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Employee Interests in Labor Law: 
The Supreme Court Swings Back the Pendulum

Lawrence F. Doppelt†

Professor Doppelt discusses significant Supreme Court labor cases decided between 1970 and 1975 and discerns a trend unfavorable to employee rights. He suggests that the Court has ignored certain important employee interests and should place more value on these interests in the future.

I

INTRODUCTION

It is by no means novel to note that labor relations law may be likened to a pendulum, swinging between the interests of the employees and management depending on the pressures of current social values and the predilections of the decision-makers. Perhaps no other field more vividly demonstrates how policy considerations, frequently unstat- ed, determine and alter legal rationales.

In sweeping terms, it may be stated that in the past 100 years labor organizations have progressed from being “threatened by an ill-defined doctrine of criminal conspiracy” to being “important centers of private power enjoying affirmative legal protection and widespread social approval.”

1 However, this trend toward the recognition of the value of labor movements has not occurred without wide swings of the pendu- lum. The decade following the advent of the New Deal saw vigorous pro-labor movements designed to overcome the long prior era of employer protection; and significant steps favoring unions and employees

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1. B. MELTZER, LABOR LAW 1 (1970).
2. Good short histories and descriptions of the development of United States labor law, as well as a collection of lead cases, are found in B. MELTZER, LABOR LAW (1970) and A. COX & D. BOK, LABOR LAW, (7th ed. 1969).
were adopted during the 1960's to offset the pro-management movement of the preceding fifteen years.³  

The first half of the 1970's saw the United States Supreme Court firmly brake the pro-union swing of the prior decade.⁴ While the Court did not uniformly rule against union interests vis-a-vis management's over the past five years,⁵ one need only compare the current decisions with those of the sixties in such fields as injunctions,⁶ subcontracting,⁷ successor obligations,⁸ subjects of bargaining,⁹ organizing,¹⁰ and bargaining obligations,¹¹ to appreciate the degree to which the Supreme Court

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4. Organized labor has clearly stated its adamant opposition to this perceived trend of the Court. See the Executive Council 1975 Report to AFL-CIO convention, reported at 191 Daily Labor Report, Sec. E (1975), noting the numerous Supreme Court decisions detrimental to organized labor in 1974 and 1975.  

5. See, e.g., NLRB v. Weingarten, 420 U.S. 251 (1975), upholding an employee's right to withdraw from an interview with his employer when the employee has a reasonable basis for believing that the interview might result in discipline and his request to have a union shop steward present has been denied, and NLRB v. Magnavox Co., 415 U.S. 322 (1974), holding that a union could not bargain away the Section 7 rights of employees to distribute union literature or solicit union support. While both these cases also involved employee rights, they primarily concerned the interests of unions in organizing and representing employees.  


10. Compare Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968), which appeared to expand a union's right to organize on certain private property, with Central Hardware Co. v. NLRB, 407 U.S. 539 (1972), which backed off from the Logan Valley rationale, and Hudgens v. NLRB, 44 U.S.L.W. 4281, March 3, 1976, which explicitly overruled Logan Valley.  

has departed from its basically pro-union stance of that earlier period. Moreover, the past five years have witnessed a total absence of those innovative and free-wheeling Supreme Court decisions which made the sixties such heady days for organized labor.\textsuperscript{12}

During the last half decade individual employee interests have fared even worse than those of organized labor before the Court. Such interests, of course, while frequently intertwined with those of organized labor, are often separate, distinct, and occasionally in direct conflict.\textsuperscript{13} With the exception of race and sex discrimination matters, such employee interests uniformly failed before the Court between 1970 and 1975. In case after case, where employee interests opposed those of employers or unions, employee rights have been defeated. Unions, at least, were victorious in some instances against employers, and in numerous cases against employees.\textsuperscript{14} With the exception of race and sex discrimination cases, employees have won almost nothing of importance when pitted against employer or union between 1970 and 1975.

\begin{itemize}
\item[13.] During the period from 1960 to 1970 Congress and the courts showed a real regard for individual employee needs when these needs were in conflict with employer or union needs. For example, in addition to the cases cited \textit{supra}, notes 7 to 12, favoring employees together with unions, during this period Congress drafted Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-15 (1970) [hereinafter Title VII] as well as the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (1970) [hereinafter OSHA] laws designed to protect employee interests against employers and/or unions. It was also during such period that the National Labor Relations Board [hereinafter NLRB] first held that a union committed an unfair labor practice under the National Labor Relations Act, as amended, 29 U.S.C. §§ 151-68 (1970) [hereinafter NLRA] by not fairly representing all employees within its bargaining unit. See also Miranda Fuel Co., 140 N.L.R.B. 181 (1961), \textit{enf. den.} 326 F.2d 172 (2d Cir. 1963). This doctrine of the duty of fair representation was shortly thereafter approved by the Supreme Court. Vaca v. Sipes, 386 U.S. 171 (1967).
\end{itemize}
The cases discussed below are not wholly exhaustive of those involving employee rights coming before the Supreme Court since 1970.\textsuperscript{15} However, they are the most significant and are illustrative of the Court's reaction to individual employee interests. The reaction has not been favorable.

\section*{II
SUPREME COURT CASES BETWEEN 1970 AND 1975}

\textbf{A. Employee Interests in Conflict with Joint Union-Employer Interests}

It is not often that a case involving employee interests opposed to joint union-employer needs reaches the Supreme Court. However during the 1974 term the Supreme Court did hear one such case, \textit{Emporium Capwell v. Western Addition Community Organization}.\textsuperscript{16} This case involved a group of union-represented employees who were discharged for picketing their employer to protest his alleged racist practices. The picketing, unsupported by the union, was conducted outside the contractual grievance procedure through which the union was simultaneously processing the employee complaints relating to racism. Employer interests were threatened, aside from the effects of the employee action, because it was faced with dual and competing attempts to resolve employee complaints. Union interests were adversely affected because the union's exclusive control over grievance handling was challenged. Both the union and the employer had an obvious interest in resolving the dispute through the established and orderly grievance procedure.

