, at 93.

We cannot accept the Board's conclusion, because it "rest[s] on erroneous legal foundations." As we have explained, the exception to *Babcock's* rule is a narrow one. It does not apply wherever nontrespassory access to employees may be cumbersome or less-than-ideally effective, but only where "the *location of a plant and the living quarters of the employees* place the employees *beyond the reach* of reasonable union efforts to communicate with them," 351 U.S. at 113 (emphasis added). Classic examples include logging camps, see *NLRB* v. *Lake Superior Lumber Corp.*, 167 F.2d 147 (CA6 1948); mining camps, see *Alaska Barite Co.*, 197 N.L.R.B. 1023 (1972), enforced mem., 83 LRRM 2992 (CA9), cert. denied, 414 U.S. 1025 (1973); and mountain resort hotels, see *NLRB* v. *S & H Grossinger's Inc.*, 372 F.2d 26 (CA2 1967). *Babcock's* exception was crafted precisely to protect the § 7 rights of those employees who, by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society. The union's burden of establishing such isolation is, as we have explained, "a heavy one," *Sears, supra*, at 205, and one not satisfied by mere conjecture or the expression of doubts concerning the effectiveness of nontrespassory means of communication.

The Board's conclusion in this case that the union had no reasonable means short of trespass to make Lechmere's employees aware of its organizational efforts is based on a misunderstanding of the limited scope of this exception. Because the employees do not reside on Lechmere's property, they are presumptively not "beyond the reach," *Babcock*, 351 U.S. at 113, of the union's message. Although the employees live in a large metropolitan area (Greater Hartford), that fact does not in itself render them "inaccessible" in the sense contemplated by *Babcock*. See *Monogram Models, Inc.*, 192 N.L.R.B. 705, 706 (1971). Their accessibility is suggested by the union's success in contacting a substantial percentage of them directly, via mailings, phone calls, and home visits. Such direct contact, of course, is not a necessary element of "reasonably effective" communication; signs or advertising also may suffice. In this case, the union tried advertising in local newspapers; the Board said that this was not reasonably effective because it was expensive and might not reach the employees. 295 N.L.R.B. at 93. Whatever the merits of that conclusion, other alternative means of communication were readily available. Thus, signs (displayed, for example, from the public grassy strip adjoining Lechmere's parking lot) would have informed the employees about the union's organizational efforts. (Indeed, union organizers picketed the shopping center's main entrance for months as employees came and went every day.) *Access* to employees, not *success* in winning them over, is the critical issue -- although success, or lack thereof, may be relevant in determining whether reasonable access exists. Because the union in this case failed to establish the existence of any "unique obstacles," *Sears*, 436 U.S. at 205-206, n. 41, that frustrated access to Lechmere's employees, the Board erred in concluding that Lechmere committed an unfair labor practice by barring the nonemployee organizers from its property.

The judgment of the First Circuit is therefore reversed, and enforcement of the Board's order is denied.

It is so ordered.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

….

For several reasons, the Court errs in this case. First, that *Babcock* stated that inaccessibility would be a reason to grant access does not indicate that there would be no other circumstance that would warrant entry to the employer's parking lot and would satisfy the Court's admonition that accommodation must be made with as little destruction of property rights as is consistent with the right of employees to learn the advantages of self-organization from others. Of course the union must show that its "reasonable efforts," without access, will not permit proper communication with employees. But I cannot believe that the Court in *Babcock* intended to confine the reach of such general considerations to the single circumstance that the Court now seizes upon. If the Court in *Babcock* indicated that nonemployee access to a logging camp would be required, it did not say that only in such situations could nonemployee access be permitted. Nor did *Babcock* require the Board to ignore the substantial difference between the entirely private parking lot of a secluded manufacturing plant and a shopping center lot which is open to the public without substantial limitation. Nor indeed did *Babcock* indicate that the Board could not consider the fact that employees' residences are scattered throughout a major metropolitan area; *Babcock* itself relied on the fact that the employees in that case lived in a compact area which made them easily accessible.

Moreover, the Court in *Babcock* recognized that actual communication with nonemployee organizers, not mere notice that an organizing campaign exists, is necessary to vindicate § 7 rights. 351 U.S. at 113. If employees are entitled to learn from others the advantages of self-organization, *ibid.*, it is singularly unpersuasive to suggest that the union has sufficient access for this purpose by being able to hold up signs from a public grassy strip adjacent to the highway leading to the parking lot.

Second, the Court's reading of *Babcock* is not the reading of that case reflected in later opinions of the Court. We have consistently declined to define the principle of *Babcock* as a general rule subject to narrow exceptions, and have instead repeatedly reaffirmed that the standard is a neutral and flexible rule of accommodation. In *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 544 (1972), we explicitly stated that the "guiding principle" for adjusting conflicts between § 7 rights and property rights enunciated in *Babcock* is that contained in its neutral "accommodation" language. *Hudgens* v. *NLRB*, 424 U.S. 507 (1976), gave this Court the occasion to provide direct guidance to the Board on this issue. In that case, we emphasized *Babcock's* necessity-to-

accommodate admonition, pointed out the differences between *Babcock* and *Hudgens*, and left the balance to be struck by the Board. "The locus of that accommodation . . . may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance." 424 U.S. at 522. ....

....

5.9.1. Timeline

Date	Case Name	Decision	Notes
March 22, 1988	*United Food & Commercial Workers Union, Local 919 v. Lechmere, Inc.* United States District Court for the District of Connecticut (1988)	The store owner's motion to dismiss was granted.	**First filed in 1988** Complaint: union alleged that the owner violated the state Constitution by failing to state a claim upon which relief was granted • Link
June 15, 1989	*Lechmere, Inc., and United Food and Commercial Workers, AFL-CIO* National Labor Relations Board (1989)	Found that Lechmere violated Section 8(a)(1) of the National Labor Relations Act.	Refused to allow the union representatives to engage in organizing. • Link

Septembe r 17, 1990	*Lechmere, Inc. v. NLRB* United States Court of Appeals for the First Circuit (1990)	Enforced the NLRB's order.	Employer violated the NLRA because respondent's conclusion that no other reasonably effective means of communication were open to a union was supportable. Holding that petitioner violated the NLRA by barring the union's representatives from organizational activity was free from legal infirmity. • Link
January 27, 1992	*Lechmere, Inc. v. NLRB* Supreme Court of the United States (1992)	Reversed the judgment of the Court of Appeals and denied enforcement of the NLRB's order against the company to cease and desist from unfair labor practices.	Nonemployee union organizers have a right to enter an employer's property only if the locations of the plant and the employees' living quarters make the employees inaccessible elsewhere. • Link

5.10. NLRB v. Gissel Packing Co. (1969)

Full decision: (link); **Docket**: (link); **Oral argument**: (link)

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases involve …. whether certain specific statements made by an employer to his employees constituted such an election-voiding unfair labor practice and thus fell outside the protection of the First Amendment and § 8 (c) of the Act, 29 U. S. C. § 158 (c). For reasons given below, we answer [this question] in the affirmative.

I.

Of the four cases before us, three -- *Gissel Packing Co., Heck's Inc*., and *General Steel Products, Inc.* -- were consolidated following separate decisions in the Court of Appeals for the Fourth Circuit and brought here by the National Labor Relations Board in No. 573. Food Store Employees Union, Local No. 347, the petitioning Union in *Gissel*, brought that case here in a separate petition in No. 691. All three cases present the same legal issues in similar, uncomplicated factual settings that can be briefly described together. The fourth case, No. 585 (*Sinclair Company*), brought here from the Court of Appeals for the First Circuit and argued separately, presents many of the same questions and will thus be disposed of in this opinion; but because the validity of some of the Board's factual findings are under attack on First Amendment grounds, detailed attention must be paid to the factual setting of that case.

Nos. 573 and 691.

In each of the cases from the Fourth Circuit, the course of action followed by the Union and the employer and the Board's response were similar. In each case, the Union waged an organizational campaign, obtained authorization cards from a majority of employees in the appropriate bargaining unit, and then, on the basis of the cards, demanded recognition by the employer. All three employers refused to bargain on the ground that authorization cards were inherently unreliable indicators of employee desires; and they either embarked on, or continued, vigorous antiunion campaigns that gave rise to numerous unfair labor practice charges. In *Gissel*, where the employer's campaign began almost at the outset of the Union's organizational drive, the Union (petitioner in No. 691), did not seek an election, but instead filed three unfair labor practice charges against the employer, for refusing to bargain in violation of § 8 (a)(5), for coercion and intimidation of employees in violation of § 8 (a)(1), and for discharge of Union adherents in violation of § 8 (a)(3).[1] In *Heck's* an election sought by the Union was never held because of nearly identical unfair labor practice charges later filed by the Union as a result of the employer's antiunion campaign, initiated after the Union's recognition demand.[2] And in *General Steel*, an election petitioned for by the Union and won by the employer was set aside by the Board because of the unfair labor practices committed by the employer in the pre-election period.[3]

In each case, the Board's primary response was an order to bargain directed at the employers, despite the absence of an election in *Gissel* and *Heck's* and the employer's victory in *General Steel*. More specifically the Board found in each case (1) that the Union had obtained valid authorization cards[4] from a majority of the employees in the bargaining unit and was thus entitled to represent the employees for collective bargaining purposes; and (2) that the employer's refusal to bargain with the Union in violation of § 8 (a)(5) was motivated, not by a "good faith" doubt of the Union's majority status, but by a desire to gain time to dissipate that status. The Board based its conclusion as to the lack of good faith doubt on the fact that the employers had committed substantial unfair

labor practices during their antiunion campaign efforts to resist recognition. Thus, the Board found that all three employers had engaged in restraint and coercion of employees in violation of § 8 (a)(1) -- in *Gissel*, for coercively interrogating employees about Union activities, threatening them with discharge, and promising them benefits; in *Heck's*, for coercively interrogating employees, threatening reprisals, creating the appearance of surveillance, and offering benefits for opposing the Union; and in *General Steel*, for coercive interrogation and threats of reprisals, including discharge. In addition, the Board found that the employers in *Gissel* and *Heck's* had wrongfully discharged employees for engaging in Union activities in violation of § 8 (a)(3). And, because the employers had rejected [*584] the card-based bargaining demand in bad faith, the Board found that all three had refused to recognize the Unions in violation of § 8 (a)(5).

Only in *General Steel* was there any objection by an employer to the validity of the cards and the manner in which they had been solicited, and the doubt raised by the evidence was resolved in the following manner. The customary approach of the Board in dealing with allegations of misrepresentation by the Union and misunderstanding by the employees of the purpose for which the cards were being solicited has been set out in *Cumberland Shoe Corp*., 144 N. L. R. B. 1268 (1963) and reaffirmed in *Levi Strauss & Co*., 172 N. L. R. B. No. 57, 68 L. R. R. M. 1338 (1968). Under the *Cumberland Shoe* doctrine, if the card itself is unambiguous (*i.e*., states on its face that the signer authorizes the Union to represent the employee for collective bargaining purposes and not to seek an election), it will be counted unless it is proved that the employee was told that the card was to be used *solely* for the purpose of obtaining an election. In *General Steel*, the trial examiner considered the allegations of misrepresentation at length and, applying the Board's customary analysis, rejected the claims with findings that were adopted by the Board and are reprinted in the margin.[5]

Consequently, the Board ordered the companies to cease and desist from their unfair labor practices, to offer reinstatement and back pay to the employees who had been discriminatorily discharged, to bargain with the Unions on request, and to post the appropriate notices.

On appeal, the Court of Appeals for the Fourth Circuit, in *per curiam* opinions in each of the three cases (398 F.2d 336, 337, 339), sustained the Board's findings as to the §§ 8 (a)(1) and (3) violations, but rejected the Board's findings that the employers' refusal to bargain violated § 8 (a)(5) and declined to enforce those portions of the Board's orders directing the respondent companies to bargain in good faith. The court based its § 8 (a)(5) rulings on its 1967 decisions raising the same fundamental issues, *Crawford Mfg. Co*. v. *NLRB*, 386 F.2d 367, cert. denied, 390 U.S. 1028 (1968); *NLRB* v. *Logan Packing Co*., 386 F.2d 562; *NLRB* v. *Sehon Stevenson & Co., Inc*., 386 F.2d 551. The court in those cases held that the 1947 Taft-Hartley amendments to the Act, which permitted the Board to resolve representation disputes by certification under § 9 (c) only by secret ballot election, withdrew from the Board the authority to order an employer to bargain under § 8 (a)(5) on the basis of cards, in the absence of NLRB certification, unless the employer knows independently of the cards that there is in fact no representation dispute. The court held that the cards themselves were so inherently unreliable that their use gave an employer

virtually an automatic, good faith claim that such a dispute existed, for which a secret election was necessary. Thus, these rulings established that a company could not be ordered to bargain unless (1) there was no question about a Union's majority status (either because the employer agreed the cards were valid or had conducted his own poll so indicating), or (2) the employer's §§ 8 (a)(1) and (3) unfair labor practices committed during the representation campaign were so extensive and pervasive that a bargaining order was the only available Board remedy irrespective of a card majority.

Thus based on the earlier decisions, the court's reasoning in these cases was brief, as indicated by the representative holding in *Heck's*:

> We have recently discussed the unreliability of the cards, in the usual case, in determining whether or not a union has attained a majority status and have concluded that an employer is justified in entertaining a good faith doubt of the union's claims when confronted with a demand for recognition based solely upon union authorization cards. We have also noted that the National Labor Relations Act after the Taft-Hartley amendments provides for an election as the sole basis of a certification and restricts the Board to the use of secret ballots for the resolution of representation questions. This is not one of those extraordinary cases in which a bargaining order might be an appropriate remedy for pervasive violations of § 8 (a)(1). It is controlled by our recent decisions and their reasoning. . . . There was not substantial evidence to support the findings of the Board that Heck's, Inc. had no good faith doubt of the unions' claims of majorities." 398 F.2d, at 338-339.

No. 585.

In No. 585, the factual pattern was quite similar. The petitioner, a producer of mill rolls, wire, and related products at two plants in Holyoke, Massachusetts, was shut down for some three months in 1952 as the result of a strike over contract negotiations with the American Wire Weavers Protective Association, the representative of petitioner's journeymen and apprentice wire weavers from 1933 to 1952. The Company subsequently reopened without a union contract, and its employees remained unrepresented through 1964, when the Company was acquired by an Ohio corporation, with the Company's former president continuing as head of the Holyoke, Massachusetts, division. In July 1965, the International Brotherhood of Teamsters, Local Union No. 404, began an organizing campaign among petitioner's Holyoke employees and by the end of the summer had obtained authorization cards from 11 of the Company's 14 journeymen wire weavers choosing the Union as their bargaining agent. On September 20, the Union notified petitioner that it represented a majority of its wire weavers, requested that the Company bargain with it, and offered to submit the signed cards to a neutral third party for authentication. After petitioner's president declined the Union's request a week later, claiming, *inter alia*, that he had a

good faith doubt of majority status because of the cards' inherent unreliability, the Union petitioned, on November 8, for an election that was ultimately set for December 9.

When petitioner's president first learned of the Union's drive in July, he talked with all of his employees in an effort to dissuade them from joining a union. He particularly emphasized the results of the long 1952 strike, which he claimed "almost put our company out of business," and expressed worry that the employees were forgetting the "lessons of the past." He emphasized, secondly, that the Company was still on "thin ice" financially, that the Union's "only weapon is to strike," and that a strike "could lead to the closing of the plant," since the parent company had ample manufacturing facilities elsewhere. He noted, thirdly, that because of their age and the limited usefulness of their skills outside their craft, the employees might not be able to find re-employment if they lost their jobs as a result of a strike. Finally, he warned those who did not believe that the plant could go out of business to "look around Holyoke and see a lot of them out of business." The president sent letters to the same effect to the employees in early November, emphasizing that the parent company had no reason to stay in Massachusetts if profits went down.

During the two or three weeks immediately prior to the election on December 9, the president sent the employees a pamphlet captioned: "Do you want another 13-week strike?" stating, *inter alia*, that: "We have no doubt that the Teamsters Union can again close the Wire Weaving Department and the entire plant by a strike. We have no hopes that the Teamsters Union Bosses will not call a strike. . . . The Teamsters Union is a strike happy outfit." Similar communications followed in late November, including one stressing the Teamsters' "hoodlum control." Two days before the election, the Company sent out another pamphlet that was entitled: "Let's Look at the Record," and that purported to be an obituary of companies in the Holyoke-Springfield, Massachusetts, area that had allegedly gone out of business because of union demands, eliminating some 3,500 jobs; the first page carried a large cartoon showing the preparation of a grave for the Sinclair Company and other headstones containing the names of other plants allegedly victimized by the unions. Finally on the day before the election, the president made another personal appeal to his employees to reject the Union. He repeated that the Company's financial condition was precarious; that a possible strike would jeopardize the continued operation of the plant; and that age and lack of education would make re-employment difficult. The Union lost the election 7-6, and then filed both objections to the election and unfair labor practice charges which were consolidated for hearing before the trial examiner.

The Board agreed with the trial examiner that the president's communications with his employees, when considered as a whole, "reasonably tended to convey to the employees the belief or impression that selection of the Union in the forthcoming election could lead [the Company] to close its plant, or to the transfer of the weaving production, with the resultant loss of jobs to the wire weavers." Thus, the Board found that under the "totality of the circumstances" petitioner's activities constituted a violation of § 8 (a)(1) of the Act. The Board further agreed with the trial examiner that petitioner's activities, because they "also interfered with the exercise of a free and untrammeled choice in the election," and "tended to foreclose the possibility" of holding a fair

election, required that the election be set aside. The Board also found that the Union had a valid card majority (the unambiguous cards, see n. 4, *supra*, went unchallenged) when it demanded recognition initially and that the Company declined recognition, not because of a good faith doubt as to the majority status, but, as the § 8 (a)(1) violations indicated, in order to gain time to dissipate that status -- in violation of § 8 (a)(5). Consequently, the Board set the election aside, entered a cease-and-desist order, and ordered the Company to bargain on request.

On appeal, the Court of Appeals for the First Circuit sustained the Board's findings and conclusions and enforced its order in full. 397 F.2d 157. The court rejected the Company's proposition that the inherent unreliability of authorization cards entitled an employer automatically to insist on an election, noting that the representative status of a union may be shown by means other than an election; the court thus reaffirmed its stance among those circuits disavowing the Fourth Circuit's approach to authorization cards.[6] Because of the conflict among the circuits on the card issues and because of the alleged conflict between First Amendment freedoms and the restrictions placed on employer speech by § 8 (a)(1) in *Sinclair*, No. 585, we granted certiorari to consider both questions. 393 U.S. 997 (1968). For reasons given below, we reverse the decisions of the Court of Appeals for the Fourth Circuit and affirm the ruling of the Court of Appeals for the First Circuit.

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IV.

We consider finally petitioner Sinclair's First Amendment challenge to the holding of the Board and the Court of Appeals for the First Circuit. At the outset we note that the question raised here most often arises in the context of a nascent union organizational drive, where employers must be careful in waging their antiunion campaign. As to conduct generally, the above-noted gradations of unfair labor practices, with their varying consequences, create certain hazards for employers when they seek to estimate or resist unionization efforts. But so long as the differences involve conduct easily avoided, such as discharge, surveillance, and coercive interrogation, we do not think that employers can complain that the distinctions are unreasonably difficult to follow. Where an employer's antiunion efforts consist of speech alone, however, the difficulties raised are not so easily resolved. The Board has eliminated some of the problem areas by no longer requiring an employer to show affirmative reasons for insisting on an election and by permitting him to make reasonable inquiries. We do not decide, of course, whether these allowances are mandatory. But we do note that an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board. Thus, § 8 (c) (29 U. S. C. § 158 (c)) merely implements the First Amendment by requiring that the expression of "any views, argument, or opinion" shall not be "evidence of an unfair labor practice," so long as such expression contains "no threat of reprisal or force or promise of benefit" in violation of § 8 (a)(1).

Section 8 (a)(1), in turn, prohibits interference, restraint or coercion of employees in the exercise of their right to self-organization.

Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8 (a)(1) and the proviso to § 8 (c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. Stating these obvious principles is but another way of recognizing that what is basically at stake is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent, not the election of legislators or the enactment of legislation whereby that relationship is ultimately defined and where the independent voter may be freer to listen more objectively and employers as a class freer to talk. Cf. *New York Times Co*. v. *Sullivan*, 376 U.S. 254 (1964).

Within this framework, we must reject the Company's challenge to the decision below and the findings of the Board on which it was based. The standards used below for evaluating the impact of an employer's statements are not seriously questioned by petitioner and we see no need to tamper with them here. Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See *Textile Workers* v. *Darlington Mfg. Co*., 380 U.S. 263, 274, n. 20 (1965). If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that "conveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof." 397 F.2d 157, 160. As stated elsewhere, an employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisal to be taken solely on his own volition." *NLRB* v. *River Togs, Inc*., 382 F.2d 198, 202 (C. A. 2d Cir. 1967).

