

## Employment Discrimination: An Overview of the 1989 Supreme Court Term

Suzanna Sherry\*

Many of you have seen or heard in the media much discussion about last term's employment discrimination cases. Indeed, last term there was an extraordinary amount of activity in the Supreme Court on employment discrimination. The Court decided four separate cases under Title VII<sup>1</sup> (which prohibits employment discrimination) and two cases under related laws. One of those concerned the Equal Protection Clause of the Constitution, and the other involved 42 U.S.C. § 1981, which prohibits discrimination in contractual relations on the basis of race. With all this activity, it does seem like a lot of new law.

In fact, however, only one of these six cases announced a significant change in the law. All of the other decisions were continuations of developments that have been occurring for the past five years or more. These were essentially incremental changes in the law, and were quite predictable on the basis of what the Court had been doing for some time. So, despite the media claims, and despite the sheer number of employment discrimination cases before the Court last term, there has not yet been a conservative counter-revolution in employment discrimination law, nor have there yet been major cutbacks in at least the employment aspects of civil rights law. I want to emphasize that I have no predictions to make about what the Court will do in the future; I am only talking about what it did last term.

Now, as I have said, only one case announced a significant change in the law, and I will start with that. It is a case called *Wards Cove Packing Co. v. Atonio*.<sup>2</sup> *Wards Cove* was, as most of these cases were, decided late in the term, in June, and again, as with most of the cases, it was a five to four decision. Before I describe the case, I should provide a little background for those of you who do not know any Title VII law.

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\* Professor of Law, University of Minnesota. A.B. 1976, Middlebury College; J.D. 1979, University of Chicago.

1. 42 U.S.C. § 2000e-2 (1982).

2. 109 S. Ct. 2115 (1989).

There are two basic causes of action under Title VII: disparate treatment and disparate impact. In a disparate treatment case, the plaintiff is alleging, and is required to prove, that the employer intentionally discriminated against him or her. A disparate treatment case thus involves a claim that the employer's real motivation was something like: "I will not hire you because you are a minority or because you are a woman." In this type of case, there must be discriminatory intent on the part of the employer, and the plaintiff has the burden of proving intent. There are, of course, a variety of ways a plaintiff can do that.

In a disparate impact case, however, there is no allegation of intentional discrimination. The plaintiff is not required to prove discriminatory intent, nor can the employer escape liability by proving lack of discriminatory intent. Instead, a disparate impact cause of action arises when the employer uses a neutral criterion that has a disparate impact or disproportionately negative effect on minorities or women. Cases involving high school diplomas, pen and paper tests, agility tests, and so on are the most common examples of disparate impact. In these cases, the employer has no deliberate purpose or intention of keeping minorities or women out of the workplace, and yet the particular neutral criteria which apply to all applicants have the effect of keeping more women or more minorities out of the workplace. Thus, the crux of a disparate impact cause of action is that although everyone takes whatever test is involved, whites or males pass it at a higher rate.

The *Wards Cove* case involved disparate impact and had nothing to do with disparate treatment. So, as far as anybody knows, the Court has not changed the standards for disparate treatment. Disparate impact, however, was changed significantly in *Wards Cove*. The case involved the claim that almost all of the unskilled workers—cannery workers at the fish packing plant—were minorities, while all of the skilled and clerical workers were white. Plaintiffs claimed, therefore, that *something* had a disparate impact. The Court rejected that claim. In doing so, the Court began with several conclusions that were quite predictable and quite in accordance with the pre-existing law.

The first thing the Court said was that you cannot compare the number of skilled workers to the number of unskilled workers and assume that a racial imbalance shows a disparate impact. You must compare the work force to the right population; in a case like *Wards Cove*, the right population is the population that is applying for the skilled positions. If the population applying for the skilled positions had consisted of significantly more minorities than the

employer's skilled work force did, then there might have been a disparate impact, according to the Court. But the Court would not assume that all of the people who were unskilled necessarily wanted to be in the skilled positions. Essentially, lawyers in that case made what is a fairly common mistake—comparing the wrong populations. This mistake had been noted earlier by lower courts and by the Supreme Court in other contexts.

The second thing that the Court said is that even where there is a disparity between minority applicants and minorities hired, plaintiffs still must show what is causing the disparity. That is, the plaintiff must point to a particular employment practice that has a disparate impact, and cannot simply rely on a bottom-line disparity between the percentage of minorities applying for the job and the percentage of minorities hired. The Court said that plaintiffs must identify a specific employment practice—something the plaintiffs in *Wards Cove* had failed to do.