The District of Columbia Court of Appeals invalidated the discharges\textsuperscript{17} under Section 8(a)(1) of the NLRA.\textsuperscript{18} The Court held that the general rule permitting employers to terminate "wildcat" picketers\textsuperscript{19}

\begin{itemize}
\item \textsuperscript{15} See note 115 infra.
\item \textsuperscript{16} Emporium Capwell v. Western Addition Community Organization, 95 S. Ct. 977 (1975).
\item \textsuperscript{17} Western Addition Community Organization v. NLRB, 485 F.2d 917 (D.C. Cir. 1973). The Court held that the action of the minority employees did not remove such concerted activities from the protection of the Act where employees utilized the procedure established by the collective bargaining agreements and abandoned this procedure only after the union declined to change the pending complaint from an individual to a group basis, as requested by the employees. The Court remanded the case to the NLRB to decide whether the picketing of the employer was so disloyal that they should be removed from the protection of the Act.
\item \textsuperscript{18} Section 8(a)(1), 29 U.S.C. § 158(a)(1) (1970) prohibits employers from interfering with, restraining, or coercing employees in violation of their rights under Section 7 of the NLRA, 29 U.S.C. § 157 (1970). Section 7 protects, \textit{inter alia}, the right to engage in, or to refrain from engaging in, "concerted activities for the purpose of collective bargaining or other mutual aid or protection."
\item \textsuperscript{19} NLRB v. Sunbeam Lighting Co., 318 F.2d 661 (7th Cir. 1963); Harnischfeger
does not apply to unauthorized picketing to protest an employer's alleged racial discrimination, and that there was "a distinction between concerted activity involving racially discriminatory employment practices and [other] concerted activity" because "[t]he right to be free of discriminatory practices is firmly rooted in Title VII" of the Civil Rights Act of 1964. The Court of Appeals thus opted to protect employee interests at the expense of the exclusivity principle, which in this case served the interests of both the union and the employer.

A divided Supreme Court reversed. Emphasizing the importance of the exclusivity principle of "majority rule" in collective bargaining, the Court held that where a union represents employees the "strength of some individuals or groups might be subordinated to the interests of the majority . . . " The Court thereby underscored and approved this majoritarian principle, finding the employees' activity unprotected and their interests subordinate to the interest of the union and employer in maintaining an exclusive channel for grievance handling.

There is ample authority in past case law to support the Emporium Capwell decision. The Supreme Court merely followed tradition and retained the status quo by holding such employee activities unprotected. It was the appellate court which had changed the rules of the game by protecting the rights of "wildcat" picketers. The Court recognized that the majoritarian principle has well served the area of collective bargaining and grievance handling. Unions are able to unify their membership and speak with a single, authoritative voice, and this is necessary for effective representation. Employers are able to deal with one bargaining agent, assured that agreements will be honored and that they will not be "whipsawed" by rival groups after making concessions. The stability which results from the exclusivity principle has freed unions to direct their efforts at improved wages, fringe benefits and working conditions for employees.

However, this exclusivity principle, so strongly endorsed by the

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Corp. v. NLRB, 207 F.2d 575 (7th Cir. 1953); NLRB v. Draper Corp., 145 F.2d 199 (4th Cir. 1944).


22. Id. at 62.

23. Id.

24. Id.

25. NLRB v. Sunbeam Lighting Co., 318 F.2d 661 (7th Cir. 1963); Harnischfeger Corp. v. NLRB, 207 F.2d 575 (7th Cir. 1953); NLRB v. Draper Corp., 145 F.2d 199 (4th Cir. 1944).
Court and so necessary to collective bargaining, may deprive individual employees of important rights, for it renders many persons “prisoners of the union.” Labor organizations are political bodies, attempting to please the majority. The minority may thus not be well served.

But a minority group of employees may well have rights deserving, if not requiring, protection. Such may be the individual employee’s right to racial or ethnic equality, an interest which may not always be taken seriously by the local union. It may be the employees’ right to have the contract they ratified be enforced by a union otherwise willing to ignore its terms. Or it may simply be the right to be heard by an employer or union not anxious to listen to a minority group of employees. The *Emporium Capwell* decision presents a definite obstacle to the exercise of these and similar rights by a minority group within a union. These employees can neither work through a union unwilling to represent them, nor circumvent the union procedure. Nor can they appeal to the employer, for he may well have a stake, together with the union, in keeping the minority group interests squelched. Thus, the employees opposed by both union and management have no legitimate channel through which they can seek to remedy a situation they find intolerable.

A possible way to avoid this harsh impact on individual employee rights, while still maintaining the majority rule principle in collective bargaining, is to strengthen the duty of fair representation owed by a union to all the employees it represents. The Court, while approving such duty,26 has rendered a limited interpretation. A union breaches such obligation towards its minority membership only if its conduct is “arbitrary, discriminatory, or in bad faith.”27 Such a standard, by its terms, puts “an intolerable burden on an employee ....”28 Proof of arbitrary, discriminatory, or bad faith conduct is a difficult burden to sustain. Accordingly, there are few cases where unions have been found to have breached their duty.29

Broadening the standard to require more fair representation from unions would serve to redress, in part, the presently existing imbalance


28. *Id.* at 210.

between majority and minority rights within the union. While employees still would be unable to by-pass their representative, they could expect more from it.

Recent NLRB and lower court decisions have apparently recognized the need to expand a union's duty of fair representation. Absence of bad faith or arbitrariness would not, alone, be sufficient to rebut a claim that the union had failed to fulfill its duty of fair representation. Rather, these cases would seem to require conduct "fiduciary in nature," or not "negligent."

