Labor and the Supreme Court: significant decisions of 1979–80

The Court approved Congress' remedial quotas, left important safety and health issues unresolved, limited NLRA coverage of teaching professionals, and broadened the concept of work preservation; many important cases were decided by one-vote margins

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Mr. Dooley said that " . . . th' supreme coort follows th' iliction returns,"[1] but in its 1979–80 labor cases, the Supreme Court foreshadowed the electorate's November return to private sector emphasis with a series of cases expanding the flexibility of private sector employers and unions[2] but limiting that of public sector employers.[3] Some decisions resulted in expansive enforcement of constitutional rights,[4] while the Court read statutory texts literally to broaden administrative discretion in some cases[5] and limit it in others.[6]

In seven of the year's most important cases, different alliances produced decisions that hinged on one vote. Such close verdicts in cases involving health and safety standards, faculty bargaining rights, seniority system provisions, and the work preservation doctrine suggest that the new approaches established by the Court in these areas may be either broadened or trimmed, as some justices clarify their views or as the makeup of the Court changes.

In the cases considering workplace health and safety standards and racial quotas, the independent-minded justices forged agreements only by combining the result of differing factions, because no more than three justices could agree on the reasons for a verdict. The Court's splintered approach to health and safety standards prevented a resolution of whether the costs of standards, such as for reducing worker exposure to benzene, need to be justified based on the benefits to workers' health.[7] The Occupational Safety and Health Administration's standard-setting process probably must be modified based on the Court's multiple opinions, but the agency and affected industries will have to await future decisions—perhaps in the 1980–81 term—to find out exactly how much.

The decision on racial quotas was somewhat more conclusive, as the six justices who approved minority set-asides by Congress split evenly on the appropriate constitutional standard in such cases.[8] Employment discrimination cases under Title VII of the 1964 Civil Rights Act permitted wide flexibility in negotiated seniority system provisions[9] and settled important procedural questions, including a ruling that the Equal Employment Opportunity Commission need not meet restrictive class certification standards.[10]

A pair of public-sector cases significantly altered the potential liability of State and local governments. An old law with many new twists, the Civil Rights Act of 1871 permits suits against governmental entities for alleged violations of all Federal statutory rights, not just civil rights.[11] And municipalities may not claim "good faith" immunity as a defense in such suits.[12] A third public-sector case further restricted patronage.[13]

In traditional labor law, the Court continued a year-earlier pattern and rejected National Labor Relations Board positions in two of three cases. But the result in all three cases expanded employer rights. The Court denied Board-approved bargaining rights to faculty professors with "managerial" responsibilities,[14] and rejected

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the Board's limited interpretation of the work preservation doctrine applied to longshoring.[15] However, the Court adopted a new NLRB policy that prohibits secondary picketing of a struck product if it will have a severe economic impact on a neutral employer.[16]

The Supreme Court also decided a wide range of issues concerning government benefit programs. In contrast to the variegated pattern in other areas, nearly every decision involving benefits expanded coverage or made benefits more available by removing restrictions created by legislatures and courts.

Safety and health

The Occupational Safety and Health Administration celebrated its 10th anniversary in 1980, winning one of two Supreme Court cases challenging its interpretation of the 1970 health and safety law. Now, the agency enters its second decade facing two major sources of uncertainty: the Supreme Court has been unable to agree on how health and safety standards must be justified; and the new Administration may approach OSHA regulatory policies differently than did President Carter.

Early in the year, the Court resolved a conflict among the Circuits by upholding an OSHA regulation giving workers the right to refuse to perform hazardous jobs if they reasonably believe that there is no other way to avoid risk of serious injury or death.[17] Although the OSH act does not mention a right to refuse to work under unsafe conditions, Justice Potter Stewart's opinion for a unanimous Court reasoned that the Secretary of Labor had the power to find such an implied right in the law because Congress had intended to prevent injuries and to require employers to eliminate dangers in the workplace. However, the Court made clear that employers have no obligation to pay workers for the time they have refused to work.

What the Court characterized as its liberal interpretation of the health and safety law in *Whirlpool Corp.* did not last. In *American Petroleum Institute,*[18] the Court took its first look at the complicated process of setting health and safety standards without resolving much. Although it was expected to answer several questions, including whether and when the benefits of a standard must justify its costs, the decision had only one legal outcome: OSHA's attempt to further reduce worker exposure to benzene was impermissible.

In reaching its 5–4 verdict on the benzene standard, the Court pluarality (five justices split three ways in explaining their vote) appeared to seriously undermine OSHA's standard-setting procedure for carcinogens. The Secretary of Labor had relied on the act's language requiring the most protective standard feasible for toxic substances.[19] But the Court's lead opinion, written by Justice Stevens and joined by Chief Justice Warren Burger and Justice Stewart (and in part by Justice Powell), found that the act initially requires all standards to be "reasonably necessary or appropriate to remedy a significant risk" to workers' health or safety. After making this "threshold determination," the Secretary may select a standard geared to eliminate the "significant risk of harm," Stevens wrote. But he explicitly rejected OSHA's policy on regulating carcinogens, which sought standards strict enough to produce a risk-free work environment. The law was not intended to provide such protection, Stevens declared. Because the Secretary had failed to produce "substantial evidence" that a significant risk exists with the old benzene exposure limits (10 parts per million parts of air), Stevens refused to consider the further question of whether the benzene standard was economically feasible.

The law is unclear as to the meaning of economic feasibility, and the Circuits have split on the question. Some have held, as the Fifth Circuit had when considering the benzene case, that OSHA must use some cost/benefit approach in creating standards for industry.[20] Other Circuits have ruled that the standards are economically feasible as long as an industry is not faced with massive economic dislocation.[21] There is a wide gap between the two approaches, and the Court will have another opportunity to resolve the question during its 1980–81 term when it reviews a District of Columbia Circuit Court ruling upholding OSHA's cotton dust standard.[22] The D.C. appeals court found that a standard can be economically feasible even if compliance results in the demise of some employers within an industry.