I want to note a few points about this “particular practice” holding. First, it was not unexpected. A year earlier, three of the Justices had concurred in an opinion written by Justice O'Connor requiring the same thing.<sup>3</sup> All that happened last term was that the four obtained their fifth vote. A more important precedent for this aspect of *Wards Cove* is an opinion, authored about eight years ago by Justice Brennan, in a case called *Connecticut v. Teal*.<sup>4</sup> In *Teal*, the Court had held exactly the converse: where the plaintiff shows that a specific practice has a disparate impact, the employer is liable even if there is bottom-line equality in the work force. In other words, if the employer uses a pen and paper test which screens out a disproportionate number of minorities, and then from the pool of eligible whites and minorities chooses more minorities to make up for that disproportionate impact—and thus the percentage of minorities in the work force is identical to the percentage of the minorities who applied—the employer is still liable under *Teal*. *Wards Cove* thus cited *Teal* for the proposition that bottom-line effects and particular practices are not to be equated.

In addition to extending *Teal* in this way, the Court in *Wards Cove* went further than it had to in delineating a disparate impact cause of action. I have just suggested that the plaintiffs in *Wards Cove* had not made out a prima facie case: they used the wrong statistics, and they failed to point to a particular practice causing the disparate impact. The case could have stopped there and by all

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3. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).

4. 457 U.S. 440 (1982).

rights should have stopped there. Part of what makes this case significant, beyond the impact that it will have upon litigation, is that the Court did not stop there, but instead seems to be sending a message that it is aggressively going to make new law in the civil rights area.

What the Court did was to assume that the plaintiff *had* made out a prima facie case. Under long-established precedent, the employer would then be required to show that there was a "business necessity" for the particular practice causing the disparate impact. That is, the employer would be required to show that business needs required the use of that particular employment criterion as a screening device.

The Court in *Wards Cove* watered down that "business necessity" test in two ways. First, it moved the burden of proof from the employer to the employee; the plaintiff now has to prove the *lack* of a business justification rather than the employer having to prove the existence of a business justification. Second, it diluted the substance of the test, changing it from "business necessity," which is somewhat equivalent to a compelling interest in constitutional law, to "business justification," which seems to be much closer to rational basis in constitutional law. *Wards Cove* held that the employee has to show that the particular practice does not "significantly serve a legitimate business interest." So, not only is the burden now on the plaintiff to show lack of a significant business interest, but the very idea of significant business interest has been made more lenient.

This change in the standard will have a significant effect on litigating disparate impact cases. It will make disparate impact cases much harder for plaintiffs to win because, at least in some circuits, the business necessity defense has been difficult for employers to prove. They essentially had to prove that there was no other way for them to get qualified workers except to use the challenged practices. It is now going to be much easier for employers to defend practices that have a disparate impact. However, we have not seen the end of it. There will still be plenty of litigation to determine exactly what the Court meant by "significantly serving a legitimate business interest." There were several hints in the Court's opinion that it did not intend a completely toothless standard. Thus, the best constitutional analogy might be quasi-strict scrutiny rather than rational basis. I suspect that the employer will need a good reason, but not a really terrific reason, to use the practice. The change in burden of proof is not likely to have as great an effect on litigation, for several reasons. The employer is

still required to produce evidence of a legitimate business interest, and liberal discovery rules will allow plaintiffs to explore the proffered evidence quite closely.

I also think that even the change in the burden of proof is partly the result of Brennan's *Teal* opinion. Recall that disparate treatment essentially focuses on individual rights ("the employer refused to hire me personally because of my gender"), whereas disparate impact focuses on group rights (the employer is excluding a whole group of women or minorities from employment by using the particular employment criterion or hiring practice). Up until the *Teal* case in 1982, the Supreme Court kept these two causes of action thoroughly distinct. Lower courts often confused them, but the Supreme Court was fairly clear that disparate impact was essentially a protection against group discrimination and disparate treatment was protection against individual discrimination. In *Teal*, however, Justice Brennan ignored the fact that it was a disparate impact case and used a lot of language about how Title VII is designed to protect *individuals* against discrimination. He reasoned that a minority who was excluded by the pen and paper test was not helped by the fact that the employer then hired more minorities from the eligible pool and, thus, that the excluded minority's individual rights were diminished.