At a minimum, such expansion of the duty of fair representation should be applied to situations where an employee is attempting to further, through the union, an interest arguably protected by law or national labor policy. For example, if an employee is seeking racial, sexual, or ethnic equality in employment, a right guaranteed by Title VII, a union should certainly be required to act as a reasonable union under all the circumstances in representation matters. Similarly, an employee should be able to expect reasonably prudent union representation when voicing complaints over unsafe working conditions, or when attempting to enforce the terms of a collective bargaining agreement. Unless unions are required to consider carefully the grievances of employees who claim violations of these protected rights there may be no effective representation within the union of certain important minority group interests.

This is not to say that an employee is always right in such situations or that a union may never decline to act on employee complaints. All that would be required in such instances would be reasonableness on the part of the union, taking all the circumstances into account. Anything more could well hamper the union in its capacity as majority representative. Anything less, however, too severely limits the rights of individual

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32. Ruzicka v. General Motors, 523 F.2d 306 (6th Cir. 1975).
33. Section 703 of Title VII, 42 U.S.C. § 2000e-2(a)(1) (1970), makes it an unlawful employment practice for an employer to discriminate against employees in terms or conditions of employment on the basis of "race, color, religion, sex, or national origin."
34. OSHA requires employers to provide employees "a place of employment which is free from recognized hazards that are likely to cause death or serious physical harm . . ." 29 U.S.C. § 654(a)(1) (1970).
35. Employees have a protected right to enforce the terms of a collective bargaining agreement under Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1) (1970); NLRB v. Ben Pekin Corp., 452 F.2d 205 (7th Cir. 1971); NLRB v. Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1967).
employees. Admittedly, reconciling the rights of unions as collective bargaining agents with the needs of individual employees is not an easy matter, especially when the interests of the employer are allied with those of the union. However, the balance at present is decidedly against the employees' interests, and Emporium Capwell poses an even further limitation on employee rights. A readjustment is warranted.

B. Employee Interests in Conflict With Employer Interests

Generally, where employee interests are separate and distinct from union interests, they compete with employer interests. In virtually every significant case in this area between 1970 and 1975 the Supreme Court decided in favor of the employer.

Perhaps the most important case of competing employer-employee interests was Gateway Coal Co. v. United Mine Workers which involved, inter alia, the interpretation of Section 502 of the NLRA, and the rights granted thereunder to employees who refuse to perform work they deem unsafe. Ordinarily, employees who concertedly refuse to perform work in violation of a contractual no-strike clause lose the protection of the NLRA and are subject to employer discipline. However, there is an exception to the rule allowing employer discipline of these striking employees in Section 502 which sanctions a work stoppage over abnormally dangerous working conditions.

The Third Circuit Court of Appeals had characterized employee refusals to perform work as "protected activity" within the ambit of Section 502 if based "on a good faith apprehension of physical danger . . . even where the employees have subscribed to a comprehensive no-strike clause . . . ." The Court pithily noted that "[m]en are not

37. In addition to the issue relating to employee rights, Gateway Coal involved an issue encompassing competing union and employer interests. In question was whether safety issues are subject to a no-strike pledge and compulsory arbitration as contained in a collective bargaining agreement between the parties so that strikes thereover may be enjoined. The Court answered this question in the affirmative. Id. at 379-80.
38. Section 502 provides, in part: "[N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work . . . be deemed a strike . . . ." Labor Management Relations Act, 29 U.S.C. § 143 (1970).
40. NLRB v. Knight Morley Corp., 251 F.2d 753 (6th Cir. 1957). The work stoppage is then protected and employees may not be disciplined for the strike.
41. Gateway Coal Co. v. UMW, 466 F.2d 1157 (3d Cir. 1972).
42. Id. at 1160.
Employee interests in safe working conditions thus outweighed the employer's interests in continuous production, even where the contract contained a no-strike clause.

A divided Supreme Court reversed. Rejecting the conclusion that an employee's good faith belief of abnormally dangerous working conditions brings his refusal to perform work within Section 502 protection, the Court ruled this section insulates a work stoppage in the face of a no-strike clause only upon "ascertainable, objective evidence supporting [the] conclusion that an abnormally dangerous condition exists." By holding an employee to this stricter standard of proof in safety and health disputes, the Court undoubtedly furthered the employer interest in maintaining production during safety disputes.

As with the Emporium Capwell decision, there are important policies supporting the Court decision. Employee self-help is seriously detrimental to an established collective bargaining relationship and to industrial stability. Perhaps the most firmly established rule of labor arbitration law is that ordinarily an employee may not take it upon himself to disobey a supervisory order even if the employee's contractual rights are violated; the employee is obligated to obey the order, even if he deems it improper, and to pursue his remedy through the established grievance procedure. This is true even of safety grievances unless the health hazard is unusual or abnormal.

However, employees properly regard their safety as especially important. They are reluctant to postpone their sole remedy for a violation of safety rules until an arbitrator's decision can be obtained. One safety hazard, one act of employer carelessness, one act of negligence by another employee could permanently jeopardize an employee's economic future. An employee understandably does not want to put his future working career on the line by taking risks.

Gateway Coal, however, compels an employee to act at his peril when faced with what he deems is a safety hazard. If the employee does withhold his services, and he is incorrect about the risk, he may lose his job. If he does not withhold his services, and he is correct as to the safety issue, he may lose his life or limb. Clearly, these are difficult choices to force an employee to make.

43. Id.
44. Gateway Coal Co. v. UMW, 414 U.S. 368 (1974). Mr. Justice Powell delivered the decision of the Court. Mr. Justice Douglas dissented.
45. Id. at 387.
The Supreme Court could have better balanced the competing interests of stability and safety by requiring an employee to have objective reasons for his fears, rather than by requiring him to have objective evidence of the safety hazard itself. The Court, in effect, now requires the employee to be right, or, at least, substantially right, as to the existence of the abnormal safety condition, and subjects him to discharge if he is wrong. It should be sufficient, however, that the employee have a valid basis for his fears, even if his fears are incorrect.

