An Academic Perspective: Selected Recent Supreme Court Decisions

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When I first thought about this essay—now over a year ago—I decided my approach would be somewhat different from that of many of my predecessors in this position. Without intending any criticism of them, in the days of quick reporting of Supreme Court cases, of Westlaw, Lexis, BNA and CCH summaries, it is hardly a good use of time to recite the facts and holdings of all, or a substantial number, of this year's Supreme Court cases.

Nor do I expect that it is of great interest to you which outcomes I approve of and which I do not. The basic value of an essay by an academic is in the unique perspective that an academic can bring to the topic.

It would be surprising, or worse, if the academic perspective had nothing in common with the practitioners' perspective. But in my view the academic perspective and the practitioner perspective are, or ought to be, different. What distinguishes the academic from the practitioner is, in a word, clients. A practitioner's view of the Supreme Court cases must be, in whole or in part, "What does this case mean for my clients?" This yields a set of very practical-oriented inquiries.

Lacking clients and having more time to read and reflect, the academic's task is one of attention to theory. Labor law, unfortunately, has lagged behind other disciplines in this respect. One has only to turn to the best scholarship in areas such as corporations, bankruptcy, antitrust, and secured transactions, to conclude that labor law scholarship seldom approaches the richness of scholarship in those areas. This seems odd because, like those areas, labor and employment law has to do with the regulation of part of our processes of turning out goods and services. Labor and employment law operates in the marketplace.

I have selected only a few—actually four—of this year's Supreme Court cases and will discuss some puzzles that these cases

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raise for the academic. It should be noted that I only suggest, not exhaust, lines of inquiry.

Review of Arbitration Awards: *United Paperworkers International Union v. Misco, Inc.*

Isaiah Cooper, a night shift worker who operated hazardous "slitter-rewinder" machines at a paper plant was fired after his employer found that police had apprehended Cooper, during working hours, in the back seat of a marijuana-smoke filled automobile, not belonging to Cooper, with a burning marijuana cigarette in the front.[1] After the decision to discharge, but before an arbitration hearing, the company discovered that police had also found marijuana paraphernalia in Cooper's car.[2]

The arbitrator upheld the grievance and ordered Cooper reinstated with full back pay and seniority. The company, viewing the award as outrageous, sued in federal district court to set it aside. The district court and court of appeals set aside the award as "contrary to public policy," the policy in this case being one "against the operation of dangerous machinery by persons under the influence of drugs or alcohol."[3] The Supreme Court reversed; the arbitration award in Cooper's favor stands.[4]

The first matter before the Court was whether to continue to adhere to the standard announced in the *Steelworker's Trilogy*, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority . . . ," the award will be upheld.[5]

The second matter was whether an award, otherwise valid under the *Trilogy*, may be set aside because it is inconsistent with "public policy," and, if so, what is the standard by which to determine the reach and effect of public policy.[6]

The first part of the Court's opinion reaffirms the vitality of the *Steelworkers Trilogy* standard for reviewing arbitration awards. The puzzle for the academic is whether or why it matters what the rule is in this context. All these cases involve negotiated arbitration clauses.[7] I strongly suspect that if a union and an employer were to

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1. *See* United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364, 368 (1987).
2. *See id.*
3. *See id.* at 369; *see also Misco*, 768 F.2d 739, 743 (5th Cir. 1985).
4. *Misco*, 108 S. Ct. at 374-75.
5. *Id.* at 371; *see* Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) (the Court's function is very limited).
6. *Misco*, 108 S. Ct. at 373; *see* W. R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766 (1983) (a court may refuse to uphold a contract that violates law or public policy).
7. *See id.* at 370.

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bargain a "hard look" clause, such as, "The parties agree that an arbitration award will be enforced if and only if it is nonarbitrary and supported by substantial evidence," a court would honor such a clause. I also suspect the converse is true; had the Court fashioned a "hard look" rule in the *Trilogy*, it would nonetheless honor a contractual stipulation that even "bad" awards will be enforced.

If these parties are already bargaining, and if the scope and finality of arbitration awards is important, then why does it matter what the Court rules? Whatever the rule is, parties dissatisfied with it will bargain around it. After all, this is not the sort of situation where if you fail to reach agreement, you get to keep something. Absent a bargaining agreement, there will be no arbitration award.

Thus the *Trilogy* acts as a contractual gap-filler: it sets the standard for those parties who leave their agreement silent on this issue.[8] This analysis suggests two lines of inquiry for the academic:

1. If parties can and will bargain over this issue, then the objective for the Court is straightforward: adopt the rule that a majority of bargainers would adopt if they bargained explicitly over the rule. Moreover, if over the nearly thirty year period since the *Trilogy* was decided relatively few agreements have adopted a different rule, that is strong evidence of majoritarian preferences.
2. Suppose, though, that many parties are disabled from negotiating a contrary rule. Analysis of the "proper" rule now has to proceed differently, for the rule will "count." The puzzle for the academic is whether and why the parties in the labor context might find it difficult or impossible to bargain over this issue.