In *Teal*, Justice Brennan talked about how Title VII is for the protection of individual rights, and the fact that the group does well under the employer's practice is irrelevant to whether the employer is liable to the individual. The majority opinion in *Wards Cove* is full of citations to, and quotations from, *Teal*. In switching the burden of proof, for example, the Court relied solely on disparate treatment cases. The burden in disparate impact cases had always been on the defendant to prove business necessity, but *Wards Cove*, in effect, said, "That can't be right. The burden of proof has always been on the plaintiff. See . . .," and then listed a whole set of disparate *treatment* cases. So, the confusion between disparate treatment and disparate impact, begun in *Teal*, may be largely responsible for the *Wards Cove* holdings.

One other substantive Title VII case from last term is going to change the law, although only incrementally, and this time in plaintiffs' favor. That is a case called *Price Waterhouse v. Hopkins*,<sup>5</sup> decided in May, again by a five to four vote. Justice O'Connor provided the fifth vote, combining with the four liberal Justices. She did not join Justice Brennan's opinion, but she did concur in the result. *Price Waterhouse* was a disparate treatment

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5. 109 S. Ct. 1775 (1989).

case. A disparate treatment case frequently produces the following conundrum: The plaintiff comes forward with enough evidence to persuade the fact-finder that the employer acted on the basis of an illicit, discriminatory motive. However, the employer also comes forward with enough evidence to persuade the fact-finder that, in fact, the employer also acted on the basis of a perfectly legitimate motive, one which had nothing to do with discrimination. Now, we are not talking here about a battle of credibility or even a battle of who has presented sufficient evidence. In such a case, there is enough evidence that the judge, in fact, believes both people.

Not every business decision is made for only one reason. When, in a disparate treatment case, the employment decision was made for two reasons, one of them illegal discrimination and one of them perfectly lawful and legitimate (such as that the plaintiff was fired because she was not doing very good work), what should a court do? Lower courts have ranged from the most plaintiff-oriented (if discrimination played any role at all in the motive then the employer was liable) to the most defense-oriented (the plaintiff has to prove that the same decision would have been made even in the absence of the perfectly legitimate non-discriminatory motive).

*Price Waterhouse* involved exactly this type of mixed-motive circumstance. Five Justices found for the plaintiff, holding that the standard in such cases is that the employer must prove it would have made the same decision even in the absence of the discriminatory motive. This is not the most plaintiff-oriented standard possible because the Court held that the employer only has to meet the "same decision" standard by a preponderance of evidence, not by clear and convincing evidence. Of course, the Court also rejected holding the employer automatically liable because of any discriminatory intent. The Court's standard, however, is in keeping with a long line of civil rights cases over the last twenty years in other areas. It is also in keeping with our own notions of civil standards of proof. After all, the plaintiff only has to prove by a preponderance of evidence that there is discrimination, so it seems only fair to allow the defendant to avoid the finding of discrimination by showing by a preponderance of the evidence that it would have acted the same way even in the absence of the discriminatory motive.

Justice O'Connor concurred, rather than join in the majority, to make explicit that a mixed-motive case does not even arise unless there is evidence that discrimination played a substantial role

in the decision. The plurality did not address this issue because there was sufficient evidence that discrimination played an extremely substantial role in this particular employment decision. Essentially, Justice O'Connor wanted to ensure that if the fact-finder believed that the decision was the result of motives that were 95% legitimate and only 5% discriminatory, the employer would not have the burden of proving that he or she would have made the same decision. Justice O'Connor did not quantify, or even well define, what a substantial role is, so we will see more litigation on that issue in the future.

The other, and in some ways even more significant, aspect of the case was whether there was any discrimination at all by the employer. *Price Waterhouse* involved an employer's refusal to make a woman a partner in an accounting firm. While there was some evidence of overt discrimination, there was not much. Most of the evidence of discrimination was the result of sex-stereotyping: the partners viewed women as required to behave in certain ways, and if they did not behave in those ways, then they were not partnership material. It was not that no women could be partners, it was that women who did not "behave like women" could not be partners. One of the partners, for example, urged the plaintiff to "take a course at charm school." Another partner—one of the plaintiff's supporters—noted that she had "matured from a tough-talking, somewhat masculine, hard-nosed manager to an authoritative, formidable, but much more appealing lady-partner candidate." And finally, one of her supporters told her that if she wanted to get a partnership she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." That, the Court said, is sex discrimination. (Notice that only five Justices said that it is sex discrimination.) As I said, however, this is probably only an incremental change in the law, although the case probably would have been much more astounding if the Court had gone the other way. So *Price Waterhouse* is a small step forward for plaintiffs, *Wards Cove* is a large step backward for plaintiffs, and everything else is about six steps sideways.