The latter test would adequately protect both employers and employees, as opposed to the Gateway Coal standard which protects only the employer interest in maintaining production. An employee could not frivolously withhold his services, nor use safety as a pretext to strike for other purposes, inasmuch as he would be required to show good reasons for his apprehensions. His subjective motivation would have to be supported by objective evidence. On the other hand, having such objective evidence, an employee could refuse to subject himself to a safety hazard he considered abnormal. He would not have to bear the burden of proving he was right, and risk discharge if he was unable to prove that the safety hazard in fact justified the work stoppage.

In Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division, another case which could be categorized as a conflict between employee and employer interests, the Court held that retirees were not covered by the NLRA. That case involved an appeal from a decision of the NLRB which had held that the employer violated Section 8(a)(5) of the NLRA by refusing to bargain with a union concerning insurance and other benefits for retirees. The Board found these to be a mandatory subject of bargaining. Reasoning that retirement status had a “substantial connection to the bargaining unit,” the NLRB declared retirees to be “employees” within the meaning of the NLRA, entitled to the benefits of collective bargaining on their behalf.

A divided Supreme Court reversed. It found that retirees were neither “employees” within the meaning of the Act, nor “employees”

47. 404 U.S. 157 (1971). This case also involved issues of mandatory subjects of bargaining.
50. Id. at 914.
52. Id. at 166.
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included in the bargaining unit. They were thus not entitled to either NLRA protection nor to the fruits of continued collective bargaining between the union and their former employer on the subject of their retirement benefits.

The Supreme Court decision was clearly motivated by policy considerations since the wording of the statute is sufficiently vague to have permitted a construction which was either inclusive or exclusive of retirees. Certainly retirees are not “employees” within the clear meaning of the word, as the Court held. On the other hand, numerous prior instances exist where persons who are similarly not employees within the plain meaning of the word have been held to be employees within the meaning of the Act.

The Court should have acquiesced in the Board’s decision to afford retirees the protection of the Act. As the Court noted, the primary function for determining the limits of the term employee “has been assigned primarily to the agency created by Congress to administer the Act.” Moreover, when one balances the competing interests involved, the Court should have given greater weight to those of retirees. Aged and retired persons constitute a severely disadvantaged group, having substantial economic and psychological needs resulting from their status. They can truly benefit from collective bargaining on their behalf. Employer needs in this situation, on the other hand, would not be seriously harmed by requiring companies to bargain with unions concerning benefits for retired employees. Bargaining, after all, does

53. Id. at 172.
55. Such instances were cited by the NLRB in its decision, Pittsburgh Plate Glass Co., Chem. Div. and Local 1, Allied Chem. and Alkali Workers of America, 177 N.L.R.B. 911, 913 (1969), rev’d, 427 F.2d 936 (6th Cir. 1970), and were not disavowed by the Court.
58. For example, past increases in pension plan benefits for retired employees who are former union members, which are necessary for protection from inflationary erosions of retirement income, have generally resulted from collective bargaining. Thus, studies conducted by the General Counsel of the NLRB in connection with Pittsburgh Plate indicated that pension benefits for retired employees had become a major topic of collective bargaining, and that, consequently pension benefit increases were frequently extended to retirees, or their benefits otherwise improved. Gordon, Current Trends in the Issuance of Complaints, in Proceedings of New York University Twentieth Annual Conference on Labor 177 (1968). With employers not required to collectively bargain over such an issue, retirees can no longer anticipate consideration being given to such increases, thus rendering their economic situation more vulnerable.
not require concessions,\textsuperscript{59} and employers would not necessarily have to yield on or grant any benefits for retirees they did not deem warranted.\textsuperscript{60} Further, while unions have the right to insist to impasse upon matters which are within the scope of mandatory bargaining,\textsuperscript{61} it is unlikely that a group of workers would actually engage in a strike, endangering their own economic security, to gain increased benefits for retired employees.\textsuperscript{62}

Two other Supreme Court cases of the past five years, \textit{NLRB v. Bell Aerospace Co.}\textsuperscript{63} and \textit{Beasley v. Food Fair of North Carolina, Inc.},\textsuperscript{64} similarly limited the groups of employees to whom federal or state laws are available as a protection in labor disputes. In \textit{Bell Aerospace},\textsuperscript{65} the NLRB, finding that managerial employees not specifically excluded from NLRA inclusion may be covered thereby,\textsuperscript{66} had ordered the employer to recognize a union representing management employees.\textsuperscript{67} A divided Supreme Court reversed,\textsuperscript{68} concluding that although the NLRA does not specifically except managerial employees from its coverage,\textsuperscript{69} these employees should nonetheless be excluded therefrom\textsuperscript{70} and not allowed to compel bargaining on their behalf. The Court, relying on past NLRB and appellate court decisions and legislative history, declared that the NLRA was designed to protect "workers" and "laborers," rather than "managers."\textsuperscript{71}

In \textit{Beasley},\textsuperscript{72} the Court denied state, as well as federal, protection to supervisory employees terminated for union activity.\textsuperscript{73} Exclusion of