The second issue before the Court, the existence and scope of a public policy bar to enforcement of some arbitration awards, is surely of a different character.[9] It is one that the Court is likely to impose on parties notwithstanding any attempt by parties to reach a different rule by private agreement.[10] Thus, it is not possible to argue with respect to this rule that the courts should adopt the rule that most parties would adopt if they bargained explicitly over the rule.

There was a range of "public policy" rules open to the Court:

1. Failure to comply with public policy is not a bar to enforcing an award that otherwise satisfies the *Trilogy*.
2. Public policy means only the enforcement of a provision that

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8. *See id.* at 371.

9. *See id.* at 373-75.

10. *See id.* at 373 (doctrine is based on morality, legality and the concerns of the general public. Thus, this clause would not be valid: "Arbitration awards under this agreement are binding notwithstanding public policies to the contrary.").

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violates positive law, or that requires the employer to violate the law in order to comply.

3. Public policy is any "well-defined and dominant policy" (the Court held that the test is at least this strong, and that it was not met in this case).
4. A lesser standard.

The Court's opinion does not expand upon its currently understood position.[11] There is a public policy bar. At least the policy must be "well defined and dominant;" whether it must go farther and violate an express law is not decided.[12]

The academic is interested in what the Court seeks to accomplish with its rule, for the Court is not compelled to any result by statute or constitution. The Court's rationale is that:

> [The] doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements. . . . In the common law of contracts, this doctrine has served as the foundation for occasional exercises of judicial power to abrogate private agreements.[13]

This rationale is not very helpful. The law of contracts does contain such cases, but they involve neat distinctions such as whether the legality appears on the face of the contract. The Court makes no attempt genuinely to use the common law as an analogy.[14]

Nor does the Court take a serious look at the nature of society's interest.[15] A state or local legislature that outlaws the use of marijuana has expressed a societal condemnation of marijuana use, but only up to a point. The legislature has not made it unlawful for a marijuana user to hold a job, even the job of "slitter-rewinder."

Thus the academic might see this as a question of judicial power; how much power ought a court have to supplement existing prohibitions of explicit law and to create new prohibitions from the judges' perceptions as to what are "bad practices."

Use of Fees and Dues: *Communications Workers of America v. Beck*

The Court held in *Beck* that it violates section 8(a)(3) of the National Labor Relations Act for a union, over the objection of dues-

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11. *See id.* at 375.
12. *See id.* at 374.
13. *See id.* at 373; *see* McMullen v. Hoffman, 174 U.S. 639, 654-55 (1899); Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353, 356-58 (1931).
14. *See Misco,* 108 S. Ct. at 373.
15. *See id.* at 374.

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paying nonmember employees, to expend funds collected from them on activities unrelated to collective-bargaining activities.[16]

The practical implications of this case are unclear. Has the Court created a quasi-right to work law for all workers covered by section 8(a)(3) of the National Labor Relations Act (NRLA)?[17] Is the National Labor Relations Board (NLRB), and only the NLRB, to fashion the remedy? Must the dues-paying nonmember register an objection with the union before there is a section 8(a)(3) violation? Can the NLRB order recoupment for employees who have not objected, or who are not charging parties?

As an academic, these issues hold little interest because they cannot be analyzed. I cannot analyze them because the *Beck* decision is literally an unprincipled exercise of judicial power.

Most of us understand the commonly accepted statutory construction of regulations on union dues: a unionized worker in a non-right to work state may, after appropriate notice and a waiting period, be subjected to a collective bargaining agreement requirement that she pay union dues and initiation fees, but the employee may not be required to join the union and thus become subject to union rules and regulations.[18]

Beck says that not all financial exactions may be thus compelled, only financial exactions that are necessary to "performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues."[19]

The Court grounds its result on section 8(a)(3).[20] The Court, however, does not have authorizing language in the statute to support it. That principle is thus unavailable. Is there language subject to a "gloss" that supports the Court's result? The answer is probably no, unless one is prepared to conclude that "dues" will support this construction. The Court simply relies on congressional intent by reasoning that the Congress wanted to prevent "free riding," but free riding does not include enjoying benefits that are not directly related to collective bargaining.[21]

It is impossible to think that in 1947 members of Congress thought that unions under the new statute could not spend compulsory dues to organize the employees of a competing employer. Equally as unbelievable is that members of Congress would have thought this, had

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16. Communications Workers of America v. Beck, 108 S. Ct. 2641 (1988).

17. *See* 29 U.S.C. § 158(a)(3) (1982).

18. *See Beck*, 108 S. Ct. at 2648-49.