The other two Title VII cases, both steps sideways, are procedural cases. Both essentially involve variations on the statute of limitations. The first is *Lorance v. AT&T Technologies*.<sup>6</sup> *Lorance* was a five to three decision. Justice O'Connor did not participate, and Justice Stevens, who usually votes with the liberals, joined with the normally conservative Justices to make the majority.

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6. 109 S. Ct. 2261 (1989).

Again, some background is necessary. Disparate impact covers almost anything an employer does, except seniority systems. Imagine that an employer for many years did not hire many women, and then starts hiring women. If a typical seniority agreement is in effect, it means that women are going to have fewer seniority rights because they were hired more recently. However, the statute itself explicitly exempts seniority systems from liability, and the Court has held that this means a plaintiff cannot state a disparate impact cause of action based on a seniority system. That is, the fact that the seniority system causes fewer women to be promoted or more women to be laid off does *not* state a cause of action for disparate impact even though it seems to have a disparate impact. A court cannot strike down the seniority system because the statute specifically protects it. However, the Court has also said that if the seniority system was adopted with discriminatory intent, then it is illegal. In other words, if the employer deliberately adopted a seniority system in order to keep women or minorities at the bottom of the ladder, then it violates Title VII, but it does not violate Title VII simply by creating a disparate impact.

In *Lorance*, plaintiffs were alleging that the employer's seniority system was adopted for discriminatory reasons. If they could have proven the discriminatory intent, the seniority system would have been illegal. The problem was that plaintiffs did not bring the suit within the (very short) period of limitation after the adoption of the seniority system, but instead sued years later. If they had been able to bring a disparate impact cause of action, they could have brought it later because the impact would have been continuing every time that a woman was not promoted or was laid off. So, every time a woman was harmed by the seniority system she would have had a cause of action under disparate impact. Unfortunately, there is no cause of action under Title VII for disparate impact resulting from seniority systems. So plaintiffs had to allege that the system was adopted with discriminatory intent, but in that case they were challenging the adoption and not the continuing impact, and the limitations period started running as of the date of adoption. That is all *Lorance* held, and thus it was neither particularly surprising nor disturbing. What caused the problem for the plaintiffs was a combination of two things: (1) Title VII has a very short statute of limitations, usually a maximum of ninety days; and (2) Title VII exempts seniority systems from the disparate impact cause of action. In fact, Justice Stevens made quite clear that he did not like the result but was joining the majority because the statute left him no other choice.



Another step sideways was *Martin v. Wilks*,<sup>7</sup> also a procedural case. *Wilks* was again a five to four opinion, and involved a suit by whites challenging an affirmative action consent decree. Unlike *Lorance*, plaintiffs in *Wilks* did have a continuing cause of action because every time a white was not promoted or not hired because of this affirmative action consent decree, the white was harmed. They claimed that this violated Title VII because the employer intentionally discriminated on the basis of race. The substance of that claim is simply a question on the merits of affirmative action, which I will get to in a moment. *Wilks*, however, did not reach the merits but only held that indeed, because the whites were continuously hurt every time the affirmative action consent decree was acted on, they did have a live cause of action. I will return later to the possible effect of this case.

First, however, I want to discuss the two cases that were not Title VII cases. The first was a fairly minor case called *Patterson v. McLean Credit Union*.<sup>8</sup> *Patterson* almost became a major case because the Court almost overruled long-standing precedent, but because the Court did not overrule it, the case is of little significance. *Patterson* involved 42 U.S.C. § 1981, which prohibits discrimination in contractual relations. Section 1981 has been held to apply to employment contracts, and *Patterson* was suing for racial harassment in an employment context. Racial harassment, like sexual harassment, has long been actionable under Title VII, but this plaintiff chose to proceed under Section 1981 for a variety of reasons. The Supreme Court held that racial harassment, while actionable under Title VII, is not actionable under Section 1981. Sexual harassment, incidentally, was never actionable under Section 1981 because Section 1981 only applies to race discrimination and does not apply to gender discrimination. The Court essentially equalized racial harassment and sexual harassment by saying that both have to be brought under Title VII and cannot be brought under Section 1981.

The Court did go a little further than that and said that Section 1981 only applies to the formation of contracts and not to anything that occurs after the formation of the contract. In other words, if the employer refuses to hire a person on the basis of race, that is actionable under Section 1981, but if the employer does hire the person and then treats him or her differently, that might not be actionable depending on the terms and conditions of the original contract. The reason that I say this is minor is that I cannot

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7. 109 S. Ct. 2180 (1989).