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\item \textsuperscript{59} Section 8(d) of the NLRA, 29 U.S.C. § 158(d) (1970).
\item \textsuperscript{60} Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 210 (1964); NLRB v. American Nat'l Ins., 343 U.S. 395, 402 (1952).
\item \textsuperscript{61} NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342, 349 (1958).
\item \textsuperscript{62} While it is impossible to state that such a strike never has occurred, experience demonstrates such are indeed rare. Indeed, unions more and more are weighted by young members, (under age 35), A. L. Goldman, \textit{Labor Relations and Social Policy} 130 (1973), persons unlikely to engage in work stoppages to secure increased benefits for older retirees. In fact, disputes over pensions, as such, even for existing employees are not a major cause of negotiation impasses. \textit{Id.} at 134.
\item \textsuperscript{63} 416 U.S. 267 (1974).
\item \textsuperscript{64} 416 U.S. 653 (1974).
\item \textsuperscript{65} Bell Aerospace and Local 1286, UAW, 190 N.L.R.B. 431 (1971); \textit{motion to recon. den.}, 196 N.L.R.B. 827 (1972).
\item \textsuperscript{66} \textit{Id.}
\item \textsuperscript{67} Bell Aerospace and Local 1286, UAW, 197 N.L.R.B. 209 (1972). The Court of Appeals for the Second Circuit reversed. 475 F.2d 485 (2nd Cir. 1973).
\item \textsuperscript{68} NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974). Mr. Justice Powell delivered the opinion of the Court. Mr. Justice White, joined by Mr. Justice Brennan, Mr. Justice Stewart, and Mr. Justice Marshall, dissented.
\item \textsuperscript{69} \textit{Id.} at 275.
\item \textsuperscript{70} \textit{Id.} at 289.
\item \textsuperscript{71} \textit{Id.} at 279.
\item \textsuperscript{72} 416 U.S. 653 (1974). Mr. Justice Brennan wrote for a unanimous Court.
\item \textsuperscript{73} While discharging employees for union activity ordinarily violates Section
\end{itemize}
supervisory employees from NLRA protection served, the Court
determined, to likewise preclude otherwise available state relief for such
employer action. Supervisors need not be treated as “employees” under
federal or state law as a matter of “national policy.”

These cases are not subject to serious criticism. It has always been
conceded, in labor-management circles, that an employer need not deal
with a union in regard to its managerial or supervisory employees, and
that such employees are generally not protected by the NLRA against
employer reprisals. Any contrary conclusion should thus be mandated
by the legislature, and not by the NLRB or courts.

Two significant 1972 controversies, Board of Regents of State
Colleges v. Roth and Perry v. Sindermann, involved employer-em-
ployee conflicts in the public, rather than the private, sector. The Court
was no more generous to public employees than it had been to private
employees.

In Roth a state university refused to renew the contract of a non-
tenured teacher who had been hired for a fixed term of one academic
year. No hearing was accorded the employee prior to the University's
decision not to renew his contract.

The Court of Appeals for the Seventh Circuit struck down the
employee’s termination because of the employer’s denial of procedural
due process. The public employer’s action in not giving the dismissed
employee an explanation or hearing was held to infringe on his 14th
Amendment rights.

A divided Supreme Court reversed. Procedural due process, it
found, applies only “to the deprivation of interests encompassed by the
Fourteenth Amendment’s protection of . . . liberty and property.”
A “legitimate claim of entitlement to a job,” rather than a need or
desire therefor, is required to establish such a protected property right in

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8(a)(1) and (3), 29 U.S.C. § 158(a)(1) and (a)(3), of the NLRA, such is permitted
when employees are supervisors within the meaning of section 2(11), 29 U.S.C. §
74. Section 2(3) of the NLRA, 29 U.S.C. § 152(3) (1970) states that the term
“employee” thereunder shall not include any individual employed as a supervisor.
78. 408 U.S. 564 (1972).
79. Roth v. Board of Regents, 446 F.2d 806 (7th Cir. 1971).
80. Board of Regents v. Roth, 408 U.S. 564 (1972). Mr. Justice Stewart delivered
the Court's decision. Mr. Justice Douglas, Mr. Justice Brennan and Mr. Justice Marshall
filed separate dissenting opinions.
81. Id. at 569.
82. Id. at 577.
employment.\textsuperscript{88} And, the Court concluded, the employee’s year-to-year contract was insufficient to give rise to such an entitlement, constituting merely an “abstract concern in being rehired,”\textsuperscript{84} even though year-to-year teachers were, generally, re-employed.

In a companion case to the foregoing, \textit{Perry v. Sindermann},\textsuperscript{85} the Fifth Circuit Court of Appeals had, similarly to the Seventh Circuit, struck down a state junior college’s failure to renew a non-tenured teacher’s contract.\textsuperscript{86} As in \textit{Roth}, the public employer had failed to give the terminated public employee prior notice or hearing, and the appellate court held that this action violated the public employee’s Fourteenth Amendment rights to procedural due process.

A divided Supreme Court again reversed the lower court’s conclusion that an “expectancy of reemployment” was sufficient to give rise to a property interest entitling public employees to procedural due process rights in employment.\textsuperscript{87} Said the Supreme Court, “[T]he mere showing that he was not rehired in one particular job, without more, did not amount to a . . . showing of loss of property.”\textsuperscript{88}

\textit{Roth} and \textit{Perry} constitute serious blows to rights of public employees. Procedural due process generally results in more than merely procedural rights in labor-management relations in that it frequently serves as a hedge against arbitrary employer action. Requiring employers to articulate reasons for their actions against employees generally discourages employers from dismissing employees without justification therefor. As a practical matter, it is difficult and embarrassing for an employer to explain his reasons unless, on their face at least, they have some basis. Lacking this protection, public employees may well be subject to unquestioned and capricious managerial abuses of power.

Another recent case, \textit{Geduldig v. Aiello},\textsuperscript{89} involved a curious mixture of public and private rights. The State of California administered a disability insurance system for private employees temporarily disabled but not covered by workmen's compensation. Excluded from coverage were certain disabilities resulting from pregnancy. Thus, disabled fe-

\begin{itemize}
\item \textsuperscript{83} \textit{Id.}
\item \textsuperscript{84} \textit{Id.} at 578.
\item \textsuperscript{85} 408 U.S. 593 (1972).
\item \textsuperscript{86} Sindermann v. Perry, 430 F.2d 939 (5th Cir. 1970).
\item \textsuperscript{87} Perry v. Sindermann, 408 U.S. 593 (1972). Mr. Justice Stewart delivered the opinion of the Court. Mr. Justice Brennan filed an opinion dissenting in part in which Mr. Justice Douglas joined. Mr. Justice Marshall filed a separate opinion dissenting in part.
\item \textsuperscript{88} \textit{Id.} at 599. However, the Court did remand the case to determine if the employee was, in effect, de facto tenured, in which case he would have had a sufficient property interest in his job to warrant procedural due process rights.
\item \textsuperscript{89} 417 U.S. 484 (1974).
\end{itemize}
male employees, otherwise qualified to receive benefits under the state plan, were denied these benefits for pregnancy-related disabilities.