Equally valid was the finding by the court and the Board that petitioner's statements and communications were not cast as a prediction of "demonstrable 'economic consequences,'" 397 F.2d, at 160, but rather as a threat of retaliatory action. The Board found that petitioner's speeches, pamphlets, leaflets, and letters conveyed the following message: that the company was in a

precarious financial condition; that the "strike-happy" union would in all likelihood have to obtain its potentially unreasonable demands by striking, the probable result of which would be a plant shutdown, as the past history of labor relations in the area indicated; and that the employees in such a case would have great difficulty finding employment elsewhere. In carrying out its duty to focus on the question: "What did the speaker intend and the listener understand?" (A. Cox, Law and the National Labor Policy 44 (1960)), the Board could reasonably conclude that the intended and understood import of that message was not to predict that unionization would inevitably cause the plant to close but to threaten to throw employees out of work regardless of the economic realities. In this connection, we need go no further than to point out (1) that petitioner had no support for its basic assumption that the union, which had not yet even presented any demands, would have to strike to be heard, and that it admitted at the hearing that it had no basis for attributing other plant closings in the area to unionism; and (2) that the Board has often found that employees, who are particularly sensitive to rumors of plant closings,[35] take such hints as coercive threats rather than honest forecasts.[36]

Petitioner argues that the line between so-called permitted predictions and proscribed threats is too vague to stand up under traditional First Amendment analysis and that the Board's discretion to curtail free speech rights is correspondingly too uncontrolled. It is true that a reviewing court must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship, see *NLRB* v. *Virginia Electric & Power Co*., 314 U.S. 469, 479 (1941). But an employer, who has control over that relationship and therefore knows it best, cannot be heard to complain that he is without an adequate guide for his behavior. He can easily make his views known without engaging in "'brinkmanship'" when it becomes all too easy to "overstep and tumble [over] the brink," *Wausau Steel Corp*. v. *NLRB*, 377 F.2d 369, 372 (C. A. 7th Cir. 1967). At the least he can avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees.

For the foregoing reasons, we affirm the judgment of the Court of Appeals for the First Circuit in No. 585, and we reverse the judgments of the Court of Appeals for the Fourth Circuit in Nos. 573 and 691 insofar as they decline enforcement of the Board's orders to bargain and remand those cases to that court with directions to remand to the Board for further proceedings in conformity with this opinion.

It is so ordered

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[1] At the outset of the Union campaign, the Company vice president informed two employees, later discharged, that if they were caught talking to Union men, "you God-damned things will go." Subsequently, the Union presented oral and written demands for recognition, claiming possession

of authorization cards from 31 of the 47 employees in the appropriate unit. Rejecting the bargaining demand, the Company began to interrogate employees as to their Union activities; to promise them better benefits than the Union could offer; and to warn them that if the "union got in, [the vice president] would just take his money and let the union run the place," that the Union was not going to get in, and that it would have to "fight" the Company first. Further, when the Company learned of an impending Union meeting, it arranged, so the Board later found, to have an agent present to report the identity of the Union's adherents. On the first day following the meeting, the vice president told the two employees referred to above that he knew they had gone to the meeting and that their work hours were henceforth reduced to half a day. Three hours later, the two employees were discharged.

[2] The organizing drive was initiated by the employees themselves at Heck's Charleston warehouses. The Union first demanded recognition on the basis of 13 cards from 26 employees of the Company's three Charleston warehouses. After responding "No comment" to the Union's repeated requests for recognition, the president assembled the employees and told them of his shock at their selection of the Union; he singled out one of the employees to ask if he had signed an authorization card. The next day the Union obtained the additional card necessary to establish a majority. That same day, the leading Union supporter (the employee who had first established contacts with the Union and had solicited a large number of the cards) was discharged, and another employee was interrogated as to his Union activities, encouraged to withdraw his authorization, and warned that a Union victory could result in reduced hours, fewer raises, and withdrawal of bonuses. A second demand for recognition was made two days later, and thereafter the president summoned two known Union supporters to his office and offered them new jobs at higher pay if they would use their influence to "break up the union."

The same pattern was repeated a year later at the Company's Ashland, Kentucky, store, where the Union obtained cards from 21 of the 38 employees by October 5, 1965. The next day, the assistant store manager told an employee that he knew that the Union had acquired majority status. When the Union requested recognition on October 8, however, the Company refused on the ground that it was not sure whether department heads were included in the bargaining unit -- even though the cards represented a majority with or without the department heads. After a second request for recognition and an offer to submit the cards to the employer for verification, respondent again refused, on grounds of uncertainty about the definition of the unit and because a poll taken by the Company showed that a majority of the employees did not want Union representation. Meanwhile, the Company told the employees that an employee of another company store had been fired on the spot for signing a card, warned employees that the Company knew which ones had signed cards, and polled employees about their desire for Union representation without giving them assurances against reprisals.

[3] Throughout the Union's six-month organizational campaign -- both before and after its demand for recognition based on possession of cards from 120 of the 207 employees in the appropriate unit -- the Company's foremen and supervisors interrogated employees about their Union involvement; threatened them with discharge for engaging in Union activities or voting for the Union; suggested that unionization might hurt business and make new jobs more difficult to obtain; warned that strikes and other dire economic consequences would result (a supervisor informed a group of

employees that if the Union came in, "a nigger would be the head of it," and that when the Company put in 10 new machines, "the niggers would be the operators of them"); and asserted that, although the Company would have to negotiate with the Union, it could negotiate endlessly and would not have to sign anything.

[4] The cards used in all four campaigns in Nos. 573 and 691 and in the one drive in No. 585 unambiguously authorized the Union to represent the signing employee for collective bargaining purposes; there was no reference to elections. Typical of the cards was the one used in the Charleston campaign in *Heck's*, and it stated in relevant part:

> "Desiring to become a member of the above Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, I hereby make application for admission to membership. I hereby authorize you, your agents or representatives to act for me as collective bargaining agent on all matters pertaining to rates of pay, hours, or any other conditions of employment."

[5] "Accordingly, I reject Respondent's contention 'that if a man is told that his card will be secret, or will be shown only to the Labor Board for the purpose of obtaining election, that this is the absolute equivalent of telling him that it will be used "only" for purposes of obtaining an election.'

. . . .

"With respect to the 97 employees named in the attached Appendix B Respondent in its brief contends, in substance, that their cards should be rejected because each of these employees was told *one or more* of the following: (1) that the card would be used to get an election (2) that he had the right to vote either way, even though he signed the card (3) that the card would be kept secret and not shown to anybody except to the Board in order to get an election. For reasons heretofore explicated, I conclude that these statements, singly or jointly, do not foreclose use of the cards for the purpose designated on their face."

5.10.1. Timeline

Date	Case Name	Decision	Notes
March 25, 1966	*Gissel Packing Co.* National Labor Relations Board (1966)	Affirmed the trial court's ruling	**First filed in 1966** Found that Gissel engaged in unfair labor practices • Link
1966	*NLRB v. Gissel Packing Co.* Washington Supreme Court (1966)	Declined enforcement of that portion of the Board's	

		order requiring respondent to bargain with the union.	
December 16, 1968	*NLRB v. Gissel Packing Co.* Supreme Court of the United States (1968)	Writ of certiorari granted.	• Link
June 28, 1968	*NLRB v. Gissel Packing Co.* US Court of Appeals for the Fourth Circuit (1968)	Enforcement granted in part and denied in part.	• Link
Argued March 26, 1969 **Decided June 16, 1969**	*NLRB v. Gissel Packing Co.* Supreme Court of the United States (1969)	The Court affirmed the First Circuit's decision and reversed the Fourth Circuit's decisions	First Amendment protected employers' expression of opinion to employees did not protect threats of reprisal or force • Link Rehearing denied on **October 13, 1969** • Link
December 12, 1969	*Gissel Packing Co., Inc* National Labor Relations Board	Reaffirmed.	• Link
November 9, 1970	*NLRB v. Gissel Packing Co.* US Court of Appeals for the Fourth Circuit (1970)	Enforced.	• Link

5.10.2. Notes

i. Employers' Speech?

Section 8(c) states that "The expressing of any views, argument, or opinion, or the dissemination thereof, …. shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

In the context of union organizing and employers' opposition to organizing, what kind of employer's speech does not contain a "thread of reprisal or force or promise of benefit"? Specifically, what employer's speech does not contain "force"?

The Court recognizes that employees are often dependent on their employers for their livelihood. In the US, most employees are dependent on their employers for health-insurance, sustenance, debt payment, childcare provision, and much more. In this context, can employers speak on unionization without "force" or "threat"?

ii. A Comparative Moment

In a 2011 court opinion from Israel, a labor court declared all employer speech during unionization as out of bounds because of inherent harm to workers' unionization rights. The animating idea was double. First, unionization is considered a workers' choice, an issue where the employers' opinions, views, and predictions have little value. And second, employers' speech is always a form of power and coercion. One cannot distinguish between "coercion" and "speech" in the context of employers' speech on unionization drives.

iii. The Court's Solution

The way that the *Gissel* Court approaches this problem of separating "speech" from "force" or "coercion," is by distinguishing between speech on issues that the employer has control over, and issues where the employer does not have control. An employer can "make predictions" and express "general views" but cannot "threat[en]."

Try to come up with three possible employers' predictions + general views that would constitute permissible speech, but would still have an input on a unionization drive.

5.11. Bargaining Subjects

5.11.1. NLRB v. Am. Nat'l Ins. Co., 343 U.S. 395, 72 S. Ct. 824 (1952)

Full decision: (link); **Docket**: (link); **Oral argument**: ()

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

This case arises out of a complaint that respondent refused to bargain collectively with the representatives of its employees as required under the National Labor Relations Act, as amended.

The Office Employees International Union, A. F. of L., Local No. 27, certified by the National Labor Relations Board as the exclusive bargaining representative of respondent's office employees, requested a meeting with respondent for the purpose of negotiating an agreement governing employment relations. At the first meetings, beginning on November 30, 1948, the Union submitted a proposed contract covering wages, hours, promotions, vacations and other provisions commonly found in collective bargaining agreements, including a clause establishing a procedure for settling grievances arising under the contract by successive appeals to management with ultimate resort to an arbitrator.

On January 10, 1949, following a recess for study of the Union's contract proposals, respondent objected to the provisions calling for unlimited arbitration. To meet this objection, respondent proposed a so-called management functions clause listing matters such as promotions, discipline and work scheduling as the responsibility of management and excluding such matters from arbitration. The Union's representative took the position "as soon as [he] heard [the proposed clause]" that the Union would not agree to such a clause so long as it covered matters subject to the duty to bargain collectively under the Labor Act.

Several further bargaining sessions were held without reaching agreement on the Union's proposal or respondent's counterproposal to unlimited arbitration. As a result, the management functions clause was "by-passed" for bargaining on other terms of the Union's contract proposal. On January 17, 1949, respondent stated in writing its agreement with some of the terms proposed by the Union and, where there was disagreement, respondent offered counterproposals, including a clause entitled "Functions and Prerogatives of Management" along the lines suggested at the meeting of January 10th. The Union objected to the portion of the clause providing:

> The right to select and hire, to promote to a better position, to discharge, demote or discipline for cause, and to maintain discipline and efficiency of employees and to determine the schedules of work is recognized by both union and company as the proper responsibility and prerogative of management to be held and exercised by the company, and while it is agreed that an employee feeling himself to have been aggrieved by any decision of the company in respect to such matters, or the union in his behalf, shall have the right to have such decision reviewed by top management officials of the company under the grievance machinery hereinafter set forth, it is further agreed that the final decision of the company made by such top management officials shall not be further reviewable by arbitration.

At this stage of the negotiations, the National Labor Relations Board filed a complaint against respondent based on the Union's charge that respondent had refused to bargain as required by the Labor Act and was thereby guilty of interfering with the rights of its employees guaranteed by Section 7 of the Act and of unfair labor practices under Sections 8(a)(1) and 8(a)(5) of the Act. While the proceeding was pending, negotiations between the Union and respondent continued with the management functions clause remaining an obstacle to agreement. During the negotiations, respondent established new night shifts and introduced a new system of lunch hours without consulting the Union.

On May 19, 1949, a Union representative offered a second contract proposal which included a management functions clause containing much of the language found in respondent's second counterproposal, quoted above, with the vital difference that questions arising under the Union's proposed clause would be subject to arbitration as in the case of other grievances. Finally, on January 13, 1950, after the Trial Examiner had issued his report but before decision by the Board,

an agreement between the Union and respondent was signed. The agreement contained a management functions clause that rendered nonarbitrable matters of discipline, work schedules and other matters covered by the clause. The subject of promotions and demotions was deleted from the clause and made the subject of a special clause establishing a union-management committee to pass upon promotion matters.

While these negotiations were in progress, the Board's Trial Examiner conducted hearings on the Union's complaint. The Examiner held that respondent had a right to bargain for inclusion of a management functions clause in a contract. However, upon review of the entire negotiations, including respondent's unilateral action in changing working conditions during the bargaining, the Examiner found that from and after November 30, 1948, respondent had refused to bargain in a good faith effort to reach agreement. The Examiner recommended that respondent be ordered in general terms to bargain collectively with the Union.

The Board agreed with the Trial Examiner that respondent had not bargained in a good faith effort to reach an agreement with the Union. But the Board rejected the Examiner's views on an employer's right to bargain for a management functions clause and held that respondent's action in bargaining for inclusion of any such clause "constituted, quite [apart from] Respondent's demonstrated bad faith, per se violations of Section 8 (a)(5) and (1)." Accordingly, the Board not only ordered respondent in general terms to bargain collectively with the Union, but also included in its order a paragraph designed to prohibit bargaining for any management functions clause covering a condition of employment.

On respondent's petition for review and the Board's cross-petition for enforcement, the Court of Appeals for the Fifth Circuit agreed with the Trial Examiner's view that the Act does not preclude an employer from bargaining for inclusion of any management functions clause in a labor agreement. The Court of Appeals further found that the evidence does not support the view that respondent failed to bargain collectively in good faith by reason of its bargaining for a management functions clause. As a result, enforcement of the portion of the Board's order directed to the management functions clause was denied. Other portions of the Board's order were enforced because respondent's unilateral action in changing working conditions during bargaining does support a finding that respondent had not bargained collectively in good faith as required by the Act. We granted certiorari on petition of the Board for review of the denial of enforcement as to paragraph 1 (a) of the Board's order.

First. The National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers. The Act does not compel any agreement whatsoever between employees and employers. Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement. The theory of the Act is that the making of voluntary labor agreements is encouraged by protecting employees' rights to organize for collective bargaining and by imposing on labor and management the mutual obligation to bargain collectively.

Enforcement of the obligation to bargain collectively is crucial to the statutory scheme. And, as has long been recognized, performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences. Before the enactment of the National Labor Relations Act, it was held that the duty of an employer to bargain collectively

required the employer "to negotiate in good faith with his employees' representatives; to match their proposals, if unacceptable, with counter-proposals; and to make every reasonable effort to reach an agreement." The duty to bargain collectively, implicit in the Wagner Act as introduced in Congress, was made express by the insertion of the fifth employer unfair labor practice accompanied by an explanation of the purpose and meaning of the phrase "bargain collectively in a good faith effort to reach an agreement." This understanding of the duty to bargain collectively has been accepted and applied throughout the administration of the Wagner Act by the National Labor Relations Board and the Courts of Appeal.

In 1947, the fear was expressed in Congress that the Board "has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counter-proposals that he may or may not make." Accordingly, the Hartley Bill, passed by the House, eliminated the good faith test and expressly provided that the duty to bargain collectively did not require submission of counterproposals. As amended in the Senate and passed as the Taft-Hartley Act, the good faith test of bargaining was retained and written into Section 8 (d) of the National Labor Relations Act. That Section contains the express provision that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession.

Thus it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position. And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.

Second. The Board offers in support of the portion of its order before this Court a theory quite apart from the test of good faith bargaining prescribed in Section 8 (d) of the Act, a theory that respondent's bargaining for a management functions clause as a counterproposal to the Union's demand for unlimited arbitration was, "*per se*," a violation of the Act.

Counsel for the Board do not contend that a management functions clause covering some conditions of employment is an illegal contract term. As a matter of fact, a review of typical contract clauses collected for convenience in drafting labor agreements shows that management functions clauses similar in essential detail to the clause proposed by respondent have been included in contracts negotiated by national unions with many employers. The National War Labor Board, empowered during the last war "to decide the dispute, and provide by order the wages and hours and all other terms and conditions (customarily included in collective-bargaining agreements)," ordered management functions clauses included in a number of agreements. Several such clauses ordered by the War Labor Board provided for arbitration in case of union dissatisfaction with the exercise of management functions, while others, as in the clause proposed by respondent in this case, provided that management decisions would be final. Without intimating any opinion as to the form of management functions clause proposed by respondent in this case or the desirability of including any such clause in a labor agreement, it is manifest that bargaining for management functions clauses is common collective bargaining practice.

If the Board is correct, an employer violates the Act by bargaining for a management functions clause touching any condition of employment without regard to the traditions of bargaining in the particular industry or such other evidence of good faith as the fact in this case that respondent's clause was offered as a counterproposal to the Union's demand for unlimited arbitration. The Board's argument is a technical one for it is conceded that respondent would not be guilty of an

unfair labor practice if, instead of proposing a clause that removed some matters from arbitration, it simply refused in good faith to agree to the Union proposal for unlimited arbitration. The argument starts with a finding, not challenged by the court below or by respondent, that at least some of the matters covered by the management functions clause proposed by respondent are "conditions of employment" which are appropriate subjects of collective bargaining under Sections 8 (a)(5), 8 (d) and 9 (a) of the Act. The Board considers that employer bargaining for a clause under which management retains initial responsibility for work scheduling, a "condition of employment," for the duration of the contract is an unfair labor practice because it is "in derogation of" employees' statutory rights to bargain collectively as to conditions of employment.

Conceding that there is nothing unlawful in including a management functions clause in a labor agreement, the Board would permit an employer to "propose" such a clause. But the Board would forbid bargaining for any such clause when the Union declines to accept the proposal, even where the clause is offered as a counterproposal to a Union demand for unlimited arbitration. Ignoring the nature of the Union's demand in this case, the Board takes the position that employers subject to the Act must agree to include in any labor agreement provisions establishing fixed standards for work schedules or any other condition of employment. An employer would be permitted to bargain as to the content of the standard so long as he agrees to freeze a standard into a contract. Bargaining for more flexible treatment of such matters would be denied employers even though the result may be contrary to common collective bargaining practice in the industry. The Board was not empowered so to disrupt collective bargaining practices. On the contrary, the term "bargain collectively" as used in the Act "has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States." *Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 346 (1944).

Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements. Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board. If the latter approach is agreed upon, the extent of union and management participation in the administration of such matters is itself a condition of employment to be settled by bargaining.

Accordingly, we reject the Board's holding that bargaining for the management functions clause proposed by respondent was, *per se*, an unfair labor practice. Any fears the Board may entertain that use of management functions clauses will lead to evasion of an employer's duty to bargain collectively as to "rates of pay, wages, hours and conditions of employment" do not justify condemning all bargaining for management functions clauses covering any "condition of employment" as *per se* violations of the Act. The duty to bargain collectively is to be enforced by application of the good faith bargaining standards of Section 8 (d) to the facts of each case rather than by prohibiting all employers in every industry from bargaining for management functions clauses altogether.

Third. The court below correctly applied the statutory standard of good faith bargaining to the facts of this case. It held that the evidence, viewed as a whole, does not show that respondent refused to bargain in good faith by reason of its bargaining for a management functions clause as a counterproposal to the Union's demand for unlimited arbitration. Respondent's unilateral action in changing working conditions during bargaining, now admitted to be a departure from good faith

bargaining, is the subject of an enforcement order issued by the court below and not challenged in this Court.

. . . .

Accepting as we do the finding of the court below that respondent bargained in good faith for the management functions clause proposed by it, we hold that respondent was not in that respect guilty of refusing to bargain collectively as required by the National Labor Relations Act. Accordingly, enforcement of paragraph 1 (a) of the Board's order was properly denied.

Affirmed.

MR. JUSTICE MINTON, with whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join, dissenting.

I do not see how this case is solved by telling the National Labor Relations Board that since *some* "management functions" clauses are valid (which the Board freely admits), respondent was not guilty of an unfair labor practice *in this case*. The record is replete with evidence that respondent insisted on a clause which would classify the control over certain conditions of employment as a management prerogative, and that the insistence took the form of a refusal to reach a settlement unless the Union accepted the clause. The Court of Appeals agreed that respondent was "steadfast" in this demand. Therefore, *this case* is one where the employer came into the bargaining room with a demand that certain topics upon which it had a duty to bargain were to be removed from the agenda -- that was the price the Union had to pay to gain a contract. There is all the difference between the hypothetical "management functions" clauses envisioned by the majority and this "management functions" clause as there is between waiver and coercion. No one suggests that an employer is guilty of an unfair labor practice when it proposes that it be given unilateral control over certain working conditions and the union accepts the proposal in return for various other benefits. But where, as here, the employer tells the union that the only way to obtain a contract as to wages is to agree not to bargain about certain other working conditions, the employer has refused to bargain about those other working conditions. There is more than a semantic difference between a proposal that the union waive certain rights and a demand that the union give up those rights as a condition precedent to enjoying other rights.

I need not and do not take issue with the Court of Appeals' conclusion that there was no absence of good faith. Where there is a refusal to bargain, the Act does not require an inquiry as to whether that refusal was in good faith or bad faith. The duty to bargain about certain subjects is made absolute by the Act. The majority seems to suggest that an employer could be found guilty of bad faith if it used a "management functions" clause to close off bargaining about all topics of discussion. Whether the employer closes off all bargaining or, as in this case, only a certain area of bargaining, he has refused to bargain as to whatever he has closed off, and any discussion of his good faith is pointless.

That portion of § 8(d) of the Act which declares that an employer need not agree to a proposal or make concessions does not dispose of this case. Certainly the Board lacks power to compel concessions as to the substantive terms of labor agreements. But the Board in this case was seeking to compel the employer to bargain about subjects properly within the scope of collective bargaining.That the employer has such a duty to bargain and that the Board is empowered to enforce the duty is clear.

An employer may not stake out an area which is a proper subject for bargaining and say, "As to this we will not bargain." To do so is a plain refusal to bargain in violation of § 8(a)(5) of the Act. If employees' bargaining rights can be cut away so easily, they are indeed illusory. I would reverse.