8. 109 S. Ct. 2363 (1989).

believe the Court means what it says. I am skeptical for the following reason: the original case extending Section 1981 to private discrimination involved a private school. The private school was advertising generally for students but had a racially discriminatory policy. The Court essentially held that if the school held itself out that way, it claimed to want to enter into contracts with students and could not discriminate on the basis of race. If *Patterson* really means what it says, then a private school could quite easily accept all students, minority students as well as white students, and then flunk out all the minority students at the end of the first semester. I cannot believe that the Supreme Court is going to let private schools get away with that. So, while at the moment Section 1981 seems more restricted in scope than it used to be, I just do not think that the law can possibly stay that way. As soon as there is a more appealing case, I think this problem with *Patterson* will be resolved.

One problem I think the Court had with *Patterson* is that it was not a very appealing case. Since it was an employment case, it fit very nicely into Title VII, and the Court may have believed that the plaintiff should have brought it under Title VII rather than under Section 1981. The Court may also have been worried about treating racial harassment and sexual harassment cases differently, since Section 1981 only applies to race while Title VII applies to both.

The final employment discrimination related case last term was not a Title VII case but an equal protection case involving affirmative action. That is *Richmond v. J.A. Croson Co.*,<sup>9</sup> again decided five to four. There is a majority opinion on some parts of the case but not all; in fact, there was agreement by at least five Justices on several points. *Richmond* involved a challenge to a minority set-aside program: the city of Richmond had said that some percentage of contracts by the city had to go to minority-owned businesses. The Court struck down the program as violative of the Equal Protection Clause.

Five Justices agreed that reverse discrimination or affirmative action by public entities is tested under strict scrutiny, just like regular discrimination. It does not matter whether the public entity is accused of discriminating against whites or discriminating against minorities, that action will still be tested by strict scrutiny. That is, the action will have to be shown to be necessary to a compelling state interest. The second thing that at least five Justices agreed on was that remedying prior discrimination is a compelling

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9. 109 S. Ct. 706 (1989).

state interest. Finally, five Justices agreed that in order for remedying prior discrimination to be a compelling state interest, the state actor must point to particular prior discrimination committed by itself. That is, the state actor has to have been involved, either directly or indirectly, in the prior discrimination. Remedying general societal discrimination is not sufficient to constitute a compelling state interest that would justify affirmative action. This is what the Court held, and it found that the city of Richmond's affirmative action plan was invalid because there had been no showing of prior government discrimination in the contracting business.

The reason that I say this holding is not significant—unlike most of the media, but like most knowledgeable commentators—is essentially that one could have predicted this. Beginning back in 1978 with *Bakke*,<sup>10</sup> there has always seemed to be a majority of Justices who want to test affirmative action by strict scrutiny; the analysis was only confused because some of those Justices apparently claimed that it was *never* valid. Justice Scalia seems to come very close to that in the *Richmond* case but is willing to go along with the majority enough so that it is clear that there is a majority for strict scrutiny. This is something that the Court has been struggling with for well over a decade, and *Richmond* in fact represents something of a middle ground. If you recall, in *Bakke* there were some Justices who felt that affirmative action was never appropriate and others who felt that it was essentially always appropriate. *Richmond* is somewhere in the middle, holding that remedying prior discrimination is a compelling state interest.

My last point on *Richmond* involves an issue that did not yet have a majority, but I am sure that there will be a majority shortly since the dissent did not address the issue. Justice O'Connor wrote that the evidence of prior discrimination does *not* have to be a contemporaneous finding. In other words, at the time the entity enters into an affirmative action program, it has to have some evidence of discrimination before it, but it can supplement that evidence later in the judicial proceeding. Moreover, there does not have to be enough evidence to find the entity liable for the prior discrimination, nor does it have to admit liability for the prior discrimination.

Three significant questions are left open after *Richmond*. The first is the question of federal power. Recall the *Fullilove* case,<sup>11</sup> which upheld a federal set-aside similar to the municipal program involved in *Richmond*. In *Richmond*, Justice O'Connor

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10. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

11. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

was careful to distinguish *Fullilove*, so there is no question that while states and cities must prove complicity in prior discrimination, the federal government has much greater leeway. The open question is whether the federal government could pass a law authorizing states to implement set-asides. Congress would be acting under its powers under section 5 of the fourteenth amendment, and it is not clear what would happen in that case.