A three-judge federal District Court enjoined the continued enforcement of the California plan.90 The Court found that the exclusion of pregnancy-related disability benefits to employees was based on a sex classification and thus unconstitutional under the Equal Protection Clause. The State of California appealed directly to the Supreme Court.

A divided Supreme Court reversed.91 The expense involved in covering pregnancy-related disabilities would be so great, it held, as to compromise the policies regarding the program's benefit level and contribution rate and thus gave California a legitimate interest in excluding pregnancy-related disabilities from the program. More importantly, the Court went on to surprise most of the labor-management community by strongly indicating that classifications, and discrimination, based on pregnancy are not necessarily classifications and discrimination based on sex.92

A logical conclusion of the Court's foregoing rationale is that since the denial of pregnancy-related disability benefits is not necessarily a sex-based discrimination, the denial of these benefits by private employers is likewise not necessarily based on sex and therefore not violative of Title VII. Such a conclusion, contrary to the holdings of the Equal Employment Opportunity Commission93 and federal courts,94 would be seriously damaging to female employee interests under Title VII. The scope of the decision, however, is not yet clear. There will surely be further battles on this issue.

Nonetheless, it is difficult to rationalize the Court's indication that pregnancy disabilities are not related to sex. Trite as the notion may be,

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92. Id. at 496, n.20.
94. Based on the guidelines of the EEOC (see note 79, supra) both the Fourth and Second Circuits have held, in decisions issued after Geduldig, that Geduldig, as a constitutional law case, is not dispositive of nor applicable to the Title VII issue. Gilbert v. General Electric Co., 519 F.2d 661 (4th Cir. 1975); Communications Workers of America v. A.T.&T., 513 F.2d 1024 (2d Cir. 1975). The Fourth Circuit decision specifically held disparities in employer paid disability benefits between pregnancy-related and other disabilities to be unlawful discrimination based on sex under Title VII.
only one sex becomes pregnant and only one sex incurs related disabilities. Discriminating against such disabilities in insurance benefits, then, necessarily discriminates against females on the basis of their sex. This should be sufficient in itself to invalidate the practice. It is difficult to believe the Court really meant all it said in Geduldig.

As already indicated, there are exceptions to this Supreme Court tilt toward employers, in the area of sex and race discrimination. In six such important cases decided since 1970 the Court found in favor of employees.\(^{95}\) Four of these controversies involved racial discrimination under Title VII;\(^{96}\) the others concerned sex discrimination.\(^{97}\)

While the Supreme Court has, undeniably, on balance been employee-oriented in Title VII race discrimination matters, and, to a lesser extent in sex discrimination issues, these are limited fields in the overall area of employer-employee relations. Important as they are, they do not constitute the great bulk of employer-employee disputes.

Thus, with narrow exceptions for Title VII race controversies and some sex discrimination matters, in all significant clashes of employer-employee interests arising between 1970 and 1975, the Supreme Court has uniformly swung the pendulum to the employer side. In so doing, it has limited important employee NLRA rights,\(^{98}\) removed categories of persons from federal or state protection,\(^{99}\) restricted the rights of public

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employees, and even construed one area of sex discrimination adversely to employee interests.

C. Employee Interests In Conflict with Union Interests

Although not as common as employer-employee conflicts, clashes between employee and union interests are not infrequent. Over the past five years the Supreme Court has generally resolved such controversies against employees.

Two companion cases, *Florida Power and Light v. IBEW* and *NLRB v. IBEW*, consolidated at the appellate court and Supreme Court levels, involved supervisors, who were also union members, performing rank and file work during a union strike of their employer. In each case the union fined the supervisor-members for crossing its picket lines.

The NLRB held the union discipline unlawful because it jeopardized the supervisors’ relationships with their employers in violation of Section 8(b)(1)(B) of the NLRA.

A divided Supreme Court reversed. Supervisors were held protected against such union discipline only when they act on behalf of management, such as in collective bargaining or grievance handling. However, supervisors were not immune from union discipline in the performance of rank and file work.

This Supreme Court decision seems to establish a hierarchy of protected interests among the parties involved in this case. The employer interest outweighs the union interest and the union interest outweighs that of the employees. In effect, the Court concluded that supervisors who are union members are free from union discipline when furthering their employer interests in management functions, but not when advancing their own interests by engaging in rank and file work. Again employee interests, as such, are relegated to a position inferior to both union and management.

100. Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972). See discussion supra at notes 64 to 74.
104. Section 8(b)(1)(B), 29 U.S.C. § 158(b)(1)(B) (1970), makes it an unfair labor practice for a union “to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.”
105. Florida Light and Power Co. v. IBEW, 417 U.S. 790 (1974). Mr. Justice Stewart spoke for the Court, with Mr. Justice White, joined by Chief Justice Burger, Mr. Justice Blackmun, and Mr. Justice Rehnquist, dissenting.
Moreover, as a practical matter, it is impossible to so distinguish the managerial functions of supervisors from their other duties. Seldom are supervisors more part and parcel of management than when they perform bargaining unit work during a strike. In fact, the very performance of such work is a signal both of the supervisor's loyalty to management in the work dispute and of their function as the employer's representatives. The NLRB was clearly correct in inferring that union fines of supervisors in such situations necessarily affect their loyalty towards management in their role as management representatives. The NLRA was certainly not intended to allow unions to impose fines on these management representatives in an effort to break down their loyalty.