Some of the justices used the benzene ruling to express their general views on the economic feasibility issue. Powell's concurring opinion supported the use of cost/benefit analysis to justify OSHA standards. The Chief Justice, in his own concurrence, also compared the benefits and costs of a standard, but in far more general terms. The four dissenters, in an opinion by Justice Marshall, noted that the law does not specifically require cost/benefit analysis. A standard is feasible, Marshall wrote, "if it is capable of achievement, not if its benefits outweigh its costs." Thus, these four may need the support of only one other justice to prevail on this issue when the Court considers the cotton dust standard.

Constitutional quotas, civil rights

For the third consecutive term, the Supreme Court addressed the sensitive question of whether goals and quotas are permissible tools to correct racial and ethnic imbalances. Based on the line of cases, quotas are proper tools in some hands but their use by many others involves unanswered questions. Public schools may not use rigid admissions quotas, a divided Court ruled in 1978, but race may be a factor in the selection of students.[23] Within certain limits, the 1979 *Weber* ruling

allowed private employers and unions to voluntarily adopt racial quotas in job training programs.[24] In 1980, the Court ruled that Congress has the authority to use quotas to remedy past discrimination, reasoning that the 14th Amendment's requirement of equal protection means that groups historically denied this right may be given special treatment.[25] The Court's incremental approach to deciding how far society can go in favoring minorities passed a critical constitutional test with this most recent ruling. Even though the six justices approving quotas split 3–3 on precisely when they are constitutional, the ruling made clear that properly devised minority quotas do not violate the constitutional rights of others in society. Some of the remaining questions concerning quotas, such as whether and when other governmental authorities besides Congress may use them in remedial schemes, may be answered by the Court in its 1980–81 term.[26]

Last term's case arose when white contractors challenged a provision of the 1977 Public Works Employment Act setting aside 10 percent of available funds for minority business enterprises; those owned or operated by U.S. citizens who are "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." Congress acted to remedy the effects of prior discrimination, and its unique constitutional power to enforce equal protection guarantees permits new approaches—"such as the limited use of racial and ethnic criteria"—to achieve this objective, Chief Justice Warren Burger's lead opinion concluded. Burger, joined by Justices Powell and White, reasoned that the impact on white contractors was not an unreasonable burden, even though it fell on many not guilty of prior discrimination. He also found that administrative provisions that waived the quotas when qualified minorities were unavailable reduced the potential for abuse. Questions about whether the law's coverage of specific disadvantaged groups was appropriate must be decided in other cases, Burger wrote.

Writing for the second three-man bloc, Justice Marshall approved the quotas using a much broader constitutional test he first developed in his *Bakke* opinion. As long as remedial racial classifications "serve important governmental objectives and are substantially related to these objectives," they are constitutionally permissible. The 10-percent set-aside for minorities in *Fullilove* fell well within the limits of this standard, he concluded. The significance of a split opinion, offering two rationales for the same result, is the freedom—some say confusion—it creates for lower court judges confronted with similar questions in different settings. For example, the Supreme Court's multiple *Bakke* opinions have been cited in rulings upholding voluntary racial quotas adopted by public employers.[27] On the opening day of its 1980–81 term, the Court refused to review a California Supreme Court ruling that approved the voluntary use of quotas by a county employment agency following administrative findings that its racially imbalanced work force resulted from prior discrimination. The case could signal the direction the Court will take in a similar California case it has agreed to review.[28] Until these questions are more fully resolved, *Fullilove* allows Congress—if not other governmental authorities—to use remedial quotas in the allocation of funds for jobs, housing, education, and perhaps other areas.

In cases arising under Title VII of the 1964 Civil Rights Act, the Court established a broad interpretation of the permissible provisions of a "bona fide" seniority system and narrowly ruled that the Equal Employment Opportunity Commission need not meet restrictive procedural criteria in filing class action suits. Three other cases resolved important procedural issues under Title VII.

"Bona fide" seniority systems are exempt from the antidiscrimination provisions of Title VII. The Court's 1977 *Teamsters* decision approved a two-track seniority system as bona fide, even though it perpetuated the effects of pre-act discrimination.[29] The ruling created much uncertainty about what other provisions could be included in bona fide plans. In *California Brewers Assn.*,[30] the Court finally provided some guidance. In addition to rules that operate on the basis of employment longevity, a seniority system may also include "ancillary" rules that determine when and how the "seniority time clock begins ticking," what work time will "count" toward benefits, and when and how accrued seniority can be forfeited, a 4–3 majority ruled.

As a result of this broad definition of acceptable provisions, the Court approved the use of a rule requiring brewery employees to accumulate 45 weeks of work during a year for advancement to a high-benefit seniority track. Black workers had charged that the 45-week rule had a discriminatory impact, in violation of Title VII. However, Justice Stewart's majority opinion stressed the freedom of collective bargaining parties to adopt such provisions. He also made clear that negotiated provisions acceptable under Title VII may be used as vehicles of illegal discrimination. Thus, California's black brewery workers remain free to show in district court that the *operation* of the 45-week rule produced differences in employment conditions resulting from an intention to discriminate.

The standard procedural rules governing class certification require, in part, that the group be sufficiently large and that all members share important interests. In a narrow 5–4 ruling, the Supreme Court resolved a conflict among the Circuits and found that the EEOC need not meet such procedural requirements because it has separate authority under Title VII to file suits on behalf of groups of aggrieved persons.[31]

One especially sensitive aspect of this issue is that the standard procedural requirements for class certification

(Rule 23 of the Federal Rules for Civil Procedure) make any judgment in subsequent suits binding on all class members; no such requirement exists under Title VII. Thus, employers expressed concern over the possibility of additional or supplemental claims by EEOC class action members unsatisfied with class-wide relief. Writing for the Court, Justice Byron White refused to restrict EEOC's ability to bring class actions, but he instructed lower courts to play an active role in determining whether subsequent private suits by unsatisfied EEOC class members occur. Where the EEOC has prevailed in its action, a court may require "any individual who claims under its judgment to relinquish his right to bring a separate private action." Except where lower courts ignore this advice, it should ameliorate employers' equity concerns for double recovery by discrimination victims.