19. *Id.* at 2657 (quoting Ellis v. Railway Clerks, 466 U.S. 435, 448 (1984)).

20. *See id.* at 2649-57.

21. *See id.* at 2649-51 ("free riders" accept the benefits of union representation but do not contribute their fair share of financial support); *see also* Radio Officers v. NLRB, 347 U.S. 17, 41 (1954).

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the issue been important enough to reflect upon. For an academic, the curious aspect of this case is the puzzle of just what the Court thinks that "unions do."[22]

The prevailing notion of what unions do is that they seek, through concerted action, to raise the wages and other job benefits of unionized workers to a higher level than the competitive market would yield. In economics terminology, a union is a labor supply monopolist.

No monopolist is unconcerned with competition. What limits the wage level that any union can achieve? Competition from other workers and from the products of other employers. On this view, unions organize other workers not merely out of political or philosophical leanings, but because the principal purpose of having a union, raising wages and bettering conditions, requires it. Thus the Court's incorrect and unexplained limitation on what it means to be a free rider in this context fatally undercuts the persuasiveness of the Court's result.[23] When the Court adds monies spent on union organizing to the category of reimbursable dues, it reaches an incorrect inclusion as a matter of fundamental, uncontroversial economics.

The Court also apparently disallows dues spent on lobbying. Thus, lobbying for a building code that requires sprinklers in major buildings would be unrelated to collective bargaining. Construction industry employers and the sprinkler fitters union (whose members install sprinklers) surely consider this an incorrect analysis of the interests at stake.

Secondary Boycotts and the First Amendment: *Edward J. DeBartolo v. Florida Const. Bldg. & Const. Trades Council*

One area of labor law in which the Court can seldom be faulted for acting inconsistently with the prevailing statute is that of secondary boycotts. The statute's lack of direction leaves the Court considerable freedom.[24]

The union in *DeBartolo* had its dispute with a construction contractor which was hired by a department store to build a location for it in a shopping mall.[25] The union handbilled the mall asking customers of all the mall stores not to shop at any of the stores until

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22. *See Beck,* 108 S. Ct. at 2648-53.
23. *See id.*
24. *See* 29 U.S.C. § 158(b) (1982).
25. *See* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 108 S. Ct. 1392, 1394 (1988).

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the contractor paid better wages. The mall owner filed a section 8(b)(4), secondary boycott charge.[26]

When the case came before the Supreme Court in 1983, the Court held that handbilling did not fall within the publicity proviso's exception to section 8(b)(4), and it remanded to determine whether such handbilling falls within the section 8(b)(4) prohibition at all, and, if so, whether the union is protected by the first amendment.[27]

The argument that the handbilling was coercive is straightforward. The union hoped that customers would influence mall stores, and that the stores would complain to the mall owner, causing the owner to complain to the department store, at which time, the store would do something about its contractor.[28]

On the other hand, perhaps this is only to say that the union hoped its speech would produce results. Unless you believe that people engage in speech that has no hope of persuading others to action, the speech most clearly protected by the first amendment also has the aim of producing results.

The Court construed the secondary boycott section not to reach peaceful, truthful handbilling, relying on the principle that if two reasonable constructions of a statute are available, the construction that would avoid a serious constitutional issue ought to be preferred.[29] Although this principle of statutory construction is grounded in notions of judicial restraint, the cynical academic wonders if in fact it has not been an excuse for judicial activism, as the Court pays too little attention to whether a particular statutory construction is reasonable, or even plausible.[30]

Most labor law academics are unwilling to spend much effort trying to make sense of the bewildering distinctions and seemingly inconsistent decisions in the first amendment area, especially where unions are involved. Theory here must be left to a braver lot: first amendment scholars.

On the statutory side, the Supreme Court holds that, in general, picketing is coercive and handbilling is persuasive.[31] The Court is self-consciously pushed to this result by the constitutional difficulties with holding the conduct illegal. The academic notes that it is not illegal:

1. For one to handbill;

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26. *See id.* at 1395-96.
27. *See DeBartolo*, 463 U.S. 147 (1983).
28. *See DeBartolo*, 108 S. Ct. at 1395 n.1.
29. *See id.* at 1397; NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).
30. *But see* Hooper v. California, 155 U.S. 648, 657 (1895) ("[t]he elementary rule is that every *reasonable* construction must be resorted to. . . .") (emphasis added).
31. *See DeBartolo*, 108 S. Ct. at 1399-1400.

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2. For a customer to refuse to patronize a store because she is persuaded by a union's message; or
3. For a mall owner or a department store to react to the loss of customers by pressuring its contractor.

One suspects that similar handbilling by blacks protesting the failure of a contractor to have black workers in supervisory positions would be held to be protected by the first amendment. Would there be a principled first amendment ground to distinguish union-wage handbilling from civil rights handbilling? So long as the Court declines to recognize content distinctions in free speech, no way of distinguishing the situations comes to mind. Interestingly, the Court in *DeBartolo* does not mention the civil rights picketing cases.