5.11.1.1. Timeline

Date	Case Name	Decision	Notes
April 5, 1950	*American National Insurance Company* NLRB Decision (1950)	Respondent engaged in unfair labor practices.	**First filed in 1950** • Link
February 23, 1951	*American National Insurance Co. v. NLRB* US Court of Appeals for the 5th Circuit (1951)	Affirmed decision of lower court, outlaid enforcement mechanisms.	• Link
Argued May 4, `1952 **Decided May 26, 1952**	*NLRB v. Nat'l Insurance Co* Supreme Court of the United States (1952)	Court affirmed previous decisions.	• Link

5.11.1.2. Notes

i. Scope of Management Rights

While insisting on management rights clauses are not an unlawful bad-faith bargaining, insistence on some managerial rights can be. A good example here can be that insistence on unilateral determination of the bargaining unit itself (de-jure or de-facto) is routinely considered bad faith bargaining.

For example, an employer insistent on bargaining for this proposition:

> The employer has and shall maintain at any and all times its sole and exclusive right to unilaterally and arbitrarily change, amend, and modify the certified bargaining unit set forth in [election decision], and any and all hours, wages, and/or other terms and conditions of employment at-will.

This was considered by the Board as "designed to negate the Union's representative status in its entirety."

> See, *Pacific Beach Corporation d/b/a Pacific Beach Hotel and International Longshore and Warehouse Union, Local 142*.Cases 37–CA–7311 (June 14, 2011). See also *V-O Milling Co.*,

43 NLRB 348 (Aug. 19, 1942) (unilateral determination of wages counts as bad-faith bargaining).

5.11.2. NLRB v. WOOSTER Div., 356 U.S. 342, 78 S. Ct. 718 (1958)
Full decision: (link); **Docket**: (link); **Oral argument**: (link)

MR. JUSTICE BURTON delivered the opinion of the Court.

In these cases an employer insisted that its collective-bargaining contract with certain of its employees include: (1) a "ballot" clause calling for a pre-strike secret vote of those employees (union and nonunion) as to the employer's last offer, and (2) a "recognition" clause which excluded, as a party to the contract, the International Union which had been certified by the National Labor Relations Board as the employees' exclusive bargaining agent, and substituted for it the agent's uncertified local affiliate. The Board held that the employer's insistence upon either of such clauses amounted to a refusal to bargain, in violation of § 8 (a)(5) of the National Labor Relations Act, as amended. The issue turns on whether either of these clauses comes within the scope of mandatory collective bargaining as defined in § 8 (d) of the Act. For the reasons hereafter stated, we agree with the Board that neither clause comes within that definition. Therefore, we sustain the Board's order directing the employer to cease insisting upon either clause as a condition precedent to accepting any collective-bargaining contract.

Late in 1952, the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO (here called International) was certified by the Board to the Wooster (Ohio) Division of the Borg-Warner Corporation (here called the company) as the elected representative of an appropriate unit of the company's employees. Shortly thereafter, International chartered Local No. 1239, UAW-CIO (here called the Local). Together the unions presented the company with a comprehensive collective-bargaining agreement. In the "recognition" clause, the unions described themselves as both the "International Union, United Automobile, Aircraft and Agricultural Implement Workers of America and its Local Union No. 1239, U. A. W.-C. I. O. . . . ."

The company submitted a counterproposal which recognized as the sole representative of the employees "Local Union 1239, affiliated with the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO)." The unions' negotiators objected because such a clause disregarded the Board's certification of International as the employees' representative. The negotiators declared that the employees would accept no agreement which excluded International as a party.

The company's counterproposal also contained the "ballot" clause, quoted in full in the margin. In summary, this clause provided that, as to all nonarbitrable issues (which eventually included modification, amendment or termination of the contract), there would be a 30-day negotiation period after which, before the union could strike, there would have to be a secret ballot taken among all employees in the unit (union and nonunion) on the company's last offer. In the event a majority of the employees rejected the company's last offer, the company would have an opportunity, within 72 hours, of making a new proposal and having a vote on it prior to any strike. The unions' negotiators announced they would not accept this clause "under any conditions."

From the time that the company first proposed these clauses, the employees' representatives thus made it clear that each was wholly unacceptable. The company's representatives made it equally clear that no agreement would be entered into by it unless the agreement contained both clauses. In view of this impasse, there was little further discussion of the clauses, although the parties continued to bargain as to other matters. The company submitted a "package" proposal covering economic issues but made the offer contingent upon

the satisfactory settlement of "all other issues ...." The "package" included both of the controversial clauses. On March 15, 1953, the unions rejected that proposal and the membership voted to strike on March 20 unless a settlement were reached by then. None was reached and the unions struck. Negotiations, nevertheless, continued. On April 21, the unions asked the company whether the latter would withdraw its demand for the "ballot" and "recognition" clauses if the unions accepted all other pending requirements of the company. The company declined and again insisted upon acceptance of its "package," including both clauses. Finally, on May 5, the Local, upon the recommendation of International, gave in and entered into an agreement containing both controversial clauses.

In the meantime, International had filed charges with the Board claiming that the company, by the above conduct, was guilty of an unfair labor practice within the meaning of § 8 (a)(5) of the Act. The trial examiner found no bad faith on either side. However, he found that the company had made it a condition precedent to its acceptance of any agreement that the agreement include both the "ballot" and the "recognition" clauses. For that reason, he recommended that the company be found guilty of a *per se* unfair labor practice in violation of § 8 (a)(5). He reasoned that, because each of the controversial clauses was outside of the scope of mandatory bargaining as defined in § 8 (d) of the Act, the company's insistence upon them, against the permissible opposition of the unions, amounted to a refusal to bargain as to the mandatory subjects of collective bargaining. The Board, with two members dissenting, adopted the recommendations of the examiner. 113 N. L. R. B. 1288, 1298. In response to the Board's petition to enforce its order, the Court of Appeals set aside that portion of the order relating to the "ballot" clause, but upheld the Board's order as to the "recognition" clause.

Because of the importance of the issues and because of alleged conflicts among the Courts of Appeals, we granted the Board's petition for certiorari in No. 53, relating to the "ballot" clause, and the company's cross-petition in No. 78, relating to the "recognition" clause. 353 U.S. 907.

We turn first to the relevant provisions of the statute. Section 8 (a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ." Section 8 (d) defines collective bargaining as follows:

> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ."

Read together, these provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to "wages, hours, and other terms and conditions of employment . . . ." The duty is limited to those subjects, and within that area neither party is legally obligated to yield. *Labor Board* v. *American Insurance Co*., 343 U.S. 395. As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree.

The company's good faith has met the requirements of the statute as to the subjects of mandatory bargaining. But that good faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining. We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining. This does not mean that bargaining is to be confined to the statutory subjects. Each of the two controversial clauses is lawful in itself. Each would be enforceable if agreed to by the unions. But it does

not follow that, because the company may propose these clauses, it can lawfully insist upon them as a condition to any agreement.

Since it is lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without, the issue here is whether either the "ballot" or the "recognition" clause is a subject within the phrase "wages, hours, and other terms and conditions of employment" which defines mandatory bargaining. The "ballot" clause is not within that definition. It relates only to the procedure to be followed by the employees among themselves before their representative may call a strike or refuse a final offer. It settles no term or condition of employment -- it merely calls for an advisory vote of the employees. It is not a partial "no-strike" clause. A "no-strike" clause prohibits the employees from striking during the life of the contract. It regulates the relations between the employer and the employees. See *Labor Board* v. *American Insurance Co., supra*, at 408, n. 22. The "ballot" clause, on the other hand, deals only with relations between the employees and their unions. It substantially modifies the collective-bargaining system provided for in the statute by weakening the independence of the "representative" chosen by the employees. It enables the employer, in effect, to deal with its employees rather than with their statutory representative. Cf. *Medo Photo Corp*. v. *Labor Board*, 321 U.S. 678.

The "recognition" clause likewise does not come within the definition of mandatory bargaining. The statute requires the company to bargain with the certified representative of its employees. It is an evasion of that duty to insist that the certified agent not be a party to the collective-bargaining contract. The Act does not prohibit the voluntary addition of a party, but that does not authorize the employer to exclude the certified representative from the contract.

Accordingly, the judgment of the Court of Appeals in No. 53 is reversed and the cause remanded for disposition consistent with this opinion. In No. 78, the judgment is affirmed.

No. 53 -- *Reversed and remanded*.

No. 78 -- *Affirmed*.

MR. JUSTICE FRANKFURTER . . . .

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK and MR. JUSTICE WHITTAKER join, concurring in part and dissenting in part.

I agree that the company's insistence on the "recognition" clause constituted an unfair labor practice, but reach that conclusion by a different route from that taken by the Court. However, in light of the finding below that the company bargained in "good faith," I dissent from the view that its insistence on the "ballot" clause can support the charge of an unfair labor practice.

Over twenty years ago this Court said in its first decision under the Wagner Act: "The theory of the Act is that *free opportunity for negotiation* with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." *Labor Board* v. *Jones & Laughlin Steel Corp*., 301 U.S. 1, 45. Today's decision proceeds on assumptions which I deem incompatible with this basic philosophy of the original labor Act, which has retained its vitality under the amendments effected by the Taft-Hartley Act. See *Labor Board* v. *American National Insurance Co*., 343 U.S. 395, 401-404. I fear that the decision may open the door to an intrusion by the Board into the substantive aspects of the bargaining process which goes beyond anything contemplated by the National Labor Relations Act or suggested in this Court's prior decisions under it.

The Court considers both the "ballot" and "recognition" clauses to be outside the scope of the mandatory bargaining provisions of § 8 (d) of the Act, which in connection with §§ 8 (a)(5) and 8 (b)(3) imposes an obligation on an employer and a union to ". . . confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ." From this conclusion it is said to follow that although the company was free to "propose" these clauses and "bargain" over them, it could not "insist" on their inclusion

in the collective bargaining contract as the price of agreement, and that such insistence was a *per se* unfair labor practice because it was tantamount to a refusal to bargain on "mandatory" subjects. At the same time the Court accepts the Trial Examiner's unchallenged finding that the company had bargained in "good faith," both with reference to these clauses and all other subjects, and holds that the clauses are lawful in themselves and ". . . would be enforceable if agreed to by the unions."

Preliminarily, I must state that I am unable to grasp a concept of "bargaining" which enables one to "propose" a particular point, but not to "insist" on it as a condition to agreement. The right to bargain becomes illusory if one is not free to press a proposal in good faith to the point of insistence. Surely adoption of so inherently vague and fluid a standard is apt to inhibit the entire bargaining process because of a party's fear that strenuous argument might shade into forbidden insistence and thereby produce a charge of an unfair labor practice. This watered-down notion of "bargaining" which the Court imports into the Act with reference to matters not within the scope of § 8 (d) appears as foreign to the labor field as it would be to the commercial world. To me all of this adds up to saying that the Act limits *effective* "bargaining" to subjects within the three fields referred to in § 8 (d), that is "wages, hours, and other terms and conditions of employment," even though the Court expressly disclaims so holding.

I shall discuss my difficulties with the Court's opinion in terms of the "ballot" clause. The "recognition" clause is subject in my view to different considerations.

I.

At the start, I question the Court's conclusion that the "ballot" clause does not come within the "other terms and conditions of employment" provision of § 8 (d). The phrase is inherently vague and prior to this decision has been accorded by the Board and courts an expansive rather than a grudging interpretation. Many matters which might have been thought to be the sole concern of management are now dealt with as compulsory bargaining topics. *E. g., Labor Board* v. *J. H. Allison & Co*., 165 F.2d 766 (merit increases). And since a "no-strike" clause is something about which an employer can concededly bargain to the point of insistence, see *Shell Oil Co*., 77 N. L. R. B. 1306, I find it difficult to understand even under the Court's analysis of this problem why the "ballot" clause should not be considered within the area of bargaining described in § 8 (d). It affects the employer-employee relationship in much the same way, in that it may determine the timing of strikes or even whether a strike will occur by requiring a vote to ascertain the employees' sentiment prior to the union's decision.

Nonetheless I shall accept the Court's holding that this clause is not a condition of employment, for even though the union would accordingly not be *obliged* under § 8 (d) to bargain over it, in my view it does not follow that the company was *prohibited* from insisting on its inclusion in the collective bargaining agreement. In other words, I think the clause was a permissible, even if not an obligatory, subject of good faith bargaining.

The legislative history behind the Wagner and Taft-Hartley Acts persuasively indicates that the Board was never intended to have power to prevent good faith bargaining as to any subject not violative of the provisions or policies of those Acts. As a leading proponent for the Wagner Act explained:

> When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, 'Here they are, the legal representatives of your employees.' What happens behind those doors is not inquired into, and the bill does not seek to inquire into it." 79 Cong. Rec. 7660.

The Wagner Act did not contain the "good faith" qualification now written into the bargaining requirements of § 8 (d), although this lack was remedied by early judicial interpretation which implied from former § 8 (5), 49 Stat. 453, the requirement that an employer bargain in good faith. *E. g., Labor Board* v. *Griswold Mfg. Co*., 106 F.2d 713. But apart from this essential check on the bargaining process, the Board possessed no statutory authority to regulate the *substantive* scope of the bargaining process insofar as lawful demands of the parties were concerned. Nevertheless, the Board engaged occasionally in the practice of determining that certain contract terms urged by unions were conditions of employment and thereby imposing on employers an affirmative duty to bargain as to such terms rather than insist upon their unilateral determination, *e. g., Singer Mfg. Co*., 24 N. L. R. B. 444, or conversely of determining that certain clauses were not conditions of employment and thereby prohibiting an employer from bargaining over them. *E. g., Jasper Blackburn Products Corp*., 21 N. L. R. B. 1240.

These early intrusions of the Board into the substantive aspects of the bargaining process became a matter of concern to Congress, and in the 1947 Taft-Hartley amendments to the Wagner Act, Congress took steps to curtail them by writing into § 8 (d) the particular fields as to which it considered bargaining *should* be required. The bill originally passed by the House of Representatives contained a definition of the term "collective bargaining" which restricted the area of compulsory negotiation to specified subjects, such as wages, hours, discharge or seniority provisions, safety conditions, and vacations. § 2 (11), H. R. 3020, 80th Cong., 1st Sess. The House Report on this bill, submitted by its sponsor, noted that the suggested provision would *require* unions and employers to bargain collectively as to specified topics and would limit that area ". . . to matters of interest to the employer and to the individual man at work." H. R. Rep. No. 245, 80th Cong., 1st Sess. 7. In explaining the need for specifying the topics over which bargaining was *mandatory*, and thereby establishing "objective standards" for the Board to follow, the Report continues:

> . . . The present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make. . . . [Discussion of Board cases.]
>
> . . . .
>
> These cases show that unless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective-bargaining agreements." *Id*., at 19-20.

The Senate amendment to the House bill recast these provisions to read in substantially the form of present § 8 (d). That is, the Senate provisions contained no elaboration of compulsory bargaining topics, but used the general phrase: "wages, hours, and other terms and conditions of employment." In commenting on these changes, the managers of the House Conference appended a statement to the House Conference Report which observed:

> . . . The Senate amendment, while it did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, had to a very substantial extent the same effect as the House bill in this regard, since it rejected, as a factor in determining good faith, the test of making a concession and thus prevented the Board from determining the merits of the positions of the parties." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 34.

The foregoing history evinces a clear congressional purpose to assure the parties to a proposed collective bargaining agreement the greatest degree of freedom in their negotiations, and to require the Board to remain as aloof as possible from regulation of the bargaining process in its substantive aspects.

The decision of this Court in 1952 in *Labor Board* v. *American National Insurance Co., supra*, was fully in accord with this legislative background in holding that the Board lacked power to order an employer to cease bargaining over a particular clause because such bargaining under the Board's view, entirely apart

from a showing of bad faith, constituted *per se* an unfair labor practice. There an employer insisted during negotiations upon the union's acceptance of a "management functions" clause which would vest exclusively in management during the period of the collective bargaining agreement the right to select, hire, and promote employees, to discharge for cause and maintain discipline, and to determine work schedules. The arguments advanced by the Board in that case in support of its conclusion that the employer had committed an unfair labor practice through its insistence on this clause were strikingly similar to those before us here. It was said that such a clause was "in derogation of" statutory rights to bargain given to the employees, and that insistence upon it was tantamount to refusal to bargain as to all statutory subjects covered by it.

But this Court, in reversing the Board, emphasized that flexibility was an essential characteristic of the process of collective bargaining, and that whether the topics contained in the disputed clause should be allocated exclusively to management or decided jointly by management and union ". . . is an issue for determination across the bargaining table, not by the Board." 343 U.S., at 409. It is true that the disputed clause related to matters which concededly were "terms and conditions of employment," but the broad rationale of the Court's opinion undercuts an attempt to distinguish the case on any such ground. "Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements. . . . The duty to bargain collectively is to be enforced by application of the good faith bargaining standards of Section 8 (d) to the facts of each case . . . ." 343 U.S., at 408-409.

I therefore cannot escape the view that today's decision is deeply inconsistent with legislative intention and this Court's precedents. The Act sought to compel management and labor to meet and bargain in good faith as to certain topics. This is the *affirmative* requirement of § 8 (d) which the Board is specifically empowered to enforce, but I see no warrant for inferring from it any power in the Board to *prohibit* bargaining in good faith as to lawful matters not included in § 8 (d). The Court reasons that such conduct on the part of the employer, when carried to the point of insistence, is in substance equivalent to a refusal to bargain as to the statutory subjects, but I cannot understand how this can be said over the Trial Examiner's unequivocal finding that the employer did in fact bargain in "good faith," not only over the disputed clauses but also over the statutory subjects.

It must not be forgotten that the Act requires bargaining, *not* agreement, for the obligation to bargain ". . . does not compel either party to agree to a proposal or require the making of a concession." § 8 (d). Here the employer concededly bargained but simply refused to *agree* until the union would accept what the Court holds would have been a lawful contract provision. It may be that an employer or union, by adamant insistence in good faith upon a provision which is not a statutory subject under § 8 (d), does in fact require the other party to bargain over it. But this effect is traceable to the economic power of the employer or union in the circumstances of a given situation and should not affect our construction of the Act. If one thing is clear, it is that the Board was not viewed by Congress as an agency which should exercise its powers to aid a party to collective bargaining which was in an economically disadvantageous position.

The most cursory view of decisions of the Board and the circuit courts under the National Labor Relations Act reveals the unsettled and evolving character of collective bargaining agreements. Provisions which two decades ago might have been thought to be the exclusive concern of labor or management are today commonplace in such agreements. The bargaining process should be left fluid, free from intervention of the Board leading to premature crystallization of labor agreements into any one pattern of contract provisions, so that these agreements can be adapted through collective bargaining to the changing needs of our society and to the changing concepts of the responsibilities of labor and management. What the Court does today may impede this evolutionary process. Under the facts of this case, an employer is precluded from attempting to limit the likelihood of a strike. But by the same token it would seem to follow that unions

which bargain in good faith would be precluded from insisting upon contract clauses which might not be deemed statutory subjects within § 8 (d).

As unqualifiedly stated in *Labor Board* v. *American National Insurance Co., supra*, p. 357, it is through the "good faith" requirement of § 8 (d) that the Board is to enforce the bargaining provisions of § 8. A determination that a party bargained as to statutory or nonstatutory subjects in good or bad faith must depend upon an evaluation of the total circumstances surrounding any given situation. I do not deny that there may be instances where unyielding insistence on a particular item may be a relevant consideration in the over-all picture in determining "good faith," for the demands of a party might in the context of a particular industry be so extreme as to constitute some evidence of an unwillingness to bargain. But no such situation is presented in this instance by the "ballot" clause. "No-strike" clauses, and other provisions analogous to the "ballot" clause limiting the right to strike, are hardly novel to labor agreements. And in any event the uncontested finding of "good faith" by the Trial Examiner forecloses that issue here.

Of course an employer or union cannot insist upon a clause which would be illegal under the Act's provisions, *Labor Board* v. *National Maritime Union*, 175 F.2d 686, or conduct itself so as to contravene specific requirements of the Act. *Medo Photo Supply Corp*. v. *Labor Board*, 321 U.S. 678. But here the Court recognizes, as it must, that the clause is lawful under the Act, and I think it clear that the company's insistence upon it violated no statutory duty to which it was subject. The fact that the employer here *did* bargain with the union over the inclusion of the "ballot" clause in the proposed agreement distinguishes this case from the situation involved in the *Medo Photo Supply Corp*. case, *supra*, where an employer, without the sanction of a labor agreement contemplating such action, negotiated *directly* with its employees in reference to wages. This Court upheld the finding of an unfair labor practice, observing that the Act ". . . makes it the duty of the employer to *bargain collectively with the chosen representatives* of his employees. The obligation being exclusive . . . , it exacts 'the negative duty to treat with no other.'" 321 U.S., at 683-684. Bargaining directly with employees ". . . would be subversive of the mode of collective bargaining which the statute has ordained . . . ." 321 U.S., at 684. The important consideration is that the Act does not purport to define the terms of an agreement but simply secures the representative status of the union for purposes of bargaining. The controlling distinction from *Medo Photo* is that the employer here has not sought to bargain with anyone else over the terms of the agreement being negotiated.

II.

The company's insistence on the "recognition" clause, which had the effect of excluding the International Union as a party signatory to agreement and making Local 1239 the sole contracting party on the union side, presents a different problem. In my opinion the company's action in this regard did constitute an unfair labor practice since it contravened specific requirements of the Act.

Section 8 (a)(5) makes it an unfair labor practice for an employer not to bargain collectively "with the representatives of his employees." Such representatives are those who have been chosen by a majority of the employees of the appropriate unit, and they constitute ". . . the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . ." § 9 (a). The Board under § 9 (c) is authorized to direct a representation election and certify its results. The employer's duty to bargain with the representatives includes not merely the obligation to confer in good faith, but also ". . . the execution of a written contract incorporating any agreement reached if requested . . ." by the employees' representatives. § 8 (d). I think it hardly debatable that this language must be read to require the company, if so requested, to sign any agreement reached with the same representative with which it is required to bargain. By conditioning agreement upon a change in signatory from the certified exclusive bargaining representative, the company here in effect violated this duty.