In *N.Y. Gaslight Club*,[32] the Court increased the likelihood that discrimination victims can recover the costs of their successful litigation. A 7–2 majority ruled that, in States that have employment discrimination agencies, a successful plaintiff in State court may file a Federal Title VII suit for an award of attorney's fees if State law does not provide for such an award. The Court reasoned that the complementary nature of State and Federal enforcement mechanisms permits those receiving inadequate relief in State courts to seek complete relief in Federal courts. All plaintiffs may seek attorney's fees once they reach a Federal Court, so the Court found no reason to block such access simply because adequate relief was received at the State level.

In a second case involving attorney's fees, the Court rejected a novel approach by a district judge that would award fees to prevailing parties in Title VII cases when the proceedings had been "vexatiously multiplied."[33] A separate law allows the assessment of "excess costs" for creating such delays,[34] and the lower court found that attorney's fees are part of the costs.

Even though the Supreme Court refused to award fees by combining the two laws, Justice Powell and four others found that attorney's fees may be awarded against lawyers who "willfully abuse judicial process," such as by refusing to comply with discovery orders. The five justices agreed that Federal courts have the "inherent power" to assess fees as part of the "bad faith" exception to the American Rule against recovery of counsel fees.

Both this case and *N.Y. Gaslight Club* clearly expand the opportunities for Title VII litigants to recover court costs, creating additional incentives for alleged victims to bring suits. But the assessment of fees for the abuse of judicial process should provide an incentive for more timely resolution of Title VII cases, perhaps offsetting the burden of fatter dockets in lower courts.

The fourth procedural case under Title VII involved the length of time available for filing Federal claims when deferral to a State employment discrimination agency is required. Title VII provides that, in a deferral State, a complainant must file charges with the EEOC within 300 days of the allegedly unlawful incident; the law also provides that no charges can be filed with the EEOC until 60 days after the filing of charges with a State agency.

When charges were filed with the EEOC after 291 days, and the case was then referred to a State agency, the Supreme Court ruled that the charge was not filed on time with the EEOC because the 60-day deferral period for State charges pushed the technical EEOC filing date beyond the legal 300-day limit.[35] Justices Blackmun, Marshall, and Brennan argued in dissent that the Court's interpretation effectively reduces the time for filing EEOC charges in deferral States to 240 days.

Public-sector cases

Three public-sector cases decided by the Court in 1979–80 expanded the rights of individuals in dealing with State and local governments. A pair of cases, not the subject of much media attention, fundamentally altered the potential liability of these governmental entities. In one case, the Court ruled that State and local governments can be sued not only for alleged violations of constitutional and Federal civil rights but also for alleged violations of any other federally created right. The second ruling denied municipalities a qualified "good faith" immunity defense in such suits. Increased rights for individuals and corresponding increased liability for State and local governments are certain to play a key role in public employment issues. A third public-sector decision further reduced the number of patronage jobs controlled by elected officials.

In *Maine v. Thiboutot*,[36] a 6–3 majority ruled that the Civil Rights Act of 1871 creates liability for State and local government violations of any Federal statutory right. The 1871 law provides that anyone acting under the color of State law to deprive another person's "rights, privileges, or immunities secured by the Constitution and laws" is subject to liability. Justice Brennan's majority opinion found "and laws" to be a straightforward indication that Congress wanted to provide a right of action to enforce all rights created under Federal laws.

Thiboutot specifically approved the right to file a claim against State officials for incorrectly computing benefits under the Social Security Act. But the list of federally created rights now enforceable under the 1871 law is long; it includes "any Federal-State cooperative program," according to Justice Powell's vigorous dissent. Thus, cooperative public-works programs and the Comprehensive Employment and Training Act programs, among others, may now be potential sources of

liability for the States, counties, and cities involved in their administration.

In expanding private rights under the 1871 law, the Court also ruled that attorney's fees could be awarded by State courts to prevailing parties in all actions under the law. But, in a companion case that permitted such fee awards by a Federal court based only on a consent decree,[37] the Court left open whether Federal courts can award fees against States based on a statutory, non-civil rights claim under the 1871 law. The 11th Amendment may bar such an award, but the increased litigation now expected in this area could soon produce a case that may answer this question.

In 1978, the Supreme Court overturned a 17-year-old interpretation of the 1871 Civil Rights Act and held that municipalities can be sued as "persons" under the law.[38] Last term, in a narrow 5–4 ruling, the Court found that cities cannot claim "good faith" immunity as a defense in such suits.[39] Writing for the Court, Justice Brennan reasoned that the law was designed to protect against misuse of State and local powers, and permitting immunity would undermine that purpose. Brennan made clear that government officials may still claim such a defense in cases under the 1871 law, indicating that when a municipality deprives individuals of their constitutional or Federal rights "the public, as represented by the municipality," must bear the costs.

The two-way expansion of the potential liability of State and local governments may have important implications for the role these government entities choose to play in administering Federal programs and in providing other services. Pressure on local governments to ensure that neither Federal nor constitutional rights are infringed could increase administrative costs, as program procedures are re-examined and new controls are implemented. The cost of additional court suits can easily upset a carefully balanced budget. And with public finances limited by taxpayer resistance, additional expenditures could mean fewer—but, perhaps, fairer—programs and services.

Patronage systems suffered a strong blow in 1980, as once again the Supreme Court upheld the rights of individuals over those of governmental authorities. The Court refused to permit a newly elected Democratic county administration to replace two assistant public defenders appointed by the defeated Republican officials.[40] Expanding public employees' First Amendment protections against political coercion first announced in *Elrod v. Burns*,[41] a 6–3 Court found that the attorneys, judged competent in their jobs, could not be dismissed solely because of their political beliefs.

Which public jobs can still be controlled for patronage purposes? The confidential or policymaking nature of a job is not the criterion for patronage positions, Justice Stevens wrote for the Court; rather, a hiring authority must demonstrate that party affiliation is "an appropriate requirement for the effective performance of the public office involved." However, the types of positions where effectiveness is related to party affiliation remains uncertain. Stevens acknowledged only that election judges and "various assistants" of State governors, such as press secretaries, speech writers, and lobbyists, are examples of permissible patronage jobs, but he created no clear line.