_NLRB v. Boeing Co._106 likewise involved discipline of union members for crossing union picket lines. This time non-supervisory employees crossed the lines to get to work, and each was fined $450.

The Court of Appeals for the District of Columbia held that in such union discipline cases the NLRB was obliged to examine the reasonableness of the union fines.107 Section 8(b)(1)(A) of the NLRA,108 it reasoned, rendered unlawful excessively high fines or fines disproportionate to the offense. One could reasonably infer that such penalties were in reprisal for protected activities rather than in vindication of legitimate union interests.

A divided Supreme Court reversed.109 Indications in its prior decisions that unreasonably high disciplinary fines would be unlawful110 were termed _dicta_, and rejected.111 The Court found that NLRB inquiry into the reasonableness of union fines would improperly result in the Labor Board examining internal union affairs.112

The Court's decision is open to criticism. Excessive fines should not be necessary for a union to effectively govern its internal affairs. Reasonable fines, suspensions, and expulsions give the union all the authority it needs.

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108. Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1970), makes it unlawful for a union "to restrain or coerce . . . employees" in the exercise of their rights under Section 7 of the NLRA.
112. The proviso to Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1970), provides that nothing therein shall "impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."
Excessive fines can have no effect other than to prevent dissident or minority faction employees within the union from exercising their rights or voicing their opinions. Almost by definition, fines which are unreasonable are, in fact, punitive. Certainly they assist a union to keep control, but at the expense of important employee interests.

Further, the Court decision leaves the investigation of excessive fines to the state courts. This is precisely where, in many states, union influence is strongest and individual employee power weakest.\(^6\) Also, the financial burden of opposing the fine falls on the employee, whereas, if the NLRB had jurisdiction of such matters, the General Counsel would carry the litigation for the charging party, and the financial burden of justifying the fine would fall on the unions.\(^4\)

Fines, as well as suspensions and expulsions, are plainly legitimate weapons for union use under the sanction of the NLRA.\(^5\) Just as plainly, however, unreasonable fines are a weapon subject to abuse, and this punitive result is not mandated by the NLRA.\(^114\)

Unions already have the control they need over individual employees without imposing unreasonable fines. It was not necessary for the Court, either as a matter of law or policy, to remove the use of such fines from federal sanctions.

In a companion case to *Boeing Co., Booster Lodge, No. 105 v. NLRB*,\(^117\) the Supreme Court followed a seemingly pro-employee decision it had rendered one year previously\(^118\) which held that unions cannot, under Section 8(b)(1)(A),\(^119\) fine employees who cross union strike lines if such employees have first resigned their union membership. However, these cases could well be illusory employee victories. For the Court indicated in *Booster Lodge* that a union could properly adopt regulations curtailing a member's freedom to resign therefrom,\(^120\) an action effectively vitiating any protection to employee interests otherwise offered in the decisions.

Finally, the fascinating *Old Dominion Branch 496 case*,\(^121\) arising

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113. State policing of union fines has been labeled as bewildering, inconsistent, contradictory and confused. Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049 (1961).
117. 412 U.S. 84 (1973), per curiam, Blackmun, J., concurring.
118. NLRB v. Granite State Joint Bd., 409 U.S. 213 (1972). Mr. Justice Douglas delivered the opinion of the Court. Mr. Justice Blackmun was the sole dissenter.
under state libel and slander laws, is indicative of the Supreme Court’s current views towards employee interests in conflict with union rights. There, the union, attempting to organize a public employer, printed the names of employees who did not join under a “List of Scabs.” To make its point perfectly clear, the union, using the Jack London definition, compared a scab to an “animal,” a “Judas,” a “traitor,” and other choice items. A Virginia trial court, applying state libel laws, awarded damages to the employees. The Virginia Supreme Court affirmed.

A divided Supreme Court reversed. Federal law was held to preclude applying state libel and slander laws to union organizational campaigns, absent knowledge by the declarer of the falsity of the statement, or reckless disregard as to the truth. Further, the Supreme Court noted somewhat cavalierly that terming the employees “scabs” was, rather than being false, “literally and factually true.” And the Jack London definition of “scab” was deemed protected as being “merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join.”

While the outcome of the case is understandable, it is nonetheless difficult to accept the underlying rationale. Needed protection for robust language in union organizational campaigns had been previously recognized by the Court and necessary privileges given. While, perhaps, the doctrine could have been emphasized and refined, it simply was not necessary to accord unions defaming individual employees the same constitutional protection given a free press. Nor was it necessary for the protection of union rights to put the same burden of proof on employees who seek to maintain a defamation action against their union as must be borne by public persons suing a newspaper for libel.

122. *Id.* at 268.
124. Old Dominion Branch 496, Nat’l Ass’n of Letter Carriers v. Austin, 418 U.S. 264 (1974). Mr. Justice Marshall delivered the opinion of the Court. Mr. Justice Powell, joined by the Chief Justice and Mr. Justice Rehnquist, dissented. In so reversing, the Court restricted the scope of its earlier ruling in Linn v. Plant Guard Workers, 383 U.S. 53 (1966), which held that the NLRA did not completely pre-empt the applicability of state libel laws to labor disputes.
125. The Supreme Court thus specifically applied the constitutional guidelines of New York Times v. Sullivan, 376 U.S. 254 (1964): when there is a defamation of a public official, recovery can only be obtained upon proof of “malice,” i.e. “with knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.* at 280.
127. *Id.* at 286.
Even more difficult to understand is why the Court added the dicta agreeing that employees who exercise their protected right not to join unions are, in truth, “scabs.” The Court’s comments were wholly gratuitous in view of the protection accorded union statements in its decision. It was not necessary to the decision for the Court to seemingly align itself with the union in its attitude toward persons who exercise their right not to join unions.

III

CONCLUSION

In twelve significant cases arising since 1970 involving employee interests in conflict with employer and/or union rights, the Supreme Court found against employee rights. The controversies, covering a

129. Under Section 7 of the NLRA, employees have the right to refuse to join unions as well as to join. 29 U.S.C. § 157 (1970).