I would affirm the judgment of the Court of Appeals in both cases and require the Board to modify its cease and desist order so as to allow the company to bargain over the "ballot" clause.

5.11.2.1. Timeline

Date	Case Name	Decision	Notes
August 26, 1955	*Wooster Division Borg-Warner Corp* NLRB (1955)		**First filed in 1955** • Link
September 12, 1956	*NLRB v. Wooster Division* US Court of Appeals, Sixth Circuit (1956)	Modified NLRB order, remanded and sent back for further proceedings.	• Link
Argued November 20-21, 1957 **Decided May 5, 1958**	*NLRB v. Wooster Division* Supreme Court of the United States (1958)	Judgment of appellate court was affirmed in part and reversed in part.	Committed a NLRA violation. • Link
September 4, 1958	*NLRB v. Wooster Division* US Court of Appeals, Sixth Circuit (1958)	Enforcements made and case remanded.	• Link
October 23, 1958	*Wooster Division Borg-Warner Corp* NLRB (1958)	Cease and desist ordered upon respondent.	• Link

5.11.3. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 85 S. Ct. 398 (1964)
Full decision: (link); **Docket**: (link); **Oral argument**: (link)

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case involves the obligation of an employer and the representative of his employees under §§ 8 (a)(5), 8(d) and 9(a) of the National Labor Relations Act to "confer in good faith with respect to wages, hours, and other terms and conditions of employment." The primary issue is whether the "contracting out" of work being performed by employees in the bargaining unit is a statutory subject of collective bargaining under those sections.

Petitioner, Fibreboard Paper Products Corporation (the Company), has a manufacturing plant in Emeryville, California. Since 1937 the East Bay Union Machinists, Local 1304, United Steelworkers of America, AFL-CIO (the Union) has been the exclusive bargaining representative for a unit of the Company's maintenance employees. In September 1958, the Union and the Company entered the latest of a series of collective bargaining agreements which was to expire on July 31, 1959. The agreement provided for automatic renewal for another year unless one of the contracting parties gave 60 days' notice of a desire to modify or terminate the contract. On May 26, 1959, the Union gave timely notice of its desire to modify the contract and sought to arrange a bargaining session with Company representatives. On June 2, the Company acknowledged receipt of the Union's notice and stated: "We will contact you at a later date regarding a meeting for this purpose." As required by the contract, the Union sent a list of proposed modifications on June 15. Efforts

by the Union to schedule a bargaining session met with no success until July 27, four days before the expiration of the contract, when the Company notified the Union of its desire to meet.

The Company, concerned with the high cost of its maintenance operation, had undertaken a study of the possibility of effecting cost savings by engaging an independent contractor to do the maintenance work. At the July 27 meeting, the Company informed the Union that it had determined that substantial savings could be effected by contracting out the work upon expiration of its collective bargaining agreements with the various labor organizations representing its maintenance employees. The Company delivered to the Union representatives a letter which stated in pertinent part:

> For some time we have been seriously considering the question of letting out our Emeryville maintenance work to an independent contractor, and have now reached a definite decision to do so effective August 1, 1959.
>
> In these circumstances, we are sure you will realize that negotiation of a new contract would be pointless. However, if you have any questions, we will be glad to discuss them with you.

After some discussion of the Company's right to enter a contract with a third party to do the work then being performed by employees in the bargaining unit, the meeting concluded with the understanding that the parties would meet again on July 30.

By July 30, the Company had selected Fluor Maintenance, Inc., to do the maintenance work. Fluor had assured the Company that maintenance costs could be curtailed by reducing the work force, decreasing fringe benefits and overtime payments, and by preplanning and scheduling the services to be performed. The contract provided that Fluor would:

> furnish all labor, supervision and office help required for the performance of maintenance work . . . at the Emeryville plant of Owner as Owner shall from time to time assign to Contractor during the period of this contract; and shall also furnish such tools, supplies and equipment in connection therewith as Owner shall order from Contractor, it being understood however that Owner shall ordinarily do its own purchasing of tools, supplies and equipment.

The contract further provided that the Company would pay Fluor the costs of the operation plus a fixed fee of $ 2,250 per month.

At the July 30 meeting, the Company's representative, in explaining the decision to contract out the maintenance work, remarked that during bargaining negotiations in previous years the Company had endeavored to point out through the use of charts and statistical information "just how expensive and costly our maintenance work was and how it was creating quite a terrific burden upon the Emeryville plant." He further stated that unions representing other Company employees "had joined hands with management in an effort to bring about an economical and efficient operation," but "we had not been able to attain that in our discussions with this particular Local." The Company also distributed a letter stating that "since we will have no employees in the bargaining unit covered by our present Agreement, negotiation of a new or renewed Agreement would appear to us to be pointless." On July 31, the employment of the maintenance employees represented by the Union was terminated and Fluor employees took over. That evening the Union established a picket line at the Company's plant.

The Union filed unfair labor practice charges against the Company, alleging violations of §§ 8 (a)(1), 8 (a)(3) and 8 (a)(5). After hearings were held upon a complaint issued by the National Labor Relations Board's Regional Director, the Trial Examiner filed an Intermediate Report recommending dismissal of the complaint. The Board accepted the recommendation and dismissed the complaint. 130 N. L. R. B. 1558.

Petitions for reconsideration, filed by the General Counsel and the Union, were granted. Upon reconsideration, the Board adhered to the Trial Examiner's finding that the Company's motive in contracting out its maintenance work was economic rather than antiunion but found nonetheless that the Company's

"failure to negotiate with . . . [the Union] concerning its decision to subcontract its maintenance work constituted a violation of Section 8 (a)(5) of the Act." This ruling was based upon the doctrine established in *Town & Country Mfg. Co*., 136 N. L. R. B. 1022, 1027, enforcement granted, 316 F.2d 846 (C. A. 5th Cir. 1963), that contracting out work, "albeit for economic reasons, is a matter within the statutory phrase 'other terms and conditions of employment' and is a mandatory subject of collective bargaining within the meaning of Section 8 (a)(5) of the Act."

The Board ordered the Company to reinstitute the maintenance operation previously performed by the employees represented by the Union, to reinstate the employees to their former or substantially equivalent positions with back pay computed from the date of the Board's supplemental decision, and to fulfill its statutory obligation to bargain.

. . . .

We agree with the Court of Appeals that, on the facts of this case, the "contracting out" of the work previously performed by members of an existing bargaining unit is a subject about which the National Labor Relations Act requires employers and the representatives of their employees to bargain collectively. . . .

I.

Section 8 (a)(5) of the National Labor Relations Act provides that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Collective bargaining is defined in § 8 (d) as

> the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.

Read together, these provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment . . . .' The duty is limited to those subjects, and within that area neither party is legally obligated to yield. *Labor Board* v. *American Ins. Co*., 343 U.S. 395. As to other matters, however, each party is free to bargain or not to bargain . . . ." *Labor Board* v. *Wooster Div. of Borg-Warner Corp*., 356 U.S. 342, 349. Because of the limited grant of certiorari, we are concerned here only with whether the subject upon which the employer allegedly refused to bargain -- contracting out of plant maintenance work previously performed by employees in the bargaining unit, which the employees were capable of continuing to perform -- is covered by the phrase "terms and conditions of employment" within the meaning of § 8 (d).

The subject matter of the present dispute is well within the literal meaning of the phrase "terms and conditions of employment." See *Order of Railroad Telegraphers* v. *Chicago & N. W. R. Co*., 362 U.S. 330. A stipulation with respect to the contracting out of work performed by members of the bargaining unit might appropriately be called a "condition of employment." The words even more plainly cover termination of employment which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit.

The inclusion of "contracting out" within the statutory scope of collective bargaining also seems well designed to effectuate the purposes of the National Labor Relations Act. One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation. The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife. *Labor Board* v. *Jones*

& Laughlin Steel Corp., 301 U.S. 1, 42-43. To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace.

The conclusion that "contracting out" is a statutory subject of collective bargaining is further reinforced by industrial practices in this country. While not determinative, it is appropriate to look to industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining. *Labor Board* v. *American Nat. Ins. Co*., 343 U.S. 395, 408. Industrial experience is not only reflective of the interests of labor and management in the subject matter but is also indicative of the amenability of such subjects to the collective bargaining process. Experience illustrates that contracting out in one form or another has been brought, widely and successfully, within the collective bargaining framework. Provisions relating to contracting out exist in numerous collective bargaining agreements, and "contracting out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators." *United Steelworkers* v. *Warrior & Gulf Nav. Co*., 363 U.S. 574, 584.

The situation here is not unlike that presented in *Local 24, Teamsters Union* v. *Oliver*, 358 U.S. 283, where we held that conditions imposed upon contracting out work to prevent possible curtailment of jobs and the undermining of conditions of employment for members of the bargaining unit constituted a statutory subject of collective bargaining. The issue in that case was whether state antitrust laws could be applied to a provision of a collective bargaining agreement which fixed the minimum rental to be paid by the employer motor carrier who leased vehicles to be driven by their owners rather than the carrier's employees. We held that the agreement was upon a subject matter as to which federal law directed the parties to bargain and hence that state antitrust laws could not be applied to prevent the effectuation of the agreement. We pointed out that the agreement was a

> direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract. The inadequacy of a rental which means that the owner makes up his excess costs from his driver's wages not only clearly bears a close relation to labor's efforts to improve working conditions but is in fact of vital concern to the carrier's employed drivers; an inadequate rental might mean the progressive curtailment of jobs through withdrawal of more and more carrier-owned vehicles from service. *Id*., at 294.

Thus, we concluded that such a matter is a subject of mandatory bargaining under § 8 (d). *Id*., at 294-295. The only difference between that case and the one at hand is that the work of the employees in the bargaining unit was let out piecemeal in *Oliver*, whereas here the work of the entire unit has been contracted out. In reaching the conclusion that the subject matter in *Oliver* was a mandatory subject of collective bargaining, we cited with approval *Timken Roller Bearing Co*., 70 N. L. R. B. 500, 518, *enforcement denied on other grounds*, 161 F.2d 949 (C. A. 6th Cir. 1947), where the Board in a situation factually similar to the present case held that §§ 8 (a)(5) and 9 (a) required the employer to bargain about contracting out work then being performed by members of the bargaining unit.

The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.

The Company was concerned with the high cost of its maintenance operation. It was induced to contract out the work by assurances from independent contractors that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments. These have long been regarded as matters peculiarly suitable for resolution within the collective bargaining framework, and industrial experience demonstrates that collective negotiation has been highly successful in achieving peaceful

accommodation of the conflicting interests. Yet, it is contended that when an employer can effect cost savings in these respects by contracting the work out, there is no need to attempt to achieve similar economies through negotiation with existing employees or to provide them with an opportunity to negotiate a mutually acceptable alternative. The short answer is that, although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation.

The appropriateness of the collective bargaining process for resolving such issues was apparently recognized by the Company. In explaining its decision to contract out the maintenance work, the Company pointed out that in the same plant other unions "had joined hands with management in an effort to bring about an economical and efficient operation," but "we had not been able to attain that in our discussions with this particular Local." Accordingly, based on past bargaining experience with this union, the Company unilaterally contracted out the work. . . .

the type of "contracting out" involved in this case -- the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment -- is a statutory subject of collective bargaining under § 8 (d). Our decision need not and does not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy.

. . . .

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE HARLAN join, concurring.

. . . .

The question posed is whether the particular decision sought to be made unilaterally by the employer in this case is a subject of mandatory collective bargaining within the statutory phrase "terms and conditions of employment." That is all the Court decides. The Court most assuredly does not decide that every managerial decision which necessarily terminates an individual's employment is subject to the duty to bargain. Nor does the Court decide that subcontracting decisions are as a general matter subject to that duty. The Court holds no more than that this employer's decision to subcontract this work, involving "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment," is subject to the duty to bargain collectively. Within the narrow limitations implicit in the specific facts of this case, I agree with the Court's decision.

Fibreboard had performed its maintenance work at its Emeryville manufacturing plant through its own employees, who were represented by a local of the United Steelworkers. Estimating that some $ 225,000 could be saved annually by dispensing with internal maintenance, the company contracted out this work, informing the union that there would be no point in negotiating a new contract since the employees in the bargaining unit had been replaced by employees of the independent contractor, Fluor. Maintenance work continued to be performed within the plant, with the work ultimately supervised by the company's officials and "functioning as an integral part" of the company. Fluor was paid the cost of operations plus $ 2,250 monthly. The savings in costs anticipated from the arrangement derived largely from the elimination of fringe benefits, adjustments in work scheduling, enforcement of stricter work quotas, and close supervision of the new personnel. Under the cost-plus arrangement, Fibreboard remained responsible for whatever maintenance costs were actually incurred. On these facts, I would agree that the employer had a duty to bargain collectively concerning the replacement of his internal maintenance staff by employees of the independent contractor.

The basic question is whether the employer failed to "confer in good faith with respect to . . . terms and conditions of employment" in unilaterally deciding to subcontract this work. This question goes to the scope of the employer's duty in the absence of a collective bargaining agreement. It is true, as the Court's opinion points out, that industrial experience may be useful in determining the proper scope of the duty to bargain. See *Labor Board* v. *American Nat. Ins. Co*., 343 U.S. 395, 408. But data showing that many labor contracts refer to subcontracting or that subcontracting grievances are frequently referred to arbitrators under collective bargaining agreements, while not wholly irrelevant, do not have much real bearing, for such data may indicate no more than that the parties have often considered it mutually advantageous to bargain over these issues on a permissive basis. In any event, the ultimate question is the scope of the duty to bargain defined by the statutory language.

It is important to note that the words of the statute are words of limitation. The National Labor Relations Act does not say that the employer and employees are bound to confer upon any subject which interests either of them; the specification of wages, hours, and other terms and conditions of employment defines a limited category of issues subject to compulsory bargaining. The limiting purpose of the statute's language is made clear by the legislative history of the present Act. As originally passed, the Wagner Act contained no definition of the duty to bargain collectively. In the 1947 revision of the Act, the House bill contained a detailed but limited list of subjects of the duty to bargain, excluding all others. In conference the present language was substituted for the House's detailed specification. While the language thus incorporated in the 1947 legislation as enacted is not so stringent as that contained in the House bill, it nonetheless adopts the same basic approach in seeking to define a limited class of bargainable issues.

The phrase "conditions of employment" is no doubt susceptible of diverse interpretations. At the extreme, the phrase could be construed to apply to any subject which is insisted upon as a prerequisite for continued employment. Such an interpretation, which would in effect place the compulsion of the Board behind any and all bargaining demands, would be contrary to the intent of Congress, as reflected in this legislative history. Yet there are passages in the Court's opinion today which suggest just such an expansive interpretation, for the Court's opinion seems to imply that any issue which may reasonably divide an employer and his employees must be the subject of compulsory collective bargaining.

Only a narrower concept of "conditions of employment" will serve the statutory purpose of delineating a limited category of issues which are subject to the duty to bargain collectively. Seeking to effect this purpose, at least seven circuits have interpreted the statutory language to exclude various kinds of management decisions from the scope of the duty to bargain. In common parlance, the conditions of a person's employment are most obviously the various physical dimensions of his working environment. What one's hours are to be, what amount of work is expected during those hours, what periods of relief are available, what safety practices are observed, would all seem conditions of one's employment. There are other less tangible but no less important characteristics of a person's employment which might also be deemed "conditions" -- most prominently the characteristic involved in this case, the security of one's employment. On one view of the matter, it can be argued that the question whether there is to be a job is not a condition of employment; the question is not one of imposing conditions on employment, but the more fundamental question whether there is to be employment at all. However, it is clear that the Board and the courts have on numerous occasions recognized that union demands for provisions limiting an employer's power to discharge employees are mandatorily bargainable. Thus, freedom from discriminatory discharge, seniority rights, the imposition of a compulsory retirement age, have been recognized as subjects upon which an employer must bargain, although all of these concern the very existence of the employment itself.

While employment security has thus properly been recognized in various circumstances as a condition of employment, it surely does not follow that every decision which may affect job security is a subject of compulsory collective bargaining. Many decisions made by management affect the job security of employees. Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales, all may bear upon the security of the workers' jobs. Yet it is hardly

conceivable that such decisions so involve "conditions of employment" that they must be negotiated with the employees' bargaining representative.

In many of these areas the impact of a particular management decision upon job security may be extremely indirect and uncertain, and this alone may be sufficient reason to conclude that such decisions are not "with respect to . . . conditions of employment." Yet there are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of § 8 (d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.

Applying these concepts to the case at hand, I do not believe that an employer's subcontracting practices are, as a general matter, in themselves conditions of employment. Upon any definition of the statutory terms short of the most expansive, such practices are not conditions -- tangible or intangible -- of any person's employment. The question remains whether this particular kind of subcontracting decision comes within the employer's duty to bargain. On the facts of this case, I join the Court's judgment, because all that is involved is the substitution of one group of workers for another to perform the same task in the same plant under the ultimate control of the same employer. The question whether the employer may discharge one group of workers and substitute another for them is closely analogous to many other situations within the traditional framework of collective bargaining. Compulsory retirement, layoffs according to seniority, assignment of work among potentially eligible groups within the plant -- all involve similar questions of discharge and work assignment, and all have been recognized as subjects of compulsory collective bargaining.

Analytically, this case is not far from that which would be presented if the employer had merely discharged all its employees and replaced them with other workers willing to work on the same job in the same plant without the various fringe benefits so costly to the company. While such a situation might well be considered a § 8 (a)(3) violation upon a finding that the employer discriminated against the discharged employees because of their union affiliation, it would be equally possible to regard the employer's action as a unilateral act frustrating negotiation on the underlying questions of work scheduling and remuneration, and so an evasion of its duty to bargain on these questions, which are concededly subject to compulsory collective bargaining. Similarly, had the employer in this case chosen to bargain with the union about the proposed subcontract, negotiations would have inevitably turned to the underlying questions of cost, which prompted the subcontracting. Insofar as the employer frustrated collective bargaining with respect to these concededly bargaining issues by its unilateral act of subcontracting this work, it can properly be found to have violated its statutory duty under § 8 (a)(5).

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

I am fully aware that in this era of automation and onrushing technological change, no problems in the domestic economy are of greater concern than those involving job security and employment stability. Because of the potentially cruel impact upon the lives and fortunes of the working men and women of the

Nation, these problems have understandably engaged the solicitous attention of government, of responsible private business, and particularly of organized labor. It is possible that in meeting these problems Congress may eventually decide to give organized labor or government a far heavier hand in controlling what until now have been considered the prerogatives of private business management. That path would mark a sharp departure from the traditional principles of a free enterprise economy. Whether we should follow it is, within constitutional limitations, for Congress to choose. But it is a path which Congress certainly did not choose when it enacted the Taft-Hartley Act.

5.11.3.1. Timeline

Date	Case Name	Decision	Notes
March 27, 1961	*Fibreboard Paper Prod. Corp.,* National Labor Relations Board (1961)	The allegations of the complaint that the Respondent has engaged in and is engaging in unfair labor practices have not been sustained by substantial evidence.	**First filed in 1961** Within the meaning of Section 8(a)(1),(3), and (5) of the NLRA • Link
September 13, 1962	*Fibreboard Paper Prods. Corp.* National Labor Relations Board (1962)	Respondent's failure to negotiate with union constituted violation of Section 8(a)(5). Respondent shall cease and desist from refusing to bargain collectively and take affirmative actions that the Board finds will effectuate the policies of the NLRA. Respondent ordered to reinstate terminated employees with backpay.	• Link On May 15, 1961 the involved unions had filed a petition for a reconsideration of the Board's Decision and Order, on June 7, 1961 the General Counsel did so.
Argued April 29, 1963 **Decided July 3, 1963**	*East Bay Union of Machinists, etc. v. NLRB* US Court of Appeals for the District of Columbia Circuit (1963)	Enforcement of the above order.	• Link
Argued October 19, 1964	*Fibreboard Paper Prods. Corp. v. NLRB* Supreme Court of the United States (1964)	Affirmed the grant of petition for enforcement.	Because contracting out work previously done by union members was a mandatory subject of collective bargaining

Decided December 14, 1964			and the board had the authority to take any action necessary to enforce the Act, including reinstating employees. • Link

5.11.4. First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 101 S. Ct. 2573 (1981)
Full decision: (link); **Docket**: (link); **Oral argument**: (link)

JUSTICE BLACKMUN delivered the opinion of the Court.

Must an employer, under its duty to bargain in good faith "with respect to wages, hours, and other terms and conditions of employment," §§ 8(d) and 8(a)(5) of the National Labor Relations Act (Act), negotiate with the certified representative of its employees over its decision to close a part of its business? In this case, the National Labor Relations Board (Board) imposed such a duty on petitioner with respect to its decision to terminate a contract with a customer, and the United States Court of Appeals, although differing over the appropriate rationale, enforced its order.

I

Petitioner, First National Maintenance Corporation (FNM), is a New York corporation engaged in the business of providing housekeeping, cleaning, maintenance, and related services for commercial customers in the New York City area. It supplies each of its customers, at the customer's premises, contracted-for labor force and supervision in return for reimbursement of its labor costs (gross salaries, FICA and FUTA taxes, and insurance) and payment of a set fee. It contracts for and hires personnel separately for each customer, and it does not transfer employees between locations.

During the spring of 1977, petitioner was performing maintenance work for the Greenpark Care Center, a nursing home in Brooklyn. Its written agreement dated April 28, 1976, with Greenpark specified that Greenpark "shall furnish all tools, equipment [sic], materials, and supplies," and would pay petitioner weekly "the sum of five hundred dollars plus the gross weekly payroll and fringe benefits." Its weekly fee, however, had been reduced to $ 250 effective November 1, 1976. The contract prohibited Greenpark from hiring any of petitioner's employees during the term of the contract and for 90 days thereafter. Petitioner employed approximately 35 workers in its Greenpark operation.