One writer suggested that the Court has adopted and expanded Oliver Wendell Holmes' concept of "Jobbism," where a worker's political beliefs do not interfere with the performance of a job—even if that job involves carrying out the policies of a competing political party. Under the Court's present approach, "it's an open question whether a newly elected governor, or president, may appoint his own cabinet," wrote Robert M. Kaus in "Zbig for Life: The Way the Supreme Court is Going That's What We Could be Stuck With."[42] Although Stevens' opinion is unlikely to lead to court suits by cabinet officials of an out-going administration, the question of when party affiliation influences the effectiveness of a public employee's performance is bound to raise some interesting future cases that should help reduce the present uncertainty.

Indeed, some officials appointed by President Carter may be encouraged to try and keep their jobs by a recent district court decision. Mahlon M. Delong was appointed to a Schedule A, Federal "plum book" job by President Ford. Based on the Supreme Court's ruling in *Branti v. Finkel*, a district court found that Delong was illegally fired by the Carter Administration and must be reinstated as the Maine director for the Farmers Home Administration.[43] As a result, the Deputy General Counsel for the Federal Office of Personnel Management, Paul Trause, expects some Carter appointees to go to court: "I don't expect to be deluged, but I think it's a real consideration."

Traditional labor law

The NLRB's expertise in settling labor relations issues under the National Labor Relations Act has been frequently recognized by the Supreme Court. But in its 1979–80 term, the Court continued a year-earlier pattern and rejected two of three Board interpretations of the act, so that all three decisions resulted in greater flexibility for employers. In both cases lost by the Board, however, the Court achieved only a bare 5–4 majority.

In *Yeshiva*,[44] the Supreme Court ruled that the act's coverage of university faculty is far more limited than the Board claimed. The Court supported a Second Circuit ruling that faculty members who play dominant decisionmaking roles in matters of hiring, tenure, sabbaticals, terminations and promotions as well as in aca-

demic areas are "managerial" employees excluded from NLRA coverage. The Board had argued that the faculty exercised "independent professional judgment" in handling its decisionmaking responsibilities, but the Court rejected this approach in finding that the interests of faculty members and those of the university could not be separated.

Justice Powell's majority opinion stressed that the purpose of the managerial exclusion was to preserve for an employer the undivided loyalty of those employees who carry out management policies. In applying this rationale to the employment structure at private universities, the Court failed to provide clear lines to determine when a faculty member is aligned with management, although Powell suggested that tenure status in some schools might distinguish managerial faculty members.

For 9 years, NLRB decisions had approved virtually all faculty bargaining units, but the uncertainty created by *Yeshiva* requires case-by-case reviews by the Board, certain to dampen union organizing efforts among private institutions. Public colleges and universities are covered by State labor laws, and any change in coverage must come in State courts or legislatures.

Without doubt, the most significant aspect of *Yeshiva* is whether the "managerial" exclusion may now reach other professional employees. The Taft-Hartley Act created the original exemption for "supervisors," which was expanded by Court-approved Board decisions to cover those "who formulate and effectuate management policies by expressing and making operative the decisions of their employees."[45] The "managerial" activities of the Yeshiva faculty may be similar to the responsibilities held by some nurses, lawyers, doctors, engineers, and other professionals currently bargaining under the act. More precise limits on the managerial exclusion are bound to emerge through increased litigation by managements seeking to avoid collective bargaining. Ironically, the greater decisionmaking authority among professionals—such as university faculty—that resulted from the availability (if not the use) of collective bargaining may be the basis for finding their interests aligned with those of management. However, *Yeshiva's* narrow 5–4 verdict suggests that a Court majority may not support a broad expansion of the managerial exclusion.

Technological innovation carries conflicting consequences for economic growth and for the continuity of employment. As pressures increase to combat sagging productivity growth through policies to stimulate innovation, attempts to preserve traditional work may also increase. Possibly anticipating such a scenario, the Court's ruling in *NLRB v. International Longshoremen's Assn.*[46] recognized the important role of collective bargaining in resolving such conflicts and outlined a broad new interpretation of the work preservation doctrine that should permit innovative solutions to limit job losses following the introduction of new technologies.

The NLRB ruled invalid an agreement between the ILA and the shipping industry granting the union exclusive rights to pack and unpack containerized cargo within 50 miles of a port. The Board reasoned that such work was not traditional longshoring work and that the union illegally sought to acquire the work traditionally done by freight consolidators and trucking companies. However, the High Court, noting that container technology had completely replaced the traditional method of handling goods between ocean and motor transportation, found that the Board had incorrectly analyzed the work the union sought to preserve. On remand, the Board must reexamine the ILA agreement based on the Court's advice that the work preservation doctrine must protect union actions that "attempt to accommodate change while preserving as much of their traditional work as possible."

If the Board finds the ILA contract provisions valid, a second question will be whether the shipping industry has the "right to control" the assignment of work.[47] Justice Marshall hinted in a footnote to his majority opinion that the Board might frame the question in terms of the shippers' authority over containers they own or lease in their "possession and control."[48] But other issues such as government regulatory constraints cloud the resolution of the control question.

Regardless of how the Board now decides the ILA case, the Court's decision clearly broadens the scope of permissible work preservation agreements. In earlier cases such as *National Woodwork* and *Pipefitters*,[49] unions had completely rejected an innovation in efforts to preserve traditional work. Thus, it appeared that only *exact* work patterns could be preserved through negotiated contracts. Now, however, the Court has opened the way for agreements that can preserve work *generically* the same as that performed before an innovation. The flexibility of the new approach was also enhanced by Marshall's comment that valid agreements need not be the "most rational or efficient response to innovation." As in *Yeshiva*, however, the 5–4 majority in this case suggests that the new standard may extend only as far as the views of a single justice.