130. Florida Power and Light Co. v. IBEW, 417 U.S. 790 (1974), involved, and is counted as, two cases.

131. Emporium Capwell v. Western Addition Community Organization, 420 U.S. 50 (1975); Florida Power and Light Co. v. IBEW, 417 U.S. 790 (1974); Geduldig v. Aiello, 417 U.S. 484 (1974); Beasley v. Food Fair of North Carolina, Inc., 416 U.S. 653 (1974); NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); Gateway Coal Co. v. UMW, 414 U.S. 368 (1974); NLRB v. Boeing Co., 412 U.S. 67 (1973); Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 409 U.S. 564 (1972); Allied Chem. and Alkali Workers of America, Local 1 v. Pittsburgh Plate Glass Co., Chem. Div., 404 U.S. 157 (1971). Three additional possibly significant Supreme Court cases, all adverse to employee interests and all decided since 1970, have not been discussed above. It has been deemed they are not of the comparable impact as those included in the text. In Arnett v. Kennedy, 416 U.S. 134, reh. denied, 417 U.S. 977 (1974), the Court held that a federal government employee having a statutorily protected right not to be discharged except for “cause” did not have a constitutionally protected right to a pre-termination evidentiary hearing. In so holding, the Court reversed the lower Court. There was no majority rationale for such holding, however, three Justices (Chief Justice Burger and Mr. Justices Rehnquist and Stewart) reaching such conclusion for one reason, two Justices (Mr. Justices Blackmun and Powell) concurring for another reason, one Justice (Mr. Justice White) basically dissenting, and three Justices (Mr. Justices Douglas, Marshall and Brennan) totally dissenting. Thus, the scope of the decision is confused and the case is of doubtful precedential value. In Int'l Bhd. of Boilermakers v. Hardeman, 401 U.S. 233, reh. denied, 402 U.S. 967 (1971), Mr. Justice Brennan, speaking for the Court in reversing the Fifth Circuit, held that Section 101(a)(5) of the Labor-Management Reporting and Disclosure Act, 73 Stat. 523, 29 U.S.C. § 412 (1959), does not empower courts to determine what conduct may warrant union disciplinary action against its members, and that all that is necessary for a union to support such discipline is “some evidence” Int'l Bhd. of Boilermakers v. Hardeman, 401 U.S. 233, 247, reh. denied, 402 U.S. 967 (1971). Mr. Justice Douglas dissented. And in Amalgamated Ass'n of Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971), Mr. Justice Harlan, speaking for the Court and reversing the Idaho Supreme Court, held that the State Court was pre-empted by federal law from entertaining an employee suit that a union's suspension of him from membership was wrongful. Mr. Justice Douglas, Mr. Justice White, Mr. Justice Blackmun, and the Chief Justice dissented. If these three cases are included in the above tally, the number of cases decided adversely to employee interests rises to fifteen.
relatively wide spectrum of issues, involved the public and private sectors. In all but one case, the Supreme Court reversed the appellate court or the NLRB findings to reach its determination.

Only in the limited fields of race discrimination under Title VII and sex discrimination did the Court generally render decisions favorable to employees. These holdings in such restricted areas do not overcome the conclusion to be drawn from the Court's other decisions. Similarly, its two decisions narrowing a union's right to fine resigned members do not offset the impact of its other findings, the Court thereby paving the way for unions to protect themselves by controlling resignations.

The acknowledged "liberal" members of the Court vocally noted, with protests, the movement of the pendulum away from employee rights. Mr. Justice Douglas dissented in six of the twelve cases. Mr. Justice Brennan and Mr. Justice Marshall dissented in one further case and joined Mr. Justice Douglas in three others. In certain other cases, however, Mr. Justice Brennan or Mr. Justice Marshall authored the decision of the Court. Altogether there were dissents in eleven of the twelve cases. Lower court or NLRB findings or


133. See cases cited note 81 supra. But see Geduldig v. Aiello, 417 U.S. 484 (1974), showing that the Court was not uniformly pro-employee in sex discrimination matters.


140. If Arnett v. Kennedy, 416 U.S. 134, reh. denied, 417 U.S. 977 (1974);
rationale were reversed in all but one controversy.\textsuperscript{141}

The foregoing figures are significant and dramatic. Clearly the Supreme Court has reversed the pro-employee pendulum swing of the sixties to an even greater degree than it has slowed the pro-union movement. It is of course difficult to state with certainty the motivation behind these Supreme Court decisions which consistently disfavor employee interests, but perhaps the cases represent a somewhat subconscious Court backlash to the more liberal decisions of the sixties rather than an intentional series of decisions intended to slow the movement of employee rights generally. In any event, however, the Court may well have gone too far and severely compromised the rights and interests crucial to the individual employee. A more balanced viewpoint by the Supreme Court is warranted.

\textsuperscript{141} Amalgamated Ass'n of Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971) and Int'l Bhd. of Boilermakers v. Hardemann, 401 U.S. 233, \textit{reh. denied}, 402 U.S. 967 (1971) are counted there were dissents in fourteen out of fifteen cases. Only Beasly v. Food Fair of North Carolina, Inc., 416 U.S. 653 (1974) was a unanimous decision. This was an unusually high number of dissents. In the overall docket for the 1972 term there were dissents or concurring opinions in only 78.8\% of the decisions and in 1973 there were dissents or concurring opinions in only 79\% of the cases. \textit{The Supreme Court 1972 Term}, 87 \textit{Harv. L. Rev.} 1, 303-309 (1973); \textit{The Supreme Court, 1973 Term}, 88 \textit{Harv. L. Rev.} 1, 274-280 (1974).

\textsuperscript{141} Beasly v. Food Fair of North Carolina, Inc., 416 U.S. 653 (1974) was similarly the only decision upholding the lower court and administrative agency decision.