Petitioner's business relationship with Greenpark, seemingly, was not very remunerative or smooth. In March 1977, Greenpark gave petitioner the 30 days' written notice of cancellation specified by the contract, because of "lack of efficiency." This cancellation did not become effective, for FNM's work continued after the expiration of that 30-day period. Petitioner, however, became aware that it was losing money at Greenpark. On June 30, by telephone, it asked that its weekly fee be restored at the $ 500 figure and, on July 6, it informed Greenpark in writing that it would discontinue its operations there on August 1 unless the increase were granted. By telegram on July 25, petitioner gave final notice of termination.

While FNM was experiencing these difficulties, District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO (union), was conducting an organization campaign among petitioner's Greenpark employees. On March 31, 1977, at a Board-conducted election, a majority of the employees selected the union as their bargaining agent. On July 12, the union's vice president, Edward Wecker, wrote petitioner, notifying it of the certification and of the union's right to bargain, and stating: "We look forward to meeting with you or your representative for that purpose. Please advise when it will be convenient." Petitioner neither responded nor sought to consult with the union.

On July 28, petitioner notified its Greenpark employees that they would be discharged three days later. Wecker immediately telephoned petitioner's secretary-treasurer, Leonard Marsh, to request a delay for the purpose of bargaining. Marsh refused the offer to bargain and told Wecker that the termination of the Greenpark operation was purely a matter of money, and final, and that the 30 days' notice provision of the Greenpark contract made staying on beyond August 1 prohibitively expensive. Wecker discussed the matter with Greenpark's management that same day, but was unable to obtain a waiver of the notice provision. Greenpark also was unwilling itself to hire the FNM employees because of the contract's 90-day limitation on hiring. With nothing but perfunctory further discussion, petitioner on July 31 discontinued its Greenpark operation and discharged the employees.

The union filed an unfair labor practice charge against petitioner, alleging violations of the Act's §§ 8 (a)(1) and (5). After a hearing held upon the Regional Director's complaint, the Administrative Law Judge made findings in the union's favor. Relying on *Ozark Trailers, Inc*., 161 N.L.R.B. 561 (1966), he ruled that petitioner had failed to satisfy its duty to bargain concerning both the decision to terminate the Greenpark contract and the effect of that change upon the unit employees. The judge reasoned:

> That the discharge of a man is a change in his conditions of employment hardly needs comment. In these obvious facts, the law is clear. When an employer's work complement is represented by a union and he wishes to alter the hiring arrangements, be his reason lack of money or a mere desire to become richer, the law is no less clear that he must first talk to the union about it. . . . If Wecker had been given an opportunity to talk, something might have been worked out to transfer these people to other parts of [petitioner's] business. . . . Entirely apart from whether open discussion between the parties -- with the Union speaking on behalf of the employees as was its right -- might have persuaded [petitioner] to find a way of continuing this part of its operations, there was always the possibility that Marsh might have persuaded Greenpark to use these same employees to continue doing its maintenance work, either as direct employees or as later hires by a replacement contractor.
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> 242 N.L.R.B. 462, 465 (1979).

The Administrative Law Judge recommended an order requiring petitioner to bargain in good faith with the union about its decision to terminate its Greenpark service operation and its consequent discharge of the employees, as well as the effects of the termination. He recommended, also, that petitioner be ordered to pay the discharged employees backpay from the date of discharge until the parties bargained to agreement, or the bargaining reached an impasse, or the union failed timely to request bargaining, or the union failed to bargain in good faith.

The National Labor Relations Board adopted the Administrative Law Judge's findings without further analysis, and additionally required petitioner, if it agreed to resume its Greenpark operations, to offer the terminated employees reinstatement to their former jobs or substantial equivalents; conversely, if agreement was not reached, petitioner was ordered to offer the employees equivalent positions, to be made available by discharge of subsequently hired employees, if necessary, at its other operations.

The United States Court of Appeals for the Second Circuit, with one judge dissenting in part, enforced the Board's order, although it adopted an analysis different from that espoused by the Board. 627 F.2d 596 (1980). The Court of Appeals reasoned that no *per se* rule could be formulated to govern an employer's decision to close part of its business. Rather, the court said, § 8 (d) creates a *presumption* in favor of

mandatory bargaining over such a decision, a presumption that is rebuttable "by showing that the purposes of the statute would not be furthered by imposition of a duty to bargain," for example, by demonstrating that "bargaining over the decision would be futile," or that the decision was due to "emergency financial circumstances," or that the "custom of the industry, shown by the absence of such an obligation from typical collective bargaining agreements, is not to bargain over such decisions."

The Court of Appeals' decision in this case appears to be at odds with decisions of other Courts of Appeals, some of which decline to require bargaining over any management decision involving "a major commitment of capital investment" or a "basic operational change" in the scope or direction of an enterprise, and some of which indicate that bargaining is not mandated unless a violation of § 8(a)(3) (a partial closing motivated by antiunion animus) is involved. The Court of Appeals for the Fifth Circuit has imposed a duty to bargain over partial closing decisions. See *NLRB* v. *Winn-Dixie Stores, Inc*., 361 F.2d 512, cert. denied, 385 U.S. 935 (1966). The Board itself has not been fully consistent in its rulings applicable to this type of management decision.

II

A fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce. *NLRB* v. *Jones & Laughlin Steel Corp*., 301 U.S. 1 (1937). Central to achievement of this purpose is the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management. Congress ensured that collective bargaining would go forward by creating the Board and giving it the power to condemn as unfair labor practices certain conduct by unions and employers that it deemed deleterious to the process, including the refusal "to bargain collectively." §§ 3 and 8.

Although parties are free to bargain about any legal subject, Congress has limited the mandate or duty to bargain to matters of "wages, hours, and other terms and conditions of employment." A unilateral change as to a subject within this category violates the statutory duty to bargain and is subject to the Board's remedial order. *NLRB* v. *Katz*, 369 U.S. 736 (1962). Conversely, both employer and union may bargain to impasse over these matters and use the economic weapons at their disposal to attempt to secure their respective aims. *NLRB* v. *American National Ins. Co*., 343 U.S. 395 (1952). Congress deliberately left the words "wages, hours, and other terms and conditions of employment" without further definition, for it did not intend to deprive the Board of the power further to define those terms in light of specific industrial practices.

Nonetheless, in establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed. Despite the deliberate openendedness of the statutory language, there is an undeniable limit to the subjects about which bargaining must take place:

> Section 8(a) of the Act, of course, does not immutably fix a list of subjects for mandatory bargaining. . . . But it does establish a limitation against which proposed topics must be measured. In general terms, the limitation includes only issues that settle an aspect of the relationship between the employer and the employees." *Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co*., 404 U.S. 157, 178 (1971).
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> See also *Ford Motor Co*. v. *NLRB*, 441 U.S. 488 (1979); *Fibreboard Paper Products Corp*. v. *NLRB*, 379 U.S. 203 (1964); *Teamsters* v. *Oliver*, 358 U.S. 283 (1959).

Some management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship. See *Fibreboard*, 379 U.S., at 223 (STEWART, J., concurring). Other management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively "an aspect of the relationship" between employer and employee. *Chemical Workers*, 404 U.S., at 178. The present case concerns a third type of management decision, one that had a direct impact on employment, since jobs were inexorably eliminated by the termination, but had as its focus only the economic profitability of the contract with Greenpark, a concern under these facts wholly apart from the employment relationship. This decision, involving a change in the scope and direction of the enterprise, is akin to the decision whether to be in business at all, "not in [itself] primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment." *Fibreboard*, 379 U.S., at 223 (STEWART, J., concurring). Cf. *Textile Workers* v. *Darlington Co*., 380 U.S. 263, 268 (1965) ("an employer has the absolute right to terminate his entire business for any reason he pleases"). At the same time, this decision touches on a matter of central and pressing concern to the union and its member employees: the possibility of continued employment and the retention of the employees' very jobs. See *Brockway Motor Trucks* v. *NLRB*, 582 F.2d 720, 735-736 (CA3 1978); *Ozark Trailers, Inc*., 161 N.L.R.B. 561, 566-568 (1966).

Petitioner contends it had no duty to bargain about its decision to terminate its operations at Greenpark. This contention requires that we determine whether the decision itself should be considered part of petitioner's retained freedom to manage its affairs unrelated to employment. The aim of labeling a matter a mandatory subject of bargaining, rather than simply permitting, but not requiring, bargaining, is to "promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace," *Fibreboard*, 379 U.S., at 211. The concept of mandatory bargaining is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole. *Ford Motor Co*., 441 U.S., at 500-501; *Borg-Warner*, 356 U.S., at 350 (condemning employer's proposal of "ballot" clause as weakening the collective-bargaining process). This will be true, however, only if the subject proposed for discussion is amenable to resolution through the bargaining process. Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice. Congress did not explicitly state what issues of mutual concern to union and management it intended to exclude from mandatory bargaining. Nonetheless, in view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.

The Court in *Fibreboard* implicitly engaged in this analysis with regard to a decision to subcontract for maintenance work previously done by unit employees. Holding the employer's decision a subject of mandatory bargaining, the Court relied not only on the "literal meaning" of the statutory words, but also reasoned:

> The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant.
>
> No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business. 379 U.S., at 213.

The Court also emphasized that a desire to reduce labor costs, which it considered a matter "peculiarly suitable for resolution within the collective bargaining framework," was at the base of the employer's decision to subcontract:

> It was induced to contract out the work by assurances from independent contractors that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments. These have long been regarded as matters peculiarly suitable for resolution within the collective bargaining framework, and industrial experience demonstrates that collective negotiation has been highly successful in achieving peaceful accommodation of the conflicting interests. *Id*., at 213-214.
>
> The prevalence of bargaining over "contracting out" as a matter of industrial practice generally was taken as further proof of the "amenability of such subjects to the collective bargaining process. *Id*., at 211.

With this approach in mind, we turn to the specific issue at hand: an economically motivated decision to shut down part of a business.

III

A

Both union and management regard control of the decision to shut down an operation with the utmost seriousness. As has been noted, however, the Act is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved. It seems particularly important, therefore, to consider whether requiring bargaining over this sort of decision will advance the neutral purposes of the Act.

A union's interest in participating in the decision to close a particular facility or part of an employer's operations springs from its legitimate concern over job security. The Court has observed: "The words of [§ 8 (d)] . . . plainly cover termination of employment which . . . necessarily results" from closing an operation. *Fibreboard*, 379 U.S., at 210. The union's practical purpose in participating, however, will be largely uniform: it will seek to delay or halt the closing. No doubt it will be impelled, in seeking these ends, to offer concessions, information, and alternatives that might be helpful to management or forestall or prevent the termination of jobs. It is unlikely, however, that requiring bargaining over the decision itself, as well as its effects, will augment this flow of information and suggestions. There is no dispute that the union must be given a significant opportunity to bargain about these matters of job security as part of the "effects" bargaining mandated by § 8 (a)(5). See, *e. g., NLRB* v. *Royal Plating & Polishing Co*., 350 F.2d 191, 196 (CA3 1965); *NLRB* v. *Adams Dairy, Inc*., 350 F.2d 108 (CA8 1965), cert. denied, 382 U.S. 1011 (1966). And, under § 8 (a)(5), bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time, and the Board may impose sanctions to insure its adequacy. A union, by pursuing such bargaining rights, may achieve valuable concessions from an employer engaged in a partial closing. It also may secure in contract negotiations provisions implementing rights to notice, information, and fair bargaining. See BNA, Basic Patterns in Union Contracts 62-64 (9th ed., 1979).

Moreover, the union's legitimate interest in fair dealing is protected by § 8 (a)(3), which prohibits partial closings motivated by antiunion animus, when done to gain an unfair advantage. *Textile Workers* v. *Darlington Co*., 380 U.S. 263 (1965). Under § 8 (a)(3) the Board may inquire into the motivations behind a partial closing. An employer may not simply shut down part of its business and mask its desire to weaken and circumvent the union by labeling its decision "purely economic."

Thus, although the union has a natural concern that a partial closing decision not be hastily or unnecessarily entered into, it has some control over the effects of the decision and indirectly may ensure that the decision

itself is deliberately considered. It also has direct protection against a partial closing decision that is motivated by an intent to harm a union.

Management's interest in whether it should discuss a decision of this kind is much more complex and varies with the particular circumstances. If labor costs are an important factor in a failing operation and the decision to close, management will have an incentive to confer voluntarily with the union to seek concessions that may make continuing the business profitable. Cf. U.S. News & World Report, Feb. 9, 1981, p. 74; BNA, Labor Relations Yearbook-1979, p. 5 (UAW agreement with Chrysler Corp. to make concessions on wages and fringe benefits). At other times, management may have great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies. It may face significant tax or securities consequences that hinge on confidentiality, the timing of a plant closing, or a reorganization of the corporate structure. The publicity incident to the normal process of bargaining may injure the possibility of a successful transition or increase the economic damage to the business. The employer also may have no feasible alternative to the closing, and even good-faith bargaining over it may both be futile and cause the employer additional loss.

There is an important difference, also, between permitted bargaining and mandated bargaining. Labeling this type of decision mandatory could afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose. See Comment, "Partial Terminations" -- A Choice Between Bargaining Equality and Economic Efficiency, 14 UCLA L. Rev. 1089, 1103-1105 (1967). In addition, many of the cases before the Board have involved, as this one did, not simply a refusal to bargain over the decision, but a refusal to bargain at all, often coupled with other unfair labor practices. . . . . .

While evidence of current labor practice is only an indication of what is feasible through collective bargaining, and not a binding guide, see *Chemical Workers*, 404 U.S., at 176, that evidence supports the apparent imbalance weighing against mandatory bargaining. We note that provisions giving unions a right to participate in the decisionmaking process concerning alteration of the scope of an enterprise appear to be relatively rare. Provisions concerning notice and "effects" bargaining are more prevalent. See II BNA, Collective Bargaining Negotiations and Contracts § 65:201-233 (1981); U.S. Dept. of Labor, Bureau of Labor Statistics, Bull. 2065, Characteristics of Major Collective Bargaining Agreements, Jan. 1, 1978, pp. 96, 100, 101, 102-103 (1980) (charting provisions giving interplant transfer and relocation allowances; advance notice of layoffs, shutdowns, and technological changes; and wage-employment guarantees; no separate tables on decision-bargaining, presumably due to rarity). See also U.S. Dept. of Labor, Bureau of Labor Statistics, Bull. No. 1425-10, Major Collective Bargaining Agreements, Plant Movement, Transfer, and Relocation Allowances (July 1969).

Further, the presumption analysis adopted by the Court of Appeals seems ill-suited to advance harmonious relations between employer and employee. An employer would have difficulty determining beforehand whether it was faced with a situation requiring bargaining or one that involved economic necessity sufficiently compelling to obviate the duty to bargain. If it should decide to risk not bargaining, it might be faced ultimately with harsh remedies forcing it to pay large amounts of backpay to employees who likely would have been discharged regardless of bargaining, or even to consider reopening a failing operation. See, *e. g., Electrical Products Div. of Midland-Ross Corp*., 239 N. L. R. B. 323 (1978), enf'd, 617 F.2d 977 (CA3 1980), cert. denied, 449 U.S. 871 (1981). Cf. *Lever Brothers Co*. v. *International Chemical Workers Union*, 554 F.2d 115 (CA4 1976) (enjoining plant closure and transfer to permit negotiations). Also, labor costs may not be a crucial circumstance in a particular economically based partial termination. See, *e. g., NLRB* v. *International Harvester Co*., 618 F.2d 85 (CA9 1980) (change in marketing structure); *NLRB* v. *Thompson Transport Co*., 406 F.2d 698 (CA10 1969) (loss of major customer). And in those cases, the Board's traditional remedies may well be futile. See *ABC Trans-National Transport, Inc*. v. *NLRB*, 642 F.2d 675 (CA3 1981) (although employer violated its "duty" to bargain about freight terminal closing, court refused to enforce order to bargain). If the employer intended to try to fulfill a court's direction to bargain, it would have difficulty determining exactly at what stage of its deliberations the duty to bargain would arise and what amount of bargaining would suffice before it could implement its decision. Compare *Burns*

Ford, Inc., 182 N. L. R. B. 753 (1970) (one week's notice of layoffs sufficient), and *Hartmann Luggage Co*., 145 N. L. R. B. 1572 (1964) (entering into executory subcontracting agreement before notifying union not a violation since contract not yet final), with *Royal Plating & Polishing Co*., 148 N. L. R. B. 545, 555 (1964), enf. denied, 350 F.2d 191 (CA3 1965) (two weeks' notice before final closing of plant inadequate). If an employer engaged in some discussion, but did not yield to the union's demands, the Board might conclude that the employer had engaged in "surface bargaining," a violation of its good faith. See *NLRB* v. *Reed & Prince Mfg. Co*., 205 F.2d 131 (CA1), cert. denied, 346 U.S. 887 (1953). A union, too, would have difficulty determining the limits of its prerogatives, whether and when it could use its economic powers to try to alter an employer's decision, or whether, in doing so, it would trigger sanctions from the Board. See, *e. g., International Offset Corp*., 210 N. L. R. B. 854 (1974) (union's failure to realize that shutdown was imminent, in view of successive advertisements, sales of equipment, and layoffs, held a waiver of right to bargain); *Shell Oil Co*., 149 N. L. R. B. 305 (1964) (union waived its right to bargain by failing to request meetings when employer announced intent to transfer a few days before implementation).

We conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself is *not* part of § 8 (d)'s "terms and conditions," see n. 12, *supra*, over which Congress has mandated bargaining.

B

In order to illustrate the limits of our holding, we turn again to the specific facts of this case. First, we note that when petitioner decided to terminate its Greenpark contract, it had no intention to replace the discharged employees or to move that operation elsewhere. Petitioner's sole purpose was to reduce its economic loss, and the union made no claim of antiunion animus. In addition, petitioner's dispute with Greenpark was solely over the size of the management fee Greenpark was willing to pay. The union had no control or authority over that fee. The most that the union could have offered would have been advice and concessions that Greenpark, the third party upon whom rested the success or failure of the contract, had no duty even to consider. These facts in particular distinguish this case from the subcontracting issue presented in *Fibreboard*. Further, the union was not selected as the bargaining representative or certified until well after petitioner's economic difficulties at Greenpark had begun. We thus are not faced with an employer's abrogation of ongoing negotiations or an existing bargaining agreement. Finally, while petitioner's business enterprise did not involve the investment of large amounts of capital in single locations, we do not believe that the absence of "significant investment or withdrawal of capital," *General Motors Corp., GMC Truck & Coach Div*., 191 N. L. R. B., at 952, is crucial. The decision to halt work at this specific location represented a significant change in petitioner's operations, a change not unlike opening a new line of business or going out of business entirely.

The judgment of the Court of Appeals, accordingly, is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

. . . .

As this Court has noted, the words "terms and conditions of employment" plainly cover termination of employment resulting from a management decision to close an operation. *Fibreboard Paper Products Corp*.

v. *NLRB*, 379 U.S. 203, 210 (1964). As the Court today admits, the decision to close an operation "touches on a matter of central and pressing concern to the union and its member employees." *Ante*, at 677. Moreover, as the Court today further concedes, Congress deliberately left the words "terms and conditions of employment" indefinite, so that the NLRB would be able to give content to those terms in light of changing industrial conditions. *Ante*, at 675, and n. 14. In the exercise of its congressionally delegated authority and accumulated expertise, the Board has determined that an employer's decision to close part of its operations affects the "terms and conditions of employment" within the meaning of the Act, and is thus a mandatory subject for collective bargaining. *Ozark Trailers, Inc*., 161 N. L. R. B. 561 (1966). Nonetheless, the Court today declines to defer to the Board's decision on this sensitive question of industrial relations, and on the basis of pure speculation reverses the judgment of the Board and of the Court of Appeals. I respectfully dissent.

The Court bases its decision on a balancing test. It states that "bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." *Ante*, at 679. I cannot agree with this test, because it takes into account only the interests of *management*; it fails to consider the legitimate employment interests of the workers and their union. *Brockway Motor Trucks* v. *NLRB*, 582 F.2d 720, 734-740 (CA3 1978) (balancing of interests of workers in retaining their jobs against interests of employers in maintaining unhindered control over corporate direction). This one-sided approach hardly serves "to foster in a neutral manner" a system for resolution of these serious, two-sided controversies. See *ante*, at 680-681.

Even if the Court's statement of the test were accurate, I could not join in its application, which is based solely on speculation. Apparently, the Court concludes that the benefit to labor-management relations and the collective-bargaining process from negotiation over partial closings is minimal, but it provides no evidence to that effect. The Court acknowledges that the union might be able to offer concessions, information, and alternatives that might obviate or forestall the closing, but it then asserts that "[it] is unlikely, however, that requiring bargaining over the decision . . . will augment this flow of information and suggestions." *Ante*, at 681. Recent experience, however, suggests the contrary. Most conspicuous, perhaps, were the negotiations between Chrysler Corporation and the United Auto Workers, which led to significant adjustments in compensation and benefits, contributing to Chrysler's ability to remain afloat. See Wall Street Journal, Oct. 26, 1979, p. 3, col. 1. Even where labor costs are not the direct cause of a company's financial difficulties, employee concessions can often enable the company to continue in operation -- if the employees have the opportunity to offer such concessions.

The Court further presumes that management's need for "speed, flexibility, and secrecy" in making partial closing decisions would be frustrated by a requirement to bargain. *Ante*, at 682-683. In some cases the Court might be correct. In others, however, the decision will be made openly and deliberately, and considerations of "speed, flexibility, and secrecy" will be inapposite. Indeed, in view of management's admitted duty to bargain over the effects of a closing, see *ante*, at 677-678, n. 15, it is difficult to understand why additional bargaining over the closing itself would necessarily unduly delay or publicize the decision.