The views of the NLRB were adopted by the Supreme Court when it declared that a union may not picket a struck product handled by a neutral secondary employer if the product accounts for substantially all of the employer's business.[50] The Court's 1974 *Tree Fruits* decision had permitted a union to picket a struck product at a secondary location (apples in a retail store).[51] But the Court reasoned that this simple rule must be conditioned on the relationship of the product to the neutral employer's revenues. Justice Powell explained for the 6–

3 majority that when product picketing "reasonably can be expected to threaten neutral parties with ruin or substantial loss" it illegally coerces them to cease dealing with that product or with the primary employer.

The threshold criterion for when product picketing at secondary locations becomes illegally coercive remains unclear. Must a union gain access to the employer's books and use some quantitative interpretation of "substantial" before being reasonably certain that picketing is legal? In the case before the Court, revenues from sales of the struck product accounted for more than 90 percent of the neutral employers' gross income. But is 75 or even 50 percent still "substantial"? The threshold of illegality is also crossed when "ruin or substantial loss" of a neutral employer is a "reasonably expected" outcome of secondary picketing. Must a union evaluate its potential success in influencing consumers? Presumably the Board and the lower courts will have to answer these questions and others that emerge concerning specific products and their economic contribution to the neutral employer's business.

The Court also considered the First Amendment speech questions involved in limiting secondary picketing. Powell's majority opinion found the new standard constitutionally sound basically because it differed little—on the speech question—from the existing limits on secondary picketing. Justices Blackmun and Stevens agreed that the new economic impact limitation on secondary picketing was constitutional, but both were troubled by the Court's easy acceptance of additional content-based speech restrictions. During the 1979–80 term, the Court struck down an Illinois law as unconstitutional because it prohibited picketing of residential homes based on the content of the picketers' speech.[52] Generally, speech rights have only been limited based on time, place, and manner. In labor law, the Supreme Court first limited speech based on content (primary product picketing) in *Tree Fruits,* and Blackmun and Stevens appeared wary of establishing precedents that could be used in other areas.

Another case decided under the NLRA settled questions about the liability of parent unions for damages caused by a local's unauthorized strike. Unanimously the Court ruled that a parent union can be held liable for such damages when it can be proved that the local acted with the express or implied authority of the parent. Damage liability can also result from a parent union's failure to fulfill contractual obligations to resolve unauthorized strikes, the Court found in resolving a conflict among the circuits.[53] Under both tests, the United Mine Workers of America were found not liable for damages resulting from a series of wildcat strikes by locals between 1969 and 1973.

Justice Brennan's opinion emphasized that parent union liability under the NLRA exists only when a local acts as its agent. However, his analysis of the potential liability arising from contract language left some important questions.

Brennan found that the UMW's obligation to "maintain the integrity" of the contract did not require attempts to resolve the unauthorized strikes, largely because such a duty to intervene had been specifically deleted from the 1952 contract. It is unclear whether an "integrity" clause that resulted from a different bargaining history could create an obligation for parent union intervention. Thus, where contract language is imprecise and the negotiating history offers no definitive answers, a parent union could be held liable for failing to intervene in a local's unauthorized strike.

Injury compensation

The two worker compensation cases decided by the Court last term overturned unconstitutional restrictions on the availability of benefits to injured workers or their survivors. Likewise, a pair of cases under the Federal injury compensation law for maritime workers also resulted in greater availability of benefits. An unusual case under another Federal law found the Court agreeing with actions that might curb the amount of compensation awards to injured workers or their survivors.

The Missouri workers' compensation law required a dependency test for widowers seeking benefits based on their wives' former earnings, but did not require such a test for similarly situated widows. The Supreme Court struck down this unequal treatment as unconstitutional sex discrimination,[54] extending to State benefit laws the equal protection analysis used to void similar sex-based provisions for the distribution of Federal social security benefits.[55] The 8–1 ruling acknowledged that the Missouri provision discriminated both against working women, by failing to provide the same protection for their families that men receive, and against men who survive their working wives. The Court left State courts to decide whether to require a dependency test for widows or to drop it altogether.

In the second workers' compensation case, the Court ruled that an injured worker may obtain supplemental or additional benefits from a second jurisdiction that is willing to pay.[56] Although seven justices agreed on this result, they split 4–3 on their approach. Justices Stevens, Brennan, Stewart, and Blackmun would have overruled a 1943 High Court ruling that the Full Faith and Credit Clause of the Constitution precludes compensation from one State following receipt of benefits from another.[57] However, Justices White and Powell and the Chief Justice pursued a more narrow course, agreeing with a 1947 case that benefits from a second jurisdiction are permissible when not expressly prohibited by the law of the first jurisdiction.[58] In this case, Virginia's compensation law was found not to prevent addi-

tional benefits from other jurisdictions. In dissent, the unusual combination of Justices Marshall and Rehnquist supported the Court's 1943 ruling that payment of secondary compensation claims violates the Full Faith and Credit Clause.

Under the Longshoremen's and Harbor Workers' Compensation Act, the Court ruled unanimously that Congress intended coverage to be based on the nature of the work performed rather than based solely on its location. Thus, "maritime employment" for the purposes of the act includes all workers involved in moving cargo between ocean and land transportation, even though some of this traditional longshoring work may occur away from the water's edge.[59]

Another unanimous decision found that State compensation plans may cover the same land-based maritime workers covered by the Federal injury compensation scheme.[60] The Court reasoned that the extension of the Federal law in 1972 to cover such workers was meant to complement not to supplant State compensation systems.

The calculation of damage awards for a worker's death or injury has generally been based on expected gross income in claims under the Federal Employers' Liability Act. But during 1980, the Supreme Court sided with a vanguard of inflation-fighting lower courts and ruled that after-tax future earnings of a victim could be calculated and presented to the jury by the defending employer.[61] Justice Stevens wrote for the Court that juries are now sufficiently sophisticated to deal with the complexities of future tax liabilities. Awards under the law are not taxed, and Stevens reasoned that juries may be told this to prevent inadvertently large awards that include the imaginary tax consquences. Justices Blackmun and Marshall argued that the Court simply reduced penalties for defendents in such cases, whereas Congress probably intended only victims to benefit from the tax break on awards.