Subjective Employment Decisions and Disparate Impact: *Watson v. Fort Worth Bank & Trust*

Ms. Watson, a black bank employee, applied for a supervisory position at her bank. The bank relied on supervisors who were personally acquainted with the applicants and with their performance as employees in selecting those who would get the promotion. The criteria were subjective, and more than once, Ms. Watson was rejected in favor of white applicants.[32]

She sued under Title VII, arguing that the case ought to be decided under a disparate impact model, rather than a disparate treatment model.[33] Commonly, if a plaintiff alleges disparate treatment, she will be required to show that she suffered injury in employment due to an act by her employer that was motivated by discrimination.[34]

Disparate impact dispenses with the requirement of proof of discriminatory motive. If an employment practice that is neutral on its face, such as a high school diploma requirement, has a significant, adverse impact on a minority group, that is, it disqualifies blacks at a higher rate than whites, a prima facie case for a violation has been made without any evidence of a bad motive.[35] The defendant must then show a compelling business necessity, often a validation study, justifying the practice.[36]

Because validating a test, qualification or practice was often impossible or too expensive, employers sought to avoid liability by hiring and promoting minorities in sufficient numbers to avoid hav-

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32. *See* Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777, 2782 (1988).
33. *See id.* at 2783.
34. *See id.* at 2784.
35. *See id.* at 2784-85; *see also* Washington v. Davis, 426 U.S. 229 (1976); Griggs v. Duke Power Co., 401 U.S. 424 (1971).
36. *See Watson,* 108 S. Ct. at 2785, 2787; *see also Griggs*, 401 U.S. at 431.

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ing a disparate impact.[37] In this case the issue was whether disparate impact analysis will be applied to subjective criteria such as supervisory evaluations.[38]

Writing for the Court, Justice O'Connor recognizes that if the disparate impact analysis is applied only to objective hiring tests, employers will substitute subjective tests.[39] In this way, employers will avoid the mandates of *Griggs*.[40] Consequently, the Court held that the disparate impact analysis may be applied to either subjective or objective hiring tests.[41] The Court worries, however, that employers will resort to an outright quota system to avoid Title VII liability.[42]

This dilemma can be overcome, the Court holds, by the application of a particular evidentiary standard:

1. The plaintiff must identify the particular practice responsible for discrimination;
2. The disproportionate impact must be significant;
3. Defendants can rebut the evidence of disparate impact;
4. Defendant has a "business necessity" or "job relatedness" defense;
5. Validation studies are not required—a "manifest relationship to the job in question" showing will often suffice in subjective decision making.[43]

The argument between the majority and the three concurring justices is over whether the burden of proof shifts in disparate impact (as opposed to disparate treatment cases). Second, how easy is it going to be to pass the "manifest relationship" test? The case provides an important glimpse into how labor markets operate and how this can affect legal regulation.[44]

Unless blacks are, as a group, less qualified than whites for many job opportunities, a truly competitive labor market will eliminate both disparate treatment and disparate impact. Firms cannot prosper nor long survive in a market where white workers are paid more than black workers for the same work. Firms that do not discriminate will simply out-compete their discriminatory competitors.

But in a simple, perfectly competitive labor market, a firm will find no reason to promote from within as did the Fort Worth bank.

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37. *See Watson*, 108 S. Ct. at 2787.
38. *See id.* at 2786.
39. *See id.*
40. *See id.; Griggs*, 401 U.S. at 431.
41. *Watson*, 108 S. Ct. at 2786-87.
42. *See id.* at 2787.
43. *See id.* at 2788-91.
44. *See id.* at 2791-97.

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Tellers from other banks can present their qualifications and compete on individual merit for supervisory positions.

There are probably several reasons why outsiders did not effectively compete for supervisory positions in the Fort Worth bank. Incumbent workers require less training, because they are already aware of the idiosyncrasies of how this bank operates. Second, and more pertinent, current supervisors have a powerful advantage in evaluating incumbent employees. Cooperation, attentiveness, and industry are qualities that cannot be objectively measured in many jobs. Employees work in teams; team output, in turn, rests on a host of factors over which the individual has little control.

But where criteria are subjective, the danger of discrimination—intentional, or by innocent but false stereotypes—is especially serious. There is thus both a strong business reason to use subjective criteria, and a serious danger of discrimination.[45]

Justice O'Connor recognizes the shortcomings of the two polar positions. The instinct of the Justices in such a case is to reach a middle ground, in this case adopting disparate impact analysis but reducing the use of quotas by adjusting burdens of proof and production. My personal view is that firms cannot so finely tune their employment practices, and that they will be forced to rely on subjective criteria or to adopt quotas. I hope it is otherwise.

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45. *See id.* at 2786-87.

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