I am not in a position to judge whether mandatory bargaining over partial closings *in all cases* is consistent with our national labor policy, and neither is the Court. The primary responsibility to determine the scope of the statutory duty to bargain has been entrusted to the NLRB, which should not be reversed by the courts merely because they might prefer another view of the statute. *Ford Motor Co*. v. *NLRB*, 441 U.S. 488, 495-497 (1979); see *NLRB* v. *Erie Resistor Corp*., 373 U.S. 221, 236 (1963). I therefore agree with the Court of Appeals that employers presumptively have a duty to bargain over a decision to close an operation, and that this presumption can be rebutted by a showing that bargaining would be futile, that the closing was due to emergency financial circumstances, or that, for some other reason, bargaining would not further the purposes of the National Labor Relations Act. 627 F.2d 596, 601 (CA2 1980). I believe that this approach is amply supported by recent decisions of the Board. *E. g., Brooks-Scanlon, Inc*., 246 N. L. R. B. 476, 102 LRRM 1606 (1979); *Raskin Packing Co*., 246 N. L. R. B. 78, 102 LRRM 1489 (1979); *M. & M.*

Transportation Co., 239 N. L. R. B. 73 (1978). With respect to the individual facts of this case, however, I would vacate the judgment of the Court of Appeals, and remand to the Board for further examination of the evidence. See *SEC* v. *Chenery Corp*., 318 U.S. 80, 94-95 (1943).

5.11.4.1. Timeline

Date	Case Name	Decision	Notes
May 23, 1979	*First National Maintenance Corp.* National Labor Relations Board (1979)	Affirmed the rulings, findings, and conclusions of the Administrative Law Judge.	**First filed in 1979** Judge had found that Respondent violated Section 8(a)(5) and (1) of the Act. • Link
Argued March 20, 1980 **Decided July 9, 1980**	*NLRB v. First National Maintenance Corp* US Court of Appeals for the Second Circuit (1980)	Court granted request of petitioner, NLRB, to enforce its order.	• Link
Argued April 21, 1981 **Decided June 22, 1981**	*First National Maintenance Corp. v. NLRB* Supreme Court of the United States (1981)	Court reversed the judgment and remanded.	Decision was not one over which Congress mandated bargaining pursuant to Section 8(d). • Link

5.11.4.2. Notes

i. Hello Balancing my Old Friend (1)

According to the *First National* majority, the way to answer whether or not an issue is a matter of mandatory bargaining is to hypothesize on whether or not making it one would promote to goals of the NLRA. In the case of partial shutdowns of a business, the Court say it would not promote the goals of the Act to compel negotiations. Therefore, partial shutdowns are not mandatory subject of bargaining. *QED*.

This form of analysis looks like a deduction from a general rule, not balancing. But the dissent calls this balancing. Why?

Well, perhaps because the majority in weighing whether or not negotiating on a particular subject furthers the goals of the act engages in weighing-of-sort of interests. On the one side there the fact that

partially shutting a business down will affect workers "terms and conditions" of employment. But, on the other side, there's the Court's intuition that bargaining would not add anything to the decisionmaking process, and that employers have a right not to be encumbered by collective bargaining.

Wait, what?

ii. *Hello Balancing my Old Friend (2)*

Like in *Tesla*, balancing is a feature of labor law. With labor law balancing comes three features:

1. **Balancing of Statutory Rights v. Employers Interests**: here, workers have a statutory right to compel negotiations on issues relating to "terms and conditions" of employment. But, employers have a right-like interest not to be encumbered by collective bargaining.
2. **Murky origins of employers' interests**: It is clear where workers' rights come from. The statutory text. But it is not clear, and in fact pretty mysterious, the origins of the fluid-like, always-there employers' interests. For example, it is a peculiar assertion of rights to state that employers have a right under the NLRA not to be encumbered by collective bargaining on mattered pertaining to some "terms and conditions." While, in fact if you read the text of the NLRA, they don't.
3. **Workers Lose by Balancing**: Workers have on their side the statutory text. Other than that they have nothing (legally speaking). When courts balance the statutory text against unenumerated interests, workers always lose. By definition. The maximum rights workers can have is the statutory text. Courts balance by grinding the text with employers' interests. This loss of statutory rights is devastating to workers' rights, time and again, all across labor law.

5.12. Labor Preemption

5.12.1. The Rule

***5.12.1.1. San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959)**

Full decision: (link); **Docket**: (link); **Oral argument**: (link)

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case is before us for the second time. The present litigation began with a dispute between the petitioning unions and respondents, co-partners in the business of selling lumber and other materials in California. Respondents began an action in the Superior Court for the County of San Diego, asking for an injunction and damages. Upon hearing, the trial court found the following facts. In March of 1953 the unions sought from respondents an agreement to retain in their employ only those workers who were already members of the unions, or who applied for membership within thirty days. Respondents refused, claiming that none of their employees had shown a desire to join a union, and that, in any event, they could not accept such an arrangement until one of the unions had been designated by the employees as a collective bargaining agent. The unions began at once peacefully to picket the respondents' place of business, and to exert pressure on customers and suppliers in order to persuade them to stop dealing with respondents. The sole purpose of these pressures was to compel execution of the proposed contract. The unions contested this finding, claiming that the only purpose of their activities was to educate the workers and persuade them to become members. On the basis of its findings, the court enjoined the unions from picketing and from the use of other pressures to force an agreement, until one of them had been properly designated as a collective bargaining agent. The court also awarded $ 1,000 damages for losses found to have been sustained.

At the time the suit in the state court was started, respondents had begun a representation proceeding before the National Labor Relations Board. The Regional Director declined jurisdiction, presumably because the amount of interstate commerce involved did not meet the Board's monetary standards in taking jurisdiction.

On appeal, the California Supreme Court sustained the judgment of the Superior Court, 45 Cal. 2d 657, 291 P. 2d 1, holding that, since the National Labor Relations Board had declined to exercise its jurisdiction, the California courts had power over the dispute. They further decided that the conduct of the union constituted an unfair labor practice under § 8 (b)(2) of the National Labor Relations Act, and hence was not privileged under California law. As the California court itself later pointed out this decision did not specify what law, state or federal, was the basis of the relief granted. Both state and federal law played a part but, "any distinction as between those laws was not thoroughly explored." *Garmon* v. *San Diego Bldg. Trades Council*, 49 Cal. 2d 595, 602, 320 P. 2d 473, 477.

We granted certiorari, 351 U.S. 923, and decided the case together with *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, and *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc*., 353 U.S. 20. In those cases, we held that the refusal of the National Labor Relations Board to assert jurisdiction did not leave with the States power over activities they otherwise would be pre-empted from regulating. Both *Guss* and *Fairlawn* involved relief of an equitable nature. In vacating and remanding the judgment of the California court in this case, we pointed out that those cases controlled this one, "in its major aspects." 353 U.S., at 28. However, since it was not clear whether the judgment for damages would be sustained under California law, we remanded to the state court for consideration of that local law issue. The federal question, namely, whether the National Labor Relations Act precluded California from granting an award for damages arising out of the conduct in question, could not be appropriately decided until the antecedent state law question was decided by the state court.

On remand, the California court, in accordance with our decision in *Guss*, set aside the injunction, but sustained the award of damages. *Garmon* v. *San Diego Bldg. Trades Council*, 49 Cal. 2d 595, 320 P. 2d 473 (three judges dissenting). After deciding that California had jurisdiction to award damages for injuries caused by the union's activities, the California court held that those activities constituted a tort based on an unfair labor practice under state law. In so holding the court relied on general tort provisions of the California Civil Code, §§ 1677, 1708, as well as state enactments dealing specifically with labor relations, Calif. Labor Code, § 923 (1937); *ibid*., §§ 1115-1118 (1947).

We again granted certiorari, 357 U.S. 925, to determine whether the California court had jurisdiction to award damages arising out of peaceful union activity which it could not enjoin.

The issue is a variant of a familiar theme. It began with *Allen-Bradley* v. *Wisconsin Board*, 315 U.S. 740, was greatly intensified by litigation flowing from the Taft-Hartley Act, and has recurred here in almost a score of cases during the last decade. The comprehensive regulation of industrial relations by Congress, novel federal legislation twenty-five years ago but now an integral part of our economic life, inevitably gave rise to difficult problems of federal-state relations. To be sure, in the abstract these problems came to us as ordinary questions of statutory construction. But they involved a more complicated and perceptive process than is conveyed by the delusive phrase, "ascertaining the intent of the legislature." Many of these problems probably could not have been, at all events were not, foreseen by the Congress. Others were only dimly perceived and their precise scope only vaguely defined. This Court was called upon to apply a new and complicated legislative scheme, the aims and social policy of which were drawn with broad strokes while the details had to be filled in, to no small extent, by the judicial process. Recently we indicated the task that was thus cast upon this Court in carrying out with fidelity the purposes of Congress, but doing so by giving application to congressional incompletion. What we said in *Weber* v. *Anheuser-Busch, Inc*., 348 U.S. 468, deserves repetition, because the considerations there outlined guide this day's decision:

> By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. . . . But as the opinion in that case recalled, the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much.' This penumbral area can be rendered progressively clear only by the course of litigation.

The case before us concerns one of the most teasing and frequently litigated areas of industrial relations, the multitude of activities regulated by §§ 7 and 8 of the National Labor Relations Act. These broad provisions govern both protected "concerted activities" and unfair labor practices. . . . .

In determining the extent to which state regulation must yield to subordinating federal authority, we have been concerned with delimiting areas of potential conflict; potential conflict of rules of law, of remedy, and of administration. The nature of the judicial process precludes an *ad hoc* inquiry into the special problems of labor-management relations involved in a particular set of occurrences in order to ascertain the precise nature and degree of federal-state conflict there involved, and more particularly what exact mischief such a conflict would cause. Nor is it our business to attempt this. Such determinations inevitably depend upon judgments on the impact of these particular conflicts on the entire scheme of federal labor policy and administration. Our task is confined to dealing with classes of situations. To the National Labor Relations Board and to Congress must be left those precise and closely limited demarcations that can be adequately fashioned only by legislation and administration. We have necessarily been concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes. But the unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience:

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice. . . . Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law . . . ." *Garner* v. *Teamsters Union*, 346 U.S. 485, 490-491.

Administration is more than a means of regulation; administration is regulation. We have been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration. Thus, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted. When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.

When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.

At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board.

. . . .

To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic problem underlying our decision in *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1. In that case we held that the failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. The withdrawal of this narrow area from possible state activity follows from our decisions in *Weber* and *Guss*. The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.

In the light of these principles the case before us is clear. Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of § 7 or § 8 of the Act, the State's jurisdiction is displaced.

. . . .

The judgment below is

Reversed.

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5.12.1.2. Int'l Ass'n of Machinists & Aero. Workers v. Wis. Emp't Relations Comm'n, 427 U.S. 132 (1976)

Full decision: (link); **Docket**: (link); **Oral argument**: (link)

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question to be decided in this case is whether federal labor policy pre-empts the authority of a state labor relations board to grant an employer covered by the National Labor Relations Act an order enjoining a union and its members from continuing to refuse to work overtime pursuant to a union policy to put economic pressure on the employer in negotiations for renewal of an expired collective-bargaining agreement.

A collective-bargaining agreement between petitioner Local 76 (Union) and respondent, Kearney & Trecker Corp. (employer) was terminated by the employer pursuant to the terms of the agreement on June 19, 1971. Good-faith bargaining over the terms of a renewal agreement continued for over a year thereafter, finally resulting in the signing of a new agreement effective July 23, 1972. A particularly controverted issue during negotiations was the employer's demand that the provision of the expired agreement under which, as for the prior 17 years, the basic workday was seven and one-half hours, Monday through Friday, and the basic workweek was 37 1/2 hours, be replaced with a new provision providing a basic workday of eight hours and a basic workweek of 40 hours, and that the terms on which overtime rates of pay were payable be changed accordingly.

A few days after the old agreement was terminated the employer unilaterally began to make changes in some conditions of employment provided in the expired contract, *e.g.,* eliminating the checkoff of Union dues, eliminating the Union's office in the plant, and eliminating Union lost time. No immediate change was made in the basic workweek or workday, but in March 1972, the employer announced that it would unilaterally implement, as of March 13, 1972, its proposal for a 40-hour week and eight-hour day. The Union response was a membership meeting on March 7 at which strike action was authorized and a resolution was adopted binding Union members to refuse to work any overtime, defined as work in excess of seven and one-half hours in any day or 37 1/2 hours in any week. Following the strike vote, the employer offered to "defer the implementation" of its workweek proposal if the Union would agree to call off the concerted refusal to work overtime. The Union, however, refused the offer and indicated its intent to continue the concerted ban on overtime. Thereafter, the employer did not make effective the proposed changes in the workday and workweek before the new agreement became effective on July 23, 1972. Although all but a very few employees complied with the Union's resolution against acceptance of overtime work during the negotiations, the employer did not discipline, or attempt to discipline, any employee for refusing to work overtime.

Instead, while negotiations continued, the employer filed a charge with the National Labor Relations Board that the Union's resolution violated § 8(b)(3) of the National Labor Relations Act. The Regional Director dismissed the charge on the ground that the "policy prohibiting overtime work by its member employees… does not appear to be in violation of the Act" and therefore was not conduct cognizable by the Board under *NLRB* v. *Insurance Agents,* 361 U.S. 477 (1960). However, the employer also filed a complaint before the Wisconsin Employment Relations Commission charging that the refusal to work overtime constituted an unfair labor practice under state law. The Union filed a motion before the Commission to dismiss the complaint for want of "jurisdiction over the subject matter" in that jurisdiction over "the activity of the [Union] complained of [is] pre-empted by" the National Labor Relations Act. The motion was denied and the Commission adopted the Conclusion of Law of its Examiner that "the concerted refusal to work overtime, is not an activity which is arguably protected under Section 7 or arguably prohibited under Section 8 of the National Labor Relations Act, as amended, and…, therefore, the… Commission is not pre-empted from asserting its jurisdiction to regulate said conduct." The Commission also adopted the further Conclusion of Law that the Union "by authorizing… the concerted refusal to work overtime… engaged in a concerted effort to interfere with production and… committed an unfair labor practice within the meaning

of Section 111.06 (2)(h)…."[3]1 The Commission thereupon entered an order that the Union, *inter alia,* "[i]mmediately cease and desist from authorizing, encouraging or condoning any concerted refusal to accept overtime assignments…." The Wisconsin Circuit Court affirmed and entered judgment enforcing the Commission's order. The Wisconsin Supreme Court affirmed the Circuit Court. 67 Wis. 2d 13, 226 N.W. 2d 203 (1975). We granted certiorari, 423 U.S. 890 (1975). We reverse.

I

"The national… Act… leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible." *Garner* v. *Teamsters Union,* 346 U.S. 485, 488 (1953). Federal labor policy as reflected in the National Labor Relations Act, as amended, has been construed not to preclude the States from regulating aspects of labor relations that involve "conduct touch[ing] interests so deeply rooted in local feeling and responsibility that… we could not infer that Congress had deprived the States of the power to act." *San Diego Unions* v. *Garmon,* 359 U.S. 236, 244 (1959). Policing of actual or threatened violence to persons or destruction of property has been held most clearly a matter for the States.[4] Similarly, the federal law governing labor relations does not withdraw "from the States… power to regulate where the activity regulated [is] a merely peripheral concern of the Labor Management Relations Act." *Id.,* at 243.[5]

Cases that have held state authority to be pre-empted by federal law tend to fall into one of two categories: (1) those that reflect the concern that "one forum would enjoin, as illegal, conduct which the other forum would find legal" and (2) those that reflect the concern "that the [application of state law by] state courts would restrict the exercise of rights guaranteed by the Federal Acts." *Automobile Workers* v. *Russell,* 356

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[3] Wisconsin Stat. § 111.06 (2) (1974) provides:

"It shall be an unfair labor practice for an employe individually or in concert with others:

. . . . .

"(h) To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike."

[4] Thus *Automobile Workers* v. *Russell,* 356 U.S. 634 (1958), upheld state-court jurisdiction of a common-law tort action against a union to recover compensatory and punitive damages for malicious interference with the plaintiff's lawful occupation by mass picketing and threats of violence that prevented the plaintiff from entering the plant and engaging in his employment; *Youngdahl* v. *Rainfair, Inc.,* 355 U.S. 131 (1957), sustained state-court power to enjoin striking employees from threatening or provoking violence or obstructing or attempting to obstruct the free use of the streets adjacent to the struck plant, or free ingress and egress to and from the property; *Automobile Workers* v. *Wisconsin Emp. Rel. Board,* 351 U.S. 266 (1956), sustained state authority to vest jurisdiction in a state labor relations board to enjoin violent union conduct; *United Constr. Workers* v. *Laburnum Constr. Corp.,* 347 U.S. 656 (1954), held a state court not precluded from hearing and determining a commonlaw tort action based on conduct which, although an unfair labor practice under federal law, constituted threats of violence and intimidation that forced an employer to abandon all of its projects in the area. In short, a State still may exercise "its historic powers over such traditionally local matters as public safety and order and the use of streets and highways," *Allen-Bradley Local* v. *Wisconsin Emp. Rel. Board,* 315 U.S. 740, 749 (1942), for "[p]olicing of such conduct is left wholly to the states." *Automobile Workers* v. *Wisconsin Emp. Rel. Board,* 336 U.S. 245, 253 (1949).

[5] Thus *Machinists* v. *Gonzales,* 356 U.S. 617 (1958), held that a state court was not precluded from ordering the reinstatement by a union of a wrongfully expelled member and awarding him damages, even though the union's conduct might also involve an unfair labor practice, since there was only a remote possibility of conflict with enforcement by the National Labor Relations Board of national policy. And in *Hanna Mining Co.* v. *Marine Engineers,* 382 U.S. 181 (1965), we resolved the "troublesome question of where lies the line between permissible and federally preempted state regulation of [the] union activities" there presented, *id.,* at 183, by concluding that the Act's amendment expressly to exclude supervisory employees from the critical definition of "employees" eliminated any serious problems of pre-emption since "many provisions of the Act employing that pivotal term would cease to operate where supervisors were the focus of concern." *Id.,* at 188. Further, in *Linn* v. *Plant Guard Workers,* 383 U.S. 53 (1966), we held that the availability of a state judicial remedy for malicious libel would not impinge upon the national labor policy.

U.S. 634, 644 (1958). "[I]n referring to decisions holding state laws pre-empted by the NLRA, care must be taken to distinguish pre-emption based on federal protection of the conduct in question… from that based predominantly on the primary jurisdiction of the National Labor Relations Board…, although the two are often not easily separable." *Railroad Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369, 383 n. 19 (1969). Each of these distinct aspects of labor law pre-emption had its own history in our decisions, to which we now turn.

We consider first pre-emption based predominantly on the primary jurisdiction of the Board. This line of preemption analysis was developed in *San Diego Unions* v. *Garmon,* and its history was recently summarized in *Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 290-291 (1971):

> [V]arying approaches were taken by the Court in initially grappling with this pre-emption problem. Thus, for example, some early cases suggested the true distinction lay between judicial application of general common law, which was permissible, as opposed to state rules specifically designed to regulate labor relations, which were pre-empted. Others made pre-emption turn on whether the States purported to apply a remedy not provided for by the federal scheme, while in still others the Court undertook a thorough scrutiny of the federal Act to ascertain whether the state courts had, in fact, arrived at conclusions inconsistent with its provisions…. [N]one of these approaches proved satisfactory, however, and each was ultimately abandoned. It was, in short, experience -- not pure logic -- which initially taught that each of these methods sacrificed important federal interests in a uniform law of labor relations centrally administered by an expert agency without yielding anything in return by way of predictability or ease of judicial application.
>
> The failure of alternative analyses and the interplay of the foregoing policy considerations, then, led this Court to hold in *Garmon,* 359 U.S., at 244:
>
>> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

See also *San Diego Unions* v. *Garmon,* 359 U.S., at 244-247.

However, a second line of pre-emption analysis has been developed in cases focusing upon the crucial inquiry whether Congress intended that the conduct involved be unregulated because left "to be controlled by the free play of economic forces." *NLRB* v. *Nash-Finch Co.,* 404 U.S. 138, 144 (1971).[6] Concededly this

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[64] See Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1352 (1972):

"An appreciation of the true character of the national labor policy expressed in the NLRA and the LMRA indicates that in providing a legal framework for union organization, collective bargaining, and the conduct of labor disputes, Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests."

Cf. Lesnick, Preemption Reconsidered: The Apparent Reaffirmation of Garmon, 72 Col. L. Rev. 469, 478, 480 (1972):

"[T]he failure of Congress to prohibit certain conduct warrant[s a] negative inference that it was deemed proper, indeed desirable -- at least, desirable to be left for the free play of contending economic forces. Thus, the state is not merely filling a gap when it outlaws what federal law fails to outlaw; it is denying one party to an economic contest a weapon that Congress meant him to have available.

.. . . .

inquiry was not made in 1949 in the so-called *Briggs-Stratton case, Automobile Workers* v. *Wisconsin Emp. Rel. Board,* 336 U.S. 245 (1949), the decision of this Court heavily relied upon by the court below in reaching its decision that state regulation of the conduct at issue is not pre-empted by national labor law. In *Briggs-Stratton,* the union, in order to bring pressure on the employer during negotiations, adopted a plan whereby union meetings were called at irregular times during working hours without advance notice to the employer or any notice as to whether or when the workers would return. In a proceeding under the Wisconsin Employment Peace Act, the Wisconsin Employment Relations Board issued an order forbidding the union and its members to engage in concerted efforts to interfere with production by those methods. This Court did not inquire whether Congress meant that such methods should be reserved to the union "to be controlled by the free play of economic forces." Rather, because these methods were "neither made a right under federal law nor a violation of it" the Court held that there "was no basis for denying to Wisconsin the power, in governing her internal affairs, to regulate" such conduct.