Other benefits, Federal laws

Vested pension benefits are "nonforfeitable" and thus insured under provisions of the Employee Retirement Income Security Act even if the pension plan was terminated before the act took full effect and contained a provision disclaiming employer liability for insufficient assets, the Supreme Court ruled.[62] Justice Stevens wrote for a narrow 5-4 majority that disclaimers of employer liability protect against direct claims by employees, but that even during the phase-in period of benefit insurance Congress intended employers to be liable for up to 30 percent of their net assets to compensate the ERISA insurance fund for benefits paid. Because Congress knew that most plans contained disclaimers, its creation of the reimbursement plan made clear that benefits were insured where the employer had disclaimed liability.

Although the decision directly affects only the participants of plans terminated before 1976, Pepperdine University law professor R. Wayne Estes has suggested that the decision "sets a tone for strict judicial interpretation of the statute that may have a far-reaching effect.[63]

Veterans whose employment is interrupted by their military service are entitled to seniority benefits calculated as if they had been continuously employed. The Supreme Court has ruled that such seniority benefits include severance pay[64] and pension benefits[65] but not vacation benefits.[66] In 1980, a unanimous Court ruled that the steel industry's supplemental unemployment benefits are perquisites of seniority, and military service must be included in the calculation of SUB payments.[67]

Justice Marshall's opinion for the Court satisfied both prongs of the test established in *Alabama Power:*[68] it is reasonably certain that steel industry SUB benefits would have accrued to an employee who entered military service; and because they offer lay-off protection initially based on time worked, SUB benefits are a reward for length of service.

In *U.S. v. Clark,*[69] the Court made it easier for illegitimate children of Federal civil service employees to obtain survivors' benefits under the Civil Service Retirement Act. A 7-2 majority ruled that the law's requirement that "recognized natural" children "lived with" their parents to be eligible for a survivor's annuity means only that they must have *once* lived in a normal parent-child relationship—not necessarily at the time of the worker's death. Although not an explicit dependency requirement (which would raise troublesome constitutional issues), the Court's reading of the "lived with" provision establishes some basis for the economic support intended to flow to the dependent survivors of a Federal worker.

During its 1979-80 term, a unanimous Court upheld the constitutionality of the Labor Department's practice of using fines assessed for violations of child labor laws to help defray the cost of enforcing these laws.[70] Although the Court has found that Fifth Amendment due process requirements prohibited such self-supporting activities for judicial or quasi-judicial decisionmakers,[71] Justice Marshall wrote for the Court that child labor law enforcers act more like prosecutors because all employers fined under the law have an opportunity for a *de novo* review by an administrative law judge. The Court left open the question of what constitutional limits may exist on the financial or personal interests of prosecutors.

Employment discrimination issues sometimes arise in unusual legal contexts. In a case under the Emergency School Aid Act, the Court ruled that Federal funds may be denied to elementary and secondary schools based on statistical evidence of a disparate racial impact in the hiring, promotion, or assignment of employees.[72]

The Court found that discriminatory impact—not necessarily intent—should trigger a fund cutoff because Congress intended to eliminate *de facto* as well as *de jure* minority group segregation and isolation. The Court suggested that schools could possibly rebut a statistically shown disparate impact by proof of "educational necessity," analogous to the "business necessity" justification permitted under Title VII of the 1964 Civil Rights Act. □

—— *FOOTNOTES* ——

[1] Finley Peter Dunne, *Mr. Dooley's Opinions* (St. Clair Shores, Mich., Scholarly Press, Inc., 1977), reprint of original 1900 edition.

[2] Private employers gained greater flexibility in contesting health and safety regulations, *Industrial Union Dept. AFL–CIO, v. American Petroleum Institute*, 48 U.S.L.W. 5022 (U.S., July 2, 1980), and in preventing unionization of employees with some managerial responsibilities, *NLRB v. Yeshiva Univ.*, 48 U.S.L.W. 4175 (U.S., Feb. 20, 1980). Private employers and unions were jointly provided new freedoms to preserve traditional work, *NLRB v. International Longshoremen's Assn.*, 48 U.S.L.W. 4765 (U.S., June 20, 1980), and to structure seniority systems, *California Brewers Assn. v. Bryant*, 48 U.S.L.W. 4156 (U.S., Feb. 20, 1980).

[3] State and local government employers became liable for violations of all Federal statutory rights, *Maine v. Thiboutot*, 48 U.S.L.W. 4859 (U.S., June 25, 1980), and were denied "good faith" immunity in such cases, *Owen v. City of Independence, Mo.*, 38 U.S.L.W. 4389 (U.S., Apr. 16, 1980).

[4] In *Fullilove v. Klutznick*, 48 U.S.L.W. 4979 (U.S. July 2, 1980), congressionally imposed quotas were approved to enforce the equal protection rights of minorities; *Branti v. Finkel*, 48 U.S.L.W. 4331 (U.S., Mar. 31, 1980), expanded public employees' first amendment protections against dismissal for political reasons; and *Wengler v. Druggists Mutual Ins. Co.*, 48 U.S.L.W. 4459 (U.S. Apr. 22, 1980), found unconstitutional sex discrimination in a workers' compensation law by extending the equal protection analysis developed in challenges to Federal benefit laws.

[5] The Court broadened administrative discretion in *General Telephone Co. of the Northwest, Inc. v. EEOC*, 48 U.S.L.W. 4513 (U.S., May 12, 1980), allowing EEOC to use special, less restrictive class certification procedures; *Whirlpool Corp. v. Marshall*, 48 U.S.L.W. 4189 (U.S., Feb. 26, 1980), upholding a Labor Department regulation that allows employees to refuse dangerous work even though the OSH act does not specify such authority; and *NLRB v. Retail Store Employees Union, Local 1001*, 48 U.S.L.W. 4796 (U.S., June 20, 1980), approving an NLRB policy that limits secondary boycotts based on the potential economic loss for the neutral employer.