The second open question is to what extent *Richmond* applies to gender. Remember, under equal protection, race is tested by strict scrutiny and gender is tested by quasi-strict scrutiny. If the Court follows the equal protection standard, it could lead to the ironic result that racial affirmative action is tested by strict scrutiny and is hard to justify, while gender discrimination is tested by only quasi-strict scrutiny and is, therefore, easier to justify. This is ironic because the reason for the distinction between the race and gender standards is that race discrimination is thought to be worse, or more pervasive, or harder to combat, and, therefore, race discrimination is more illegal than gender discrimination.

Finally, the *Richmond* Court did not deal with other possible compelling state interests. Specifically, in the academic context, it has been argued that diversity is a compelling state interest. Justice Powell's opinion in *Bakke* accepted diversity as a compelling state interest, and although no other Justice joined his opinion, the liberal Justices are likely to uphold diversity as a compelling state interest. In *Richmond*, however, Justice O'Connor never mentioned diversity as a possible state interest. Of course, since *Richmond* involved a minority set-aside and there is no reason for there to be diversity in the contracting business, the Court did not need to reach the diversity question. The reason that I stress this as an open question is that Justice Stevens wrote a rather ominous separate opinion. Justice Stevens is not given to the kind of opinions that Justices Brennan and Marshall write, listing the parade of horrors supposedly accomplished by the majority holding. The problem with that type of opinion—and probably the reason why Justice Stevens avoids them—is that in a subsequent case the majority cites the previous opinion when they really want to decide whatever it was Justice Brennan was afraid they decided. Although Justice Stevens ordinarily does not write that kind of opinion, in *Richmond* he did. One of his main bases for disagreement with the majority opinion is that the majority never mentioned other possible compelling state interests, including diversity. I therefore suspect that Justice Stevens suspects the Justices in the majority are eventually going to reject diversity as a compelling state interest. There is no other indication of that so

far, and there is no legal reason not to use diversity as a compelling state interest for now, but, as a matter of prediction, it is significant that Justice Stevens, who is more calm and rational than some of the other Justices, appears worried about the validity of diversity as a compelling state interest.

I want to conclude by discussing briefly what these cases might mean when taken together. One thing that appears clear is that the Supreme Court thinks that garden-variety discrimination is gone. The Supreme Court seems to think that a plaintiff who simply says, "that employer discriminated against me because I'm black (or female or whatever)," is probably incorrect because most employers do not do that anymore. On the other hand, the Supreme Court does seem more sensitive to more subtle discrimination. In particular, the Court is sensitive to two new types of discrimination. The first is sexual stereotyping. I think the Court is showing that it can keep up with changes in discriminatory behavior, and when the partnership at Price Waterhouse no longer says, "we don't want women partners," but instead says, "here are the kinds of women we would like to have as partners," the Supreme Court, to its credit, recognizes that statement as a form of discrimination.

The other form of subtle discrimination that the Court seems sensitive to is the way that employers have essentially been playing racial politics to avoid *any* liability. Let me explain what I mean by that. Prior to *Wards Cove* (the disparate impact case), *Wilks* (which allows challenges to affirmative action consent decrees), and *Richmond* (which changes at least the equal protection standards for affirmative action), an employer—especially a public employer, but even a private employer—would be liable if the numbers were bad: if there were too many whites and not enough minorities, that would usually violate Title VII. Under disparate impact, all the plaintiff had to show was a bottom-line disparity, and the burden was very high on the employer to prove business necessity. Thus, if there were a disparity between the number of minorities that would be expected in the work force and the number of minorities that were in the work force, the employer would be liable. That was the way the law was. On the other hand, given the very lenient standards for affirmative action, employers were almost never liable for adopting affirmative action programs—especially in settlement of a lawsuit. So, smart employers would simply play by the numbers: they would always adopt an affirmative action program which would try to get them exactly the right number of each minority and of women in order to avoid any liability to anyone. I think the combined effect of last term's

cases is to put more of the burden on the employer. An employer is now more obligated to try to get a *meritorious* work force as opposed to simply a racially balanced work force. A racially balanced work force is no longer enough to insulate the employer from liability if that racial balance was achieved only through hiring by the numbers. An employer who fails to use merit as the hiring criterion—whether the employer discriminates against or in favor of minorities—is now more likely to be liable under Title VII. The overall result of these cases, then, is to switch the burden of eliminating discrimination from innocent white male workers to the employers. That strikes me as a very salutary effect.