However, the *Briggs-Stratton* holding that state power is not pre-empted as to peaceful conduct neither protected by § 7 nor prohibited by § 8 of the federal Act, a holding premised on the statement that "[t]his conduct is governable by the State or it is entirely ungoverned," 336 U.S., at 254, was undercut by subsequent decisions of this Court. For the Court soon recognized that a particular activity might be "protected" by federal law not only when it fell within § 7, but also when it was an activity that Congress intended to be "unrestricted by *any* governmental power to regulate" because it was among the permissible "economic weapons in reserve,… actual exercise [of which] on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *NLRB* v. *Insurance Agents,* 361 U.S., at 488-489. "[T]he legislative purpose may… dictate that certain activity 'neither protected nor prohibited' be deemed privileged against state regulation." *Hanna Mining Co.* v. *Marine Engineers,* 382 U.S. 181, 187 (1965).

II

Insurance Agents, supra, involved a charge of a refusal by the union to bargain in good faith in violation of § 8 (b)(3) of the Act. The charge was based on union activities that occurred during good-faith bargaining over the terms of a collective-bargaining agreement. During the negotiations, the union directed concerted on-the-job activities by its members of a harassing nature designed to interfere with the conduct of the employer's business, for the avowed purpose of putting economic pressure on the employer to accede to the union's bargaining demands. The harassing activities, all peaceful, by the member insurance agents included refusal for a time to solicit new business, and refusal (after the writing of new business was resumed) to comply with the employer insurance company's reporting procedures; refusal to participate in a company campaign to solicit new business; reporting late at district offices the days the agents were scheduled to attend them; refusing to perform customary duties at the office, instead engaging there in "sit-in-mornings," "doing what comes naturally," and leaving at noon as a group; absenting themselves from special business conferences arranged by the company; picketing and distributing leaflets outside the various offices of the company on specified days and hours as directed by the union; distributing leaflets each day to policyholders and others and soliciting policyholders' signatures on petitions directed to the company; and presenting the signed policyholders' petitions to the company at its home office while simultaneously engaging in mass demonstrations there. 361 U.S., at 480-481. We held that such tactics would not support a finding by the NLRB that the union had failed to bargain in good faith as required by § 8 (b)(3) and rejected the *per se* rule applied by the Board that use of "economically harassing activities" alone sufficed to prove a violation

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"The premise is… that Congress judged whether the conduct was illicit or legitimate, and that 'legitimate' connotes, not simply that federal law is neutral, but that the conduct is to be assimilated to the large residual area in which a regime of free collective bargaining -- 'economic warfare,' if you prefer -- is thought to be the course of regulatory wisdom."

of that section. The Court assumed "that the activities in question here were not 'protected' under § 7 of the Act," 361 U.S., at 483 n. 6, but held that the *per se* rule was beyond the authority of the NLRB to apply.

. . . . Our labor policy is not presently erected on a foundation of government control of the results of negotiations. Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union." *Id.,* at 490.

We noted further that "Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions" and "the activities here involved have never been specifically outlawed by Congress." *Id.,* at 498. Accordingly, the Board's claim "to power… to distinguish among various economic pressure tactics and brand the ones at bar inconsistent with good-faith collective bargaining," *id.,* at 492, was simply inconsistent with the design of the federal scheme in which "the use of economic pressure by the parties to a labor dispute is… part and parcel of the process of collective bargaining." *Id.,* at 495.

The Court had earlier recognized in pre-emption cases that Congress meant to leave some activities unregulated and to be controlled by the free play of economic forces. *Garner* v. *Teamsters Union,* in finding pre-empted state power to restrict peaceful recognitional picketing, said:

> The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the national Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." 346 U.S., at 499-500. [75]

Moreover, *San Diego Unions* v. *Garmon* expressly recognized that "the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States." 359 U.S., at 245.

It is true, however, that many decisions fleshing out the concept of activities "protected" because Congress meant them to be "unrestricted by any governmental power to regulate," *Insurance Agents,* 361 U.S., at 488, involved review of *per se* NLRB rules applied in the regulation of the bargaining process. But the analysis of *Garner* and *Insurance Agents* came full bloom in the pre-emption area in *Teamsters Union* v. *Morton,* 377 U.S. 252 (1964), which held pre-empted the application of state law to award damages for peaceful union secondary picketing. Although *Morton* involved conduct neither "protected nor prohibited" by § 7 or § 8 of the NLRA, we recognized the necessity of an inquiry whether "'Congress occupied this field and closed it to state regulation.'" 377 U.S. at 258. Central to Morton's analysis was the observation that "[i]n selecting which forms of economic pressure should be prohibited…, Congress struck the 'balance… between the uncontrolled power of management and labor to further their respective interests,'" *id.,* at 258-259:[8]

> This weapon of self-help, permitted by federal law, formed an integral part of the petitioner's effort to achieve its bargaining goals during negotiations with the respondent. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the

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[7] It is true, of course, that the seeds of the *Garmon* "primary jurisdiction of the NLRB" approach to labor law pre-emption are also contained within the *Garner* opinion. See, in addition to textual quotation, *Garner,* 346 U.S., at 490-491.

[8] "[T]he Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the… appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests." *Carpenters Union* v. *NLRB,* 357 U.S. 93, 99-100 (1958).

> employer and the community…. If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted § 303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy. 'For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.' *Garner* v. *Teamsters Union,* 346 U.S. 485, 500.

Although many of our past decisions concerning conduct left by Congress to the free play of economic forces address the question in the context of union and employee activities, self-help is of course also the prerogative of the employer because he, too, may properly employ economic weapons Congress meant to be unregulable. Mr. Justice Harlan concurring in *H. K. Porter Co.* v. *NLRB,* 397 U.S., at 109, stated the obvious:

> [T]he Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak, or that strikes and lockouts will never result from a bargaining impasse. It cannot be said that the Act forbids an employer… to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining.

"[R]esort to economic weapons should more peaceful measures not avail" is the right of the employer as well as the employee, *American Ship Bldg. Co.* v. *NLRB,* 380 U.S., at 317,[9] and the State may not prohibit the use of such weapons or "add to an employer's federal legal obligations in collective bargaining" any more than in the case of employees. Cox, *supra* N.4 at 1365. See, *e.g., Beasley* v. *Food Fair of North Carolina,* 416 U.S. 653 (1974). Whether self-help economic activities are employed by employer or union, the crucial inquiry regarding pre-emption is the same: whether "the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes." *Railroad Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S., at 380.

III

There is simply no question that the Act's processes would be frustrated in the instant case were the State's ruling permitted to stand. The employer in this case invoked the Wisconsin law because it was unable to overcome the union tactic with its own economic self-help means.[10] Although it did employ economic

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[9] See also *NLRB* v. *Truck Drivers Union,* 353 U.S. 87, 96 (1957):

"Although the Act protects the right of the employees to strike in support of their demands, this protection is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide."

[10] "Although Kearney and Trecker could have suspended, discharged, or even locked out its employees, such steps would have only increased its already enormous production problems [and] exacerbated the already substantial strain on the bargaining process…."

"Question: . . . [I]f you make the union fish or cut bait in the two extreme alternatives,… they may find they have to strike instead of engaging in some lesser activity like this. Doesn't the argument - the same argument can be made on the other side of the coin, it seems to me.

"Mr. Mallatt: Well, the union has two choices: It can accept the company's last proposal or it can strike, or it can continue to negotiate with the company and not make unilateral changes in the plant. You see, the employer can't do that, why should the union be able to do it? The employer can't pressure his employees if they are working after a contract has expired. He may lock them out.

weapons putting pressure on the union when it terminated the previous agreement, *supra,* at 134, it apparently lacked sufficient economic strength to secure its bargaining demands under "the balance of power between labor and management expressed in our national labor policy," *Teamsters Union* v. *Morton,* 377 U.S., at 260. [1110] But the economic weakness of the affected party cannot justify state aid contrary to federal law for, as we have developed, "the use of economic pressure by the parties to a labor dispute is not a grudging exception [under]… the [federal] Act; it is part and parcel of the process of collective bargaining." *Insurance Agents,* 361 U.S., at 495. The state action in this case is not filling "a regulatory void which Congress plainly assumed would not exist," *Hanna Mining Co.* v. *Marine Engineers,* 382 U.S., at 196 (BRENNAN, J., concurring). Rather, it is clear beyond question that Wisconsin "[entered] into the substantive aspects of the bargaining process to an extent Congress has not countenanced." *NLRB* v. *Insurance Agents, supra,* at 498.

Our decisions hold that Congress meant that these activities, whether of employer or employees, were not to be regulable by States any more than by the NLRB, for neither States nor the Board is "afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful." *Ibid.* Rather, both are without authority to attempt to "introduce some standard of properly 'balanced' bargaining power," *id.,* at 497 (footnote omitted), or to define "what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining." *Id.,* at 500.[12] To sanction state regulation of such economic pressure deemed by the federal Act "desirabl[y]… left for the free play of contending economic forces,… is not merely [to fill] a gap [by] outlaw[ing] what federal law fails to outlaw; it is denying one party to an economic contest a weapon that Congress meant him to have available." Lesnick, Preemption Reconsidered: The Apparent Reaffirmation of *Garmon,* 72 Col. L. Rev. 469, 478 (1972).[13] Accordingly, such regulation by the State is impermissible because it "'stands as an obstacle to the

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"Question: Couldn't you unilaterally adopt a new overtime program?

"Mr. Mallatt: We never put it in.

"Question: But you tried to?

"Mr. Mallatt: That was a little pressure, but it didn't work.

"Question: I see."

[11] Cf. Cox, *supra,* n. 4, at 1347:

"*[In Briggs-Stratton,]* the Court was beguiled by the fallacy of supposing that a Congress which allowed an employer to discharge his employees for engaging in a series of 'quickie' strikes surely would not preclude the employer's pursuing what the Court regarded as the relatively mild sanction of legal redress through state courts. In fact, most employers facing a union with the strength and discipline to call a series of 'quickie' strikes would lack the economic power to discharge union members, leaving legal redress the more efficient sanction."

[12] "It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth - or even with what might be thought to be the ideal of one. The parties - even granting the modification of views that may come from a realization of economic interdependence - still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest.The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized…. [T]he truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors - necessity for goodfaith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms - exist side by side…. Doubtless one factor influences the other; there may be less need to apply economic pressure if the areas of controversy have been defined through discussion; and at the same time, negotiation positions are apt to be weak or strong in accordance with the degree of economic power the parties possess." *Insurance Agents,* 361 U.S., at 488-489.

[1312] In this case we need not and do not disturb the holding of *Briggs-Stratton,* later remarked in *Insurance Agents,* 361 U.S., at 494 n. 23, that § 13 of the NLRA, 29 U.S.C.§ 163, which guarantees a qualified right to strike, is not an independent limitation on state power apart from its context in the structure of the Act. Nor need we determine the vitality of the implication in Briggs-Stratton, also remarked in *Insurance Agents, supra,* at 494 n. 23, that § 501 (2) of the Taft-Hartley amendments to the NLRA, 29 U.S.C.§ 142 (2), is not to be considered in connection with § 13, but rather is only an aid to construction of § 8 (b)(4), 29 U.S.C.§ 158 (b)(4), of the NLRA. We do note, however, that in determining the sense of the entire structure of the federal law respecting the use of

accomplishment and execution of the full purposes and objectives of Congress.'" *Hill* v. *Florida,* 325 U.S. 538, 542 (1945).

. . . .

V

This survey of the extent to which federal labor policy and the federal Act have pre-empted state regulatory authority to police the use by employees and employers of peaceful methods of putting economic pressure upon one another compels the conclusion that the judgment of the Wisconsin Supreme Court must be reversed. It is not contended, and on the record could not be contended, that the Union policy against overtime work was enforced by violence or threats of intimidation or injury to property. Workers simply left the plant at the end of their workshift and refused to volunteer for or accept overtime or Saturday work.. . . .

the judgment of the Wisconsin Supreme Court is

Reversed.

5.12.2. Exceptions to the Rule

5.12.2.1. IIED – Farmer v. United Bhd. of Carpenters & Joiners, 430 U.S. 290 (1977)

Full decision: (link); **Docket**: (link); **Oral argument**: (link)

MR. JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is whether the National Labor Relations Act, as amended, pre-empts a tort action brought in state court by a Union member against the union and its officials to recover damages for the intentional infliction of emotional distress.

I

Petitioner Richard T. Hill was a carpenter and a member of Local 25 of the United Brotherhood of Carpenters and Joiners of America. Local 25 (Union) operates an exclusive hiring hall for employment referral of carpenters in the Los Angeles area. In 1965, Hill was elected to a three-year term as vice president of the Union. Shortly thereafter sharp disagreement developed between Hill and the Union Business Agent, Earl Daley, and other Union officials over various internal Union policies. According to Hill, the Union then began to discriminate against him in referrals to employers, prompting him to complain about the hiring hall operation within the Union and to the District Council and the International Union. Hill claims that as a result of these complaints he was subjected to a campaign of personal abuse and harassment in addition to continued discrimination in referrals from the hiring hall.[2]

In April 1969 petitioner filed in Superior Court for the County of Los Angeles an action for damages against the Union, ... He sought $ 500,000 in actual, and $ 500,000 in punitive, damages.

The Superior Court sustained a demurrer to the allegations of discrimination and breach of contract on the ground that federal law pre-empted state jurisdiction over them, but allowed the case to go to trial on the

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economic pressure and the economic weapons assumed by Congress to be available to the parties, it is not insignificant that § 501 (2) in defining the term "strike" refers to the use of "any concerted slow-down or other concerted interruption of operations by employees." "It is hardly conceivable that such a word as 'strike' could have been defined in these statutes without congressional realization of the obvious scope of its application." *Insurance Agents, supra,* at 511 n. 6 (opinion of Frankfurter, J.).

allegations in count two. Hill attempted to prove that the Union's campaign against him included "frequent public ridicule," "incessant verbal abuse," and refusals to refer him to jobs in accordance with the rules of the hiring hall. The defendants countered with evidence that the hiring hall was operated in a nondiscriminatory manner. The trial court instructed the jury that in order to recover damages Hill had to prove by a preponderance of the evidence that the defendants intentionally and by outrageous conduct had caused him to suffer severe emotional distress.. . . .

The court also instructed that the National Labor Relations Board would not have jurisdiction to compensate petitioner for injuries such as emotional distress, pain and suffering, and medical expenses, nor would it have authority to award punitive damages. The court refused to give a requested instruction to the effect that the jury could not consider any evidence regarding discrimination with respect to employment opportunities or hiring procedures.

The jury returned a verdict of $ 7,500 actual damages and $ 175,000 punitive damages against the Union, the District Council, and Business Agent Daley, and the trial court entered a judgment on the verdict. [144]

The California Court of Appeal reversed. Relying on this Court's decisions in . . . . *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236 (1959), the Court of Appeal held that the state courts had no jurisdiction over the complaint since the "crux" of the action concerned employment relations and involved conduct arguably subject to the jurisdiction of the National Labor Relations Board. The California Supreme Court denied review.

We granted certiorari to consider the applicability of the pre-emption doctrine to cases of this nature, 423 U.S. 1086 (1976). For the reasons set forth below we vacate the judgment of the Court of Appeal and remand for further proceedings.

II

The doctrine of pre-emption in labor law has been shaped primarily by two competing interests.[15] On the one hand, this Court has recognized that "the broad powers conferred by Congress upon the National Labor Relations Board to interpret and to enforce the complex Labor Management Relations Act… necessarily imply that potentially conflicting 'rules of law, of remedy, and of administration' cannot be permitted to operate." *San Diego Bldg. Trades Council* v. *Garmon, supra,* at 242. On the other hand, because Congress has refrained from providing specific directions with respect to the scope of pre-empted state regulation, the Court has been unwilling to "declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions…." *Motor Coach Employees* v. *Lockridge, supra,* at 289. Judicial experience with numerous approaches to the pre-emption problem in the labor law area eventually led to the general rule set forth in *Garmon, supra,* at 244, and recently reaffirmed in … *Machinists* v. *Wisconsin Emp. Rel. Comm'n,* 427 U.S. 132, 138-139 (1976):

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress, and requirements imposed by state law.

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[14]4 Hill voluntarily dismissed the complaint against the International and one Union official, the trial court dismissed the complaint with respect to another Union official, and the jury entered a verdict in favor of two other Union officials.

[15]5 "[I]n referring to decisions holding state laws pre-empted by the NLRA, care must be taken to distinguish pre-emption based on federal protection of the conduct in question… from that based predominantly on the primary jurisdiction of the National Labor Relations Board…, although the two are often not easily separable." *Railroad Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369, 383 n. 19 (1969). The branch of the pre-emption doctrine most applicable to the instant case concerns the primary jurisdiction of the National Labor Relations Board.

But the same considerations that underlie the *Garmon* rule have led the Court to recognize exceptions in appropriate classes of cases. We have refused to apply the pre-emption doctrine to activity that otherwise would fall within the scope of *Garmon* if that activity "was a merely peripheral concern of the Labor Management Relations Act… [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Id.,* at 243-244. See, *e.g., Linn* v. *Plant Guard Workers,* 383 U.S. 53 (1966) (malicious libel); *Automobile Workers* v. *Russell,* 356 U.S. 634 (1958) (mass picketing and threats of violence); *Machinists* v. *Gonzales,* 356 U.S. 617 (1958) (wrongful expulsion from union membership). We also have refused to apply the pre-emption doctrine "where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes." *Motor Coach Employees* v. *Lockridge, supra,* at 297-298. See *Vaca* v. *Sipes, supra* (duty of fair representation cases).

. . . .

The nature of the inquiry is perhaps best illustrated by *Linn* v. *Plant Guard Workers, supra.* Linn, an assistant manager of Pinkerton's National Detective Agency, filed a diversity action in federal court against a union, two of its officers, and a Pinkerton employee, alleging that the defendants had circulated a defamatory statement about him in violation of state law. If unfair labor practice charges had been filed, the Board might have found that the union violated § 8 by intentionally circulating false statements during an organizational campaign, or that the issuance of the malicious statements during the campaign had such a significant effect as to require that the election be set aside. Under a formalistic application of *Garmon,* the libel suit could have been pre-empted.

But a number of factors influenced the Court to depart from the *Garmon* rule. First, the Court noted that the underlying conduct - the intentional circulation of defamatory material known to be false - was not protected under the Act, and there was thus no risk that permitting the state cause of action to proceed would result in state regulation of conduct that Congress intended to protect. Second, the Court recognized that there was "'an overriding state interest'" in protecting residents from malicious libels, and that this state interest was "'deeply rooted in local feeling and responsibility.'" Third, the Court reasoned that there was little risk that the state cause of action would interfere with the effective administration of national labor policy. The Board's § 8 unfair labor practice proceeding would focus only on whether the statements were misleading or coercive; whether the statements also were defamatory would be of no relevance to the Board's performance of its functions. Moreover, the Board would lack authority to provide the defamed individual with damages or other relief. Conversely, the state-law action would be unconcerned with whether the statements were coercive or misleading in the labor context, and in any event the court would have power to award Linn relief only if the statements were defamatory. Taken together, these factors justified an exception to the pre-emption rule.

The Court was careful, however, to limit the scope of that exception. To minimize the possibility that state libel suits would either dampen the free discussion characteristic of labor disputes or become a weapon of economic coercion, the Court adopted by analogy the standards enunciated in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), and held that state damages actions in this context would escape pre-emption only if limited to defamatory statements published with knowledge or reckless disregard of their falsity. The Court also held that a complainant could recover damages only upon proof that the statements had caused him injury, including general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or any other form of harm recognized by state tort law. The Court stressed the responsibility of the trial judge to assure that damages were not excessive.

Similar reasoning underlies the exception to the pre-emption rule in cases involving violent tortious activity. Nothing in the federal labor statutes protects or immunizes from state action violence or the threat of violence in a labor dispute, *Automobile Workers* v. *Russell,* 356 U.S., at 640; *id.,* at 649 (Warren, C.J., dissenting); United *Construction Workers* v. *Laburnum Constr. Corp.,* 347 U.S. 656, 666 (1954), and thus there is no risk that state damages actions will fetter the exercise of rights protected by the NLRA. On the other hand, our cases consistently have recognized the historic state interest in "such traditionally local matters as public safety and order and the use of streets and highways." *Allen-Bradley Local* v. *Wisconsin Emp. Rel. Bd.,* 315 U.S. 740, 749 (1942). And, as with the defamation actions preserved by *Linn,* state-court actions to redress injuries caused by violence or threats of violence are consistent with effective administration of the federal scheme: Such actions can be adjudicated without regard to the merits of the underlying labor controversy. *Automobile Workers* v. *Russell, supra,* at 649 (Warren, C.J., dissenting).

Although cases like *Linn* and Russell involve state-law principles with only incidental application to conduct occurring in the course of a labor dispute, it is well settled that the general applicability of a state cause of action is not sufficient to exempt it from pre-emption.. . . the cases reflect a balanced inquiry into such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulation.

III

In count two of his amended complaint, see *supra,* at 293, Hill alleged that the defendants had intentionally engaged in "outrageous conduct, threats, intimidation, and words" which caused Hill to suffer "grievous mental and emotional distress as well as great physical damage." In the context of Hill's other allegations of discrimination in hiring hall referrals, these allegations of tortious conduct might form the basis for unfair labor practice charges before the Board. On this basis a rigid application of the *Garmon* doctrine might support the conclusion of the California courts that Hill's entire action was pre-empted by federal law. Our cases indicate, however, that inflexible application of the doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme. With respect to Hill's claims of intentional infliction of emotional distress, we cannot conclude that Congress intended exclusive jurisdiction to lie in the Board.