[6] *Industrial Union Dept., AFL–CIO v. American Petroleum Institute*, 48 U.S.L.W. 5022 (U.S., July 2, 1980), limiting OSHA's regulatory authority over toxic substances; *NLRB v. Yeshiva University*, 48 U.S.L.W. 4175 (U.S., Feb. 20, 1980), restricting NLRB jurisdiction over university faculty; *Maine v. Thiboutot*, 48 U.S.L.W. 4859 (U.S., June 25, 1980), creating liability for State and local government violations of Federal laws; and *Mohasco Corp. v. Silver*, 48 U.S.L.W. 4851 (U.S., June 23, 1980), limiting when the EEOC may act on charges first filed with a State agency.

[7] *Industrial Union Dept., AFL–CIO v. American Petroleum Institute*, 48 U.S.L.W. 5022 (U.S., July 2, 1980), see *Monthly Labor Review*, September 1980, pp. 53–54.

[8] *Fullilove v. Klutznick*, 48 U.S.L.W. 4979 (U.S., July 2, 1980), see *Monthly Labor Review*, September 1980, pp. 54–56.

[9] *California Brewers Assn. v. Bryant*, 48 U.S.L.W. 4156 (U.S., Feb. 20, 1980), see *Monthly Labor Review*, June 1980, pp. 51–52.

[10] *General Telephone Co. of the Northwest, Inc. v. EEOC*, 48 U.S.L.W. 4513 (U.S., May 12, 1980), see *Monthly Labor Review*, August 1980, pp. 45–46.

[11] *Maine v. Thiboutot*, 48 U.S.L.W. 4859 (U.S., June 25, 1980).

[12] *Owen v. City of Independence, Mo.*, 48 U.S.L.W. 4389, (U.S., Apr. 16, 1980).

[13] *Branti v. Finkel*, 48 U.S.L.W. 4331 (U.S., Mar. 31, 1980), see *Monthly Labor Review*, August 1980, pp. 44–45.

[14] *NLRB v. Yeshiva Univ.*, 48 U.S.L.W. 4175 (U.S., Feb. 20, 1980), see *Monthly Labor Review*, April 1980, pp. 57–58.

[15] *NLRB v. International Longshoremen's Assn.*, 48 U.S.L.W. 4765 (U.S., June 20, 1980), see *Monthly Labor Review*, November 1980, pp. 46–47.

[16] *NLRB v. Retail Store Employees Union, Local 1001*, 48 U.S.L.W. 4796 (U.S., June 20, 1980), see *Monthly Labor Review*, November 1980, pp. 47–48.

[17] *Whirlpool Corp. v. Marshall*, 48 U.S.L.W. 4189 (U.S., Feb. 26, 1980), see *Monthly Labor Review*, April 1980, p. 57.

[18] *Industrial Union Dept., AFL–CIO v. American Petroleum Institute*, 48 U.S.L.W. 5022 (U.S., July 2, 1980), see *Monthly Labor Review*, September 1980, pp. 53–54.

[19] 29 U.S.C. Sec. 655(b)(5).

[20] *American Iron and Steel Institute v. OSHA*, 581 F.2d 493 (5th Cir., 1978); *RMI Co. v. Sec. of Labor*, 594 F.2d (6th Cir. 1979); and *Turner Co. v. Sec. of Labor*, 561 F.2d 82 (7th Cir., 1977).

[21] *Industrial Union Dept. v. Hodgson*, 499 F.2d 467 (D.C. Cir., 1974), and *American Iron and Steel Inst. v. OSHA*, 577 F.2d 825 (3d Cir., 1978).

[22] *American Textile Manufacturers Institute, Inc. v. Marshall*, 48 U.S.L.W. 2311 (D.C. Cir., Oct. 24, 1979), review granted, 49 U.S.L.W. 3208 (U.S., Oct. 7, 1980), see *Monthly Labor Review*, December 1980, p. 67. For a more detailed discussion, see Berger and Riskin, "Economic and Technological Feasibility in Regulating Toxic Substances Under the Occupational Safety and Health Act," 7 Ecology L.Q. 285 (1978).

[23] *University of California Regents v. Bakke*, 438 U.S. 265 1978), see *Monthly Labor Review*, August 1978, p. 46.

[24] *Steelworkers v. Weber*, 443 U.S. 193 (1979), see *Monthly Labor Review*, August 1979, pp. 56–57.

[25] *Fullilove v. Klutznick*, 48 U.S.L.W. 4979 (U.S., July 2, 1980), see *Monthly Labor Review*, September 1980, pp. 54–55.

[26] *Minnick v. California Dept. of Corrections*, 48 U.S.L.W. 2128 (Cal. Ct. App., 1979), review granted, 48 U.S.L.W. 3855 (U.S., July 2, 1980), see *Monthly Labor Review*, December 1980, pp. 67–68.

[27] See, for example, *District Atty. Sacramento Cty. v. Sacramento Cty. Civil Serv. Comm.*, 48 U.S.L.W. 2538 (Cal. Sup. Ct., 1980), cert. dismissed, 49 U.S.L.W. 3213 (U.S., Oct. 7, 1980), see *Monthly Labor Review*, December 1980, pp. 67–68; *Detroit Police Officers Assn. v. Young*, 608 F.2d 671 (6th Cir., 1979); and *Maehren v. City of Seattle*, 20 FEP Cases 854 (Wash. Sup. Ct., 1979).

[28] See footnote 19.

[29] *Teamsters v. United States*, 431 U.S. 324 (1977), see *Monthly Labor Review*, August 1977, pp. 48–49.

[30] *California Brewers Assn. v. Bryant*, 48 U.S.L.W. 4156 (U.S. . . , Feb. 20, 1980), see *Monthly Labor Review*, June 1980, pp. 51–52.

[31] *General Telephone Co. of the Northwest, Inc. v. EEOC*, 48 U.S.L.W. 4513 (U.S., May 12, 1980), see *Monthly Labor Review*, August 1980, pp. 45–46.

[32] *New York Gaslight Club, Inc. v. Carey*, 48 U.S.L.W. 4645 (U.S., June 9, 1980).

[33] *Roadway Express, Inc. v. Piper*, 48 U.S.L.W. 4836 (U.S., June 23, 1980).

[34] 29 U.S.C. Sec. 1927.