No provision of the National Labor Relations Act protects the "outrageous conduct" complained of by petitioner Hill in the second count of the complaint. Regardless of whether the operation of the hiring hall was lawful or unlawful under federal statutes, there is no federal protection for conduct on the part of union officers which is so outrageous that "no reasonable man in a civilized society should be expected to endure it." Thus, as in *Linn* v. *Plant Guard Workers,* 383 U.S. 53 (1966), and *Automobile Workers* v. *Russell, supra,* permitting the exercise of state jurisdiction over such complaints does not result in state regulation of federally protected conduct.

The State, on the other hand, has a substantial interest in protecting its citizens from the kind of abuse of which Hill complained. That interest is no less worthy of recognition because it concerns protection from emotional distress caused by outrageous conduct, rather than protection from physical injury, as in *Russell,* or damage to reputation, as in *Linn.* Although recognition of the tort of intentional infliction of emotional distress is a comparatively recent development in state law, see W. Prosser, Law of Torts, § 12, pp. 49-50, 56 (4th ed. 1971), our decisions permitting the exercise of state jurisdiction in tort actions based on violence or defamation have not rested on the history of the tort at issue, but rather on the nature of the State's interest in protecting the health and well-being of its citizens.

There is, to be sure, some risk that the state cause of action for infliction of emotional distress will touch on an area of primary federal concern. Hill's complaint itself highlights this risk. In those counts of the complaint that the trial court dismissed, Hill alleged discrimination against him in hiring hall referrals, which were also alleged to be violations of both the collective-bargaining agreement and the membership contract. These allegations, if sufficiently supported before the National Labor Relations Board, would

make out an unfair labor practice[1611] and the Superior Court considered them pre-empted by the federal Act.[1712] Even in count two of the complaint Hill made allegations of discrimination in "job-dispatching procedures" and "work assignments" which, standing alone, might well be pre-empted as the exclusive concern of the Board. The occurrence of the abusive conduct, with which the state tort action is concerned, in such a context of federally prohibited discrimination suggests a potential for interference with the federal scheme of regulation.

Viewed, however, in light of the discrete concerns of the federal scheme and the state tort law, that potential for interference is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens. . . .

On balance, we cannot conclude that Congress intended to oust state-court jurisdiction over actions for tortious activity such as that alleged in this case. . . . .The judgment of the Court of Appeal is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

5.12.2.2. Market Participator – Wis. Dep't of Indus., Labor & Human Rels. v. Gould, Inc., 475 U.S. 282 (1986)

Full decision: (link); **Docket**: (link); **Oral argument**: (link)

JUSTICE BLACKMUN delivered the opinion of the Court.

The question in this case is whether the National Labor Relations Act (NLRA), 29 U. S. C. § 151 *et seq*., pre-empts a Wisconsin statute debarring certain repeat violators of the Act from doing business with the State. We hold that it does.

I

Wisconsin has directed its Department of Industry, Labor and Human Relations to maintain a list of every person or firm found by judicially enforced orders of the National Labor Relations Board to have violated the NLRA in three separate cases within a 5-year period. See Wis. Stat. § 101.245 (1983-1984).[1] State

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[1611] Discrimination in hiring hall referrals constitutes an unfair labor practice under §§ 8(b)(1)(A) and 8(b)(2) of the NLRA. See, *e.g., Radio Officers* v. *NLRB,* 347 U.S. 17 (1954); *Operating Engineers Local 18,* 205 N.L.R.B. 901 (1973), enf'd, 500 F. 2d 48 (CA6 1974).

Prior to the filing of this suit, Hill filed an unfair labor practice charge with the Board with respect to one specific instance of alleged discrimination. He alleged that the Union violated §§ 8(b)(1)(A) and 8(b)(2) by refusing to honor an employer's request that he be referred for employment on a particular construction job. The Board awarded Hill $ 2,517 in backpay.

[1712] Whether a hiring hall practice is discriminatory and therefore violative of federal law is a determination Congress has entrusted to the Board. See *Teamsters* v. *NLRB,* 365 U.S. 667 (1961). Whether there is federal pre-emption with respect to allegations of breach of a *contractual* obligation depends upon the nature of the obligation and the alleged breach. See *Motor Coach Employees* v. *Lockridge,* 403 U.S., at 292-297, 298-301. Casting a complaint in terms of breach of a *membership agreement* does not necessarily insulate a state-court action from application of the pre-emption doctrine. See n. 9, *supra.* Allegations of breach of the contract between the union and the employer stand on different ground, since, as noted earlier, § 301 of the Labor/Management Relations Act, 29 U.S.C. § 185, authorizes suits for breach of a *collective-bargaining agreement* even if the breach is an unfair labor practice within the Board's jurisdiction. See n. 8, *supra.*

procurement agents are statutorily forbidden to purchase "any product known to be manufactured or sold by any person or firm included on the list of labor law violators." § 16.75(8).[2] A name remains on the violators' list for three years. § 101.245(4).

Gould Inc. is a Delaware corporation. In 1982, Wisconsin placed Gould on its list of labor law violators. . . . The State informed Gould that it would enter into no new contract with the company until 1985. The State also announced that it would continue its current contracts with Gould only as long as necessary to avoid contractual penalties, and that while Gould was on the list the State would not purchase products containing components produced by the company. At the time, Gould held state contracts worth over $ 10,000, and had outstanding bids for additional contracts in excess of $ 10,000.

Gould filed this action for injunctive and declaratory relief, arguing that the Wisconsin debarment scheme was pre-empted by the NLRA . . . . The United States District Court for the Western District of Wisconsin granted Gould summary judgment on the pre-emption claim. . . .. The court enjoined the defendant state officials from refusing to do business with Gould, from refusing to purchase products with Gould components, and from including Gould on the list of labor law violators. The Court of Appeals for the Seventh Circuit affirmed in relevant part. 750 F.2d 608 (1984). As did the District Court and the Court of Appeals, we find it necessary to reach only the pre-emption issue.

II

It is by now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations. Although some controversy continues over the Act's pre-emptive scope, certain principles are reasonably settled. Central among them is the general rule set forth in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), that States may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits. . . . . the *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act. The rule is designed to prevent "conflict in its broadest sense" with the "complex and interrelated federal scheme of law, remedy, and administration," *id*., at 243, and this Court has recognized that "[conflict] in technique can be fully as disruptive to the system Congress erected as conflict in overt policy." *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 287 (1971).

Consequently, there can be little doubt that the NLRA would prevent Wisconsin from forbidding *private parties* within the State to do business with repeat labor law violators. Like civil damages for picketing, which the Court refused to allow in *Garmon*, a prohibition against in-state private contracts would interfere with Congress' "integrated scheme of regulation" by adding a remedy to those prescribed by the NLRA. 359 U.S., at 247. . . .

Wisconsin does not assert that it could bar its residents from doing business with repeat violators of the NLRA. It contends, however, that the statutory scheme invoked against Gould escapes pre-emption because it is an exercise of the State's spending power rather than its regulatory power. But that seems to us a distinction without a difference, at least in this case, because on its face the debarment statute serves plainly as a means of enforcing the NLRA. The State concedes, as we think it must, that the point of the statute is to deter labor law violations and to reward "fidelity to the law." No other purpose could credibly be ascribed,

given the rigid and undiscriminating manner in which the statute operates: firms adjudged to have violated the NLRA three times are automatically deprived of the opportunity to compete for the State's business.[5]

Because Wisconsin's debarment law functions unambiguously as a supplemental sanction for violations of the NLRA, it conflicts with the Board's comprehensive regulation of industrial relations in precisely the same way as would a state statute preventing repeat labor law violators from doing any business with private parties within the State. Moreover, if Wisconsin's debarment law is valid, nothing prevents other States from taking similar action against labor law violators. Indeed, at least four other States already have passed legislation disqualifying repeat or continuing offenders of the NLRA from competing for state contracts.[6] Each additional statute incrementally diminishes the Board's control over enforcement of the NLRA and thus further detracts from the "integrated scheme of regulation" created by Congress.

That Wisconsin has chosen to use its spending power rather than its police power does not significantly lessen the inherent potential for conflict when "two separate remedies are brought to bear on the same activity," *Garner*, 346 U.S., at 498-499. To uphold the Wisconsin penalty simply because it operates through state purchasing decisions therefore would make little sense.

III

Wisconsin notes correctly that state action in the nature of "market participation" is not subject to the restrictions placed on state regulatory power by the Commerce Clause. We agree with the Court of Appeals, however, that by flatly prohibiting state purchases from repeat labor law violators Wisconsin "simply is not functioning as a private purchaser of services," 750 F.2d, at 614; for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation.

In any event, the "market participant" doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted. . . . .

Nothing in the NLRA prevents private purchasers from boycotting labor law violators. But government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. Outside the area of Commerce Clause jurisprudence, it is far from unusual for federal law to prohibit States from making spending decisions in ways that are permissible for private parties. See, *e. g., Elrod* v. *Burns*, 427 U.S. 347 (1976); *Perry* v. *Sindermann*, 408 U.S. 593 (1972). The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference. See, *e. g., Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 148-151 (1976); *Teamsters* v. *Morton*, 377 U.S. 252, 259-260 (1964); Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1346, 1351-1359 (1972). The Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play.

We do not say that state purchasing decisions may never be influenced by labor considerations, any more than the NLRA prevents state regulatory power from ever touching on matters of industrial relations.

Doubtless some state spending policies, like some exercises of the police power, address conduct that is of such "peripheral concern" to the NLRA, or that implicates "interests so deeply rooted in local feeling and responsibility," that pre-emption should notbe inferred. *Garmon*, 359 U.S., at 243-244; see also, *e. g., Belknap, Inc*. v. *Hale*, 463 U.S. 491, 498 (1983). And some spending determinations that bear on labor relations were intentionally left to the States by Congress. See *New York Tel. Co*. v. *New York State Labor Dept*., 440 U.S. 519 (1979). But Wisconsin's debarment rule clearly falls into none of these categories. We are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States. The manifest purpose and inevitable effect of the debarment rule is to enforce the requirements of the NLRA. That goal may be laudable, but it assumes for the State of Wisconsin a role Congress reserved exclusively for the Board.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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[1] Section 101.245 provides in relevant part:

"(1) The department [of industry, labor and human relations] shall maintain a list of persons or firms that have been found by the national labor relations board, and by 3 different final decisions of a federal court within a 5-year period as determined under sub. (1m), if the 3 final decisions involved a cumulative finding of at least three separate violations, to have violated the national labor relations act, 29 U. S. C. 151 *et seq*., and of persons or firms that have been found to be in contempt of court for failure to correct a violation of the national labor relations act on 3 or more occasions by a court within a 5-year period as determined under sub. (1m) if the 3 contempt findings involved a cumulative total of at least 3 different violations.

"(1m) On or before July 1 of each year the department shall compile the list required under sub. (1) based upon the 5-year period which ended on September 30 of the year preceding.

"(2) This list may be compiled from the records of the national labor relations board.

"(3) Whenever a new name is added to this list the department shall send the name to the department of administration for actions as provided in s. 16.75(8).

"(4) A name shall remain on the list for 3 years."

The statute was enacted as 1979 Wis. Laws, ch. 340, § 3. It became effective May 21, 1980.

[2] Section 16.75(8) provides in relevant part:

"The department [of administration] shall not purchase any product known to be manufactured or sold by any person or firm included on the list of labor law violators compiled by the department of industry, labor and human relations under s. 101.245. The secretary may waive this subsection if maintenance, repair or operating supplies are required to maintain systems or equipment which were purchased by the state from a person or firm included on the list prior to the date of inclusion on the list, or if the secretary finds that there exists an emergency which threatens the public health, safety or welfare and a waiver is necessary to meet the emergency."

We are advised that the statutory ban applies only to purchases by the State and not to purchasing decisions of counties, municipalities, or other political subdivisions of the State. Tr. of Oral Arg. 4.

In addition to disqualifying repeat violators of the NLRA, Wisconsin provides statutory preferences to bids from Wisconsin companies, minority businesses, employers of disabled workers, and prison industries. See Wis. Stat. §§ 16.75(1)(a), (3m)(b), (3s)(a), and (3t)(c) (1983-1984).

[5] The conflict between the challenged debarment statute and the NLRA is made all the more obvious by the essentially punitive rather than corrective nature of Wisconsin's supplemental remedy. The regulatory scheme established for labor relations by Congress is "essentially remedial," and the Board is not generally authorized to impose penalties solely for the purpose of deterrence or retribution. *Republic Steel Corp*. v. *NLRB*, 311 U.S. 7, 10-12 (1940). Wisconsin's debarment sanction, in contrast, functions as punishment and serves no corrective purpose. Punitive sanctions are inconsistent not only with the remedial philosophy of the NLRA, but also in certain situations with the Act's procedural logic. For example, the Board's certification of a bargaining representative is not subject to direct judicial appeal. An employer who believes that the Board erred in approving an election or defining a bargaining unit thus may obtain administrative and judicial review only by refusing to bargain and awaiting an enforcement action by the Board for violation of the Act. See *Magnesium Casting Co*. v. *NLRB*, 401 U.S. 137, 139 (1971); *AFL* v. *NLRB*, 308 U.S. 401 (1940). One of Gould's violations in fact occurred in precisely this manner. See *Gould, Inc., Elec. Components Div*. v. *NLRB*, 610 F.2d 316 (CA5 1980). An unsuccessful challenge of this sort, if pursued in good faith, will generally present an especially inappropriate occasion for punitive sanctions.

[6] See Conn. Gen. Stat. § 31-57a (1985); Md. State Finance & Procurement Code Ann. § 13-404 (1985); Mich. Comp. Laws §§ 423.322, .323, and .324 (Supp. 1985); Ohio Rev. Code Ann. § 121.23 (1984).

6. Work Law Movies and Shows

I thank Professor Hiba Hafiz for suggesting most of the entries here. **Some movies contain depictions of severe race, sex and class-based abuse. Viewers' discretion advised.**

- It's a Wonderful Life (1947) (dir. Frank Capra)
- On the Waterfront (1954) (dir. Elia Kazan)
- Jeanne Dielman: 23 Quai du Commerce, 1080 Bruxelles (1977) (dir. Chantal Akerman)
- Harlan County, USA (1976) (documentary) (dir. Barbara Kopple)
- Union Maids (1976) (documentary) (dirs. Jim Klein, Julia Reichart and Miles Mogulescu)
- Norma Rae (1979) (dir. Martin Ritt)
- Nine to Five (1980) (dir. Colin Higgins)
- Matewan (1987) (dir. John Sayles)
- Roger and Me (1989) (documentary) (dir. Michael Moore)
- American Dream (1990) (documentary) (dir. Barbara Kopple) – on the Hormel strike of 1985
- H-2 Worker (1990) (documentary) (dir. Stephanie Black)
- Newsies (1992) (dir. Kenny Ortega)

- Human Resources (1999) (dir. Laurent Cantet)
- Bread and Roses (2000) (dir. Ken Loach)
- The Gleaners and I (2000) (documentary) (dir. Agnes Varda)
- One Day Longer: The Story of the Frontier Strike (2000) (documentary) (dir. Amie Williams)
- The Navigators (2001) (dir. Ken Loach)
- The Phantom of the Operator (2004) (documentary) (dir. Caroline Martel)
- The World (2004) (dir. Jia Zhangke)
- Who Killed Cock Robin? (2005) (dir. Travis Wilkerson)
- Workingman's Death (2005) (dir. Michael Glawogger)
- Made in L.A. (2007) (documentary) (dir. Almudena Carracedo)
- Ratatouille (2007) (dir. Brad Bird)
- It's a Free World… (2008) (dir. Ken Loach)
- The Last Truck: Closing of a GM Plant (2009) (documentary) (dirs. Julia Reichert and Steven Bognar)
- Made in Dagenham (2010) (dir. Nigel Cole)
- Last Train Home (2009) (documentary) (dir. Lixin Fan)
- The Coca-Cola Case (2009) (documentary) (dirs. German Gutierrez and Carmen Garcia)
- Leviathan (2012) (documentary) (dirs. Lucien Castaing-Taylor and Verena Paravel)
- Brothers on the Line (2012) (documentary) (dir. Sasha Reuther) – on the Reuther brothers and the rise of the UAW
- Cesar Chavez (2014) (dir. Diego Luna)
- Food Chains (2014) (documentary) (dir. Sanjay Rawal)
- Pride (2014) (dir. Matthew Warchus)
- In Dubious Battle (2017) (dir. James Franco)
- I, Daniel Blake (2017) (dir. Ken Loach)
- Sorry We Missed You (2019) (dir. Ken Loach)
- American Factory (2019) (documentary) (dirs. Julia Reichert and Steven Bognar)
- Bombshell (2020) (dir. Jay Roach)
- The Assistant (2019) (dir. Kitty Green)
- Radium Girls (2020) (dirs. Lydia Dean Pilcher & Ginny Mohler)
- Severance (2022) (dir. Ben Stiller)

7. Work Law Canonical Books

- Edelman, Lauren B. *Working law: Courts, corporations, and symbolic civil rights*. University of Chicago Press, 2020.
- Clare, Eli. *Brilliant imperfection: Grappling with cure*. Duke University Press, 2017.
- Gross, James A. Rights, not interests: Resolving value clashes under the national labor relations act. Cornell University Press, 2017.
- Davidov, Guy. A purposive approach to labour law. Oxford University Press, 2016.
- Weinrib, Laura. *The Taming of Free Speech: America's Civil Liberties Compromise*. Harvard University Press, 2016.
- Weil, David. The Fissured Workplace. Harvard University Press, 2014.

- Thelen, Kathleen. *Varieties of liberalization and the new politics of social solidarity*. Cambridge university press, 2014.
- Rosenfeld, Jake. What unions no longer do. Harvard University Press, 2014.
- Lichtenstein, Nelson. State of the Union. Princeton University Press, 2013.
- Katznelson, Ira. *Fear itself: The new deal and the origins of our time*. WW Norton & Company, 2013.
- Freedland, Mark Robert, and Nicola Kountouris. *The legal construction of personal work relations*. Oxford University Press, 2011.
- Gross, James. Broken promise: The subversion of US labor relations. Temple University Press, 2010.
- Weiler, Paul C. Governing the workplace: The future of labor and employment law. Harvard University Press, 2009.
- Deakin, Simon F., and Frank Wilkinson. The law of the labour market: Industrialization, employment and legal evolution. Vol. 18. Oxford: Oxford University Press, 2005.
- Katznelson, Ira. *When affirmative action was white: An untold history of racial inequality in twentieth-century America*. WW Norton & Company, 2005.
- Witt, John Fabian. The accidental republic: Crippled workingmen, destitute widows, and the remaking of American law. Harvard University Press, 2004.
- Kessler-Harris, Alice. *In pursuit of equity: Women, men, and the quest for economic citizenship in 20th century America*. Oxford University Press, USA, 2003.
- McCann, Michael W. Rights at work: Pay equity reform and the politics of legal mobilization. University of Chicago Press, 1994.
- Steinfeld, Robert J. The invention of free labor: the employment relation in English and American law and culture, 1350-1870. UNC Press Books, 1991.
- Jacoby, Sanford M., ed. *Masters to managers: Historical and comparative perspectives on American employers*. Columbia University Press, 1991.
- Forbath, William E. Law and the shaping of the American labor movement. Harvard University Press, 1991.
- Orren, Karen. *Belated feudalism: Labor, the law, and liberal development in the United States*. Cambridge University Press, 1991.
- Esping-Andersen, Gosta. *The three worlds of welfare capitalism*. Princeton University Press, 1990.
- Linder, Marc. The Employment Relationship in Anglo-American Law: A Historical Perspective. Greenwood Press, 1989.
- Tomlins, Christopher L. *The state and the unions*. CUP Archive, 1985.
- Freeman, Richard B., and James L. Medoff. What do unions do (1984).
- Atleson, James B. Values and assumptions in American labor law. University of Massachusetts Press, 1983.
- Gross, James A. The reshaping of the national labor relations board: National labor policy in transition 1937-1947. State University of New York Press, 1982.

8. Work Law Documentaries

With thanks to Jeff Schuhrke for allowing me to publish what are mostly his recommendations.

- United Action Means Victory (1939)
- With These Hands (1950)
- Salt of the Earth (1954)
- Harvest of Shame (1960)
- The Inheritance (1964)
- I Am Somebody (1970)
- Finally Got the News (1970)
- The Great Sit-Down (1976)
- Harlan County, USA (1976)
- Union Maids (1976)
- With Babies and Banners (1979)
- The Wobblies (1979)
- Eugene Debs: Trade Unionist, Socialist, Revolutionary (1979)
- The Life and Times of Rosie the Riveter (1980)
- Labor's Turning Point (1981)
- We Dig Coal: A Portrait of Three Women (1982)
- Miles of Smiles, Years of Trouble (1982)
- Seeing Red (1983)
- The Last Pullman Car (1983)
- Final Offer (1985)
- American Dream (1990)
- At the River I Stand (1993)
- A. Philip Randolph For Jobs and Freedom (1996)
- https://www.imdb.com/title/tt0264802/
- Rising From the Rails: The Story of the Pullman Porter (2006)
- Mother Jones: America's Most Dangerous Woman (2007)
- No Contract, No Cookies (2011)
- Brothers on the Line (2012)
- Pride and Prejudice (2013)
- One Generation's Time: The Legacy of Silme Domingo and Gene Viernes (2013)
- Blood on the Mountain (2016)
- Dolores (2017)
- American Socialist: The Life and Times of Eugene Victor Debs (2017)
- The Revolutionist: Eugene v. Debs (2019)
- Mine Wars (2019)
- 9To5: The Story of a Movement (2021)