[35] *Mohasco Corp. v. Silver*, 48 U.S.L.W. 4851 (U.S., June 23, 1980).

[36] 48 U.S.L.W. 4859 (U.S., June 25, 1980).

[37] *Maher v. Gagne*, 48 U.S.L.W. 4891 (U.S., June 25, 1980).

[38] *Monell v. Dept. of Social Serv., New York City,* 436 U.S. 658 (1978), see *Monthly Labor Review,* October 1978, p. 53.

[39] *Owen v. City of Independence, Mo.,* 48 U.S.L.W. 4389 (U.S., Apr. 16, 1980).

[40] *Branti v. Finkel,* 48 U.S.L.W. 4331 (U.S., Mar. 31, 1980), see *Monthly Labor Review,* August 1980, pp. 44–45.

[41] 427 U.S. 347 (1976), see *Monthly Labor Review,* October 1976, pp. 46–47.

[42] Robert M. Kaus, "Zbig for Life: The Way the Supreme Court is Going, That's What We Could be Stuck With," *The Washington Monthly,* June 1980, pp. 25–32.

[43] See T. R. Reid, "GOP Loyalist's Job Victory May Impede Housecleaning," *The Washington Post,* Dec. 3, 1980, p. 12.

[44] *NLRB v. Yeshiva Univ.,* 48 U.S.L.W. 4175 (U.S., Feb. 20, 1980), see *Monthly Labor Review,* April 1980, pp. 57–58.

[45] *NLRB v. Textron,* 416 U.S. 267 (1974).

[46] 48 U.S.L.W. 4765 (U.S., June 20, 1980), see *Monthly Labor Review,* November 1980, pp. 46–47.

[47] See *NLRB v. Enterprise Assn. of Pipefitters,* 429 U.S. 507 (1977), establishing the so-called "right to control" test for work preservation agreements; see *Monthly Labor Review,* June 1977, pp. 57–58.

[48] See footnote 27 of Justice Marshall's opinion, 48 U.S.L.W. 4771.

[49] *National Woodwork Manufacturers Assn. v. NLRB,* 386 U.S. 612 (1967); *NLRB v. Enterprise Assn. of Pipefitters,* 429 U.S. 507 (1977), see *Monthly Labor Review,* June 1977, pp. 57–58.

[50] *NLRB v. Retail Store Employees,* Local 1001, 48 U.S.L.W. 4796 (U.S., June 20, 1980), see *Monthly Labor Review,* November 1980, pp. 47–48.

[51] *NLRB v. Fruit Packers (Tree Fruits),* 377 U.S. 58 (1964), see *Monthly Labor Review,* June 1964, pp. 687–88.

[52] *Carey v. Brown,* 48 U.S.L.W. 4756 (U.S., June 20, 1980).

[53] *Carbon Fuel Co. v. United Mine Workers of America,* 48 U.S.L.W. 4059 (U.S., Dec. 10, 1979). For a more detailed discussion and citations of lower court decisions, see *Monthly Labor Review,* March 1980, p. 51.

[54] *Wengler v. Druggists Mutual Ins. Co.,* 48 U.S.L.W. 4459 (U.S., Apr. 22, 1980), see *Monthly Labor Review,* August 1980, p. 45.

[55] See *Weinberger v. Wisenfield,* 420 U.S. 636 (1975); and *Califano v. Goldfarb,* 430 U.S. 199 (1977), see *Monthly Labor Review,* May 1977, pp. 51–52.

[56] *Thomas v. Washington Gaslight Co.,* 48 U.S.L.W. 4930 (U.S., June 27, 1980).

[57] *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430 (1943).

[58] *Industrial Commission of Wisconsin v. McCartin,* 330 U.S. 62 (1947).

[59] *P. C. Pfeiffer Co., Inc. v. Ford,* 48 U.S.L.W. 4018 (U.S., Nov. 27, 1979), see *Monthly Labor Review,* March 1980, pp. 51–52.

[60] *Sun Ship, Inc. v. Commonwealth of Pennsylvania,* 48 U.S.L.W. 4826 (U.S., June 23, 1980).

[61] *Norfolk and Western Railway Co. v. Liepelt,* 48 U.S.L.W. 4132 (U.S., Feb. 19, 1980), see *Monthly Labor Review,* June 1980, p. 52.

[62] *Nachman Corp. v. Pension Benefit Guaranty Corp.,* 48 U.S.L.W. 4524 (U.S., May 12, 1980), *see Monthly Labor Review,* September 1980, p. 56.

[63] R. Wayne Estes, from a paper presented at the annual meeting of the American Bar Association's Section on Labor and Employment Law, Honolulu, Hawaii, August 4, 1980, 155 DAILY LAB. REP. 1980, D-1.

[64] *Accardi v. Pennsylvania R. Co.,* 383 U.S. 225 (1966), see *Monthly Labor Review,* April 1966, pp. 417–18.

[65] *Alabama Power Co. v. Davis,* 431 U.S. 581 (1977), see *Monthly Labor Review,* October 1977, p. 71.

[66] *Foster v. Dravo Corp.,* 420 U.S. 92 (1975), see *Monthly Labor Review,* May 1975, p. 65.

[67] *Coffy v. Republic Steel Corp.,* 48 U.S.L.W. 4683 (U.S., June 10, 1980), see *Monthly Labor Review,* November 1980, p. 48.

[68] 431 U.S. 581 (1977).

[69] 48 U.S.L.W. 419 (U.S., Feb. 26, 1980), see *Monthly Labor Review,* June 1980, p. 53.

[70] *Marshall v. Jerrico, Inc.,* 48 U.S.L.W. 4485 (U.S., Apr. 28, 1980), see *Monthly Labor Review,* June 1980, pp. 52–53.

[71] See *Tumey v. Ohio,* 273 U.S. 510 (1927); and *Ward v. Village of Monroeville,* 409 U.S. 57 (1972).

[72] *Board of Ed., City of New York v. Harris,* 48 U.S.L.W. 4035 (U.S., Nov. 28, 1979), see *Monthly Labor Review,* March 1980, p. 52.