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# Employment Discrimination

Charles Stephen Ralston

Paul Kamenar

William Bradford Reynolds

Gail Wright-Sirmans

# EMPLOYMENT DISCRIMINATION

*Judge Leon Lazer:*

We are going to commence with the equal rights program, which is really the centerpiece of this conference. As you know, the Director-Counsel of the NAACP Legal Defense and Educational Fund was to be one of our featured participants but, unfortunately, for personal reasons, Julius Chambers has found it necessary to go to North Carolina. However, we have a marvelous participant who will take Mr. Chambers's place. Our speaker, Charles Stephen Ralston, Mr. Chambers's top deputy, has been with the NAACP Legal Defense Fund for twenty-five years. His law degree is from the University of California at Berkeley, where he served on Law Review. He has argued five cases in the Supreme Court (and briefed forty others) and has argued seventy-five cases in the various United States courts of appeal. He has taught and lectured all over the country. He also has written many articles. It is a privilege to have him with us.

*Charles Stephen Ralston:*

Thank you. For purposes of full disclosure, you should know that the Legal Defense Fund represented Ms. Patterson.[1] Mr. Chambers argued the case. We also represented the petitioners in the *Lorance*[2] case and filed amicus curiae briefs in the *Croson*,[3] *Jett*,[4] *Wilks*,[5] and *Atonio*[6] cases, all of which are going to be discussed. So, I come to you with a definite point of view.

In brief, this was the worst Term of the Supreme Court of the United States in the history of the Legal Defense Fund,

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1. Ms. Patterson was the plaintiff in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989).
2. Lorance v. AT & T Technologies, Inc., 109 S. Ct. 2261 (1989).
3. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989).
4. Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702 (1989).
5. Martin v. Wilks, 109 S. Ct. 2180 (1989).
6. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989).

which goes back fifty years. I want to give you the historical context for what we see going on in the Supreme Court.

For a number of years now, the Supreme Court has handed down a series of decisions that have taken a very restrictive view towards various civil rights statutes. *Grove City College v. Bell*[7] was, perhaps, the most famous, and, prior to that, there was a voting rights case, *City of Mobile v. Bolden.*[8]

Congress has, on six occasions in the last thirteen years, overruled Supreme Court decisions.[9] The most well-known instances were the Voting Rights Act of 1982,[10] which overruled *Bolden*, and the Civil Rights Restoration Act of 1988,[11] which overruled *Grove City College*. I do not think I am letting out any secret by telling you that there is a strong movement afoot in Congress to enact a comprehensive Civil Rights Restoration Bill that would overrule what the Supreme Court did this past Term.[12] Virtually all the decisions handed down that we are going to be talking about today are, with the exceptions of *Croson*,[13] and, to a lesser degree, *Wilks*,[14] statutory decisions, though *Croson* and *Wilks* may be amenable to change by statute.

So, we are seeing a significant tension between Congress on one hand and the Supreme Court on the other. The Court generally has been aided and abetted by the Department of Justice, although I must say that, with regard to the decisions of last Term, in one case that we lost, *Lorance v. AT & T Tech-*

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7. 465 U.S. 555 (1984). In *Grove City College*, the Court concluded that the Department of Education Alternate Disbursement System properly terminated federal financial assistance to Grove City College students because of Grove City's failure to execute an Assurance of Compliance. *Id.* at 563-76.

8. 446 U.S. 55 (1980). The Court in *Bolden* concluded that Mobile's at-large election system for Commission members, who exercise all legislative, executive, and administrative power in the city, did not violate the rights of the city's black voters. *Id.* at 61-65.

9. Justice Brennan, in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), cited to five such instances. *Id.* at 2385 n.9 (Brennan, J., concurring in the judgment in part and dissenting in part).

10. 42 U.S.C. § 1973 (1982).

11. 20 U.S.C. § 1681 (1982).

12. *See* A Note to Our Readers.

13. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989).

14. Martin v. Wilks, 109 S. Ct. 2180 (1989).

*nologies, Inc.*,[15] the Department of Justice was on our side right down the line,[16] and, in *Patterson v. McLean Credit Union*,[17] they were largely on our side. Even in *Wards Cove Packing Co. v. Atonio*,[18] the Supreme Court cut back further than the Department of Justice had argued. So, the current Supreme Court is taking a position in civil rights more restrictive than that of the administration. We do not know yet what the current administration's position is going to be on a Civil Rights Restoration Act. They have not been saying very much.

With those introductory remarks, let me go to the three decisions that I have been asked to discuss. First, I will examine *Croson*. I then will talk about *Patterson* and *Jett* together because they both involve the same statute, section 1981 of Title 42 of the United States Code.

*City of Richmond v. J.A. Croson Co.*[19] involved a challenge to that city's set-aside program for minority businesses seeking to get contracts from the City of Richmond.[20] The Supreme Court, in a decision by Justice O'Connor, found the City of Richmond's plan unconstitutional because it violated non-minority contractors' rights under the fourteenth amendment by excluding them from participation in contracts because of their race.[21]

The Supreme Court did not like the City of Richmond's program for a number of reasons. It felt that the goal that had been set up, a goal that thirty percent of city contracts would go to minority groups, simply had not been shown to have a

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15. 109 S. Ct. 2261 (1989).

16. *See infra* notes 145-46 and accompanying text.

17. 109 S. Ct. 2363 (1989).

18. 109 S. Ct. 2115 (1989).

19. 109 S. Ct. 706 (1989).

20. *Id.* at 712-16.

21. *Id.* at 720-21, 730 (O'Connor, J., announced the judgment of the Court and delivered the opinion of the Court with respect to parts I, III-B, and IV, in which Rehnquist, C.J., and White, Stevens, and Kennedy, JJ., joined; an opinion with respect to Part II, in which Rehnquist, C.J., and White, J., joined; and an opinion with respect to Parts III-A and V, in which Rehnquist, C.J., and White and Kennedy, JJ., joined. Stevens, J., and Kennedy, J., each filed opinions concurring in part and concurring in the judgment. Scalia, J., filed an opinion concurring in the judgment. Marshall, J., filed a dissenting opinion in which Brennan and Blackmun, JJ., joined. Blackmun, J., filed a dissenting opinion in which Brennan, J., joined).

sufficient relationship to the representation of minorities in the contracting field in Richmond, or from whatever geographical area Richmond got its contractors.[22] The Court also determined that the program was too inflexible and had over-broad coverage.[23] Justice O'Connor made something of the fact that the plan covered Aleuts and Eskimos, though there were none in Richmond, Virginia.[24]

The *Croson* decision resulted in enormous uncertainty because all the county, state, and city governments had been following the model of the federal set-aside program enacted by Congress, which was upheld by the Supreme Court a number of years ago in *Fullilove v. Klutznick*.[25] Literally hundreds of these programs have been instituted by local and state governments, and the question becomes: "What do we do now?" Since *Croson*, there have been more conferences and meetings than anyone can keep track of. If anyone, and I know there are a lot of state and local government officials at this conference, has a program that may be facing a challenge, we at the Legal Defense Fund have various materials that may be of help. One of our lawyers recently developed a checklist that you can use to evaluate your program. Basically, the *Croson* Court said that, in order to uphold such a program, there has to be a demonstration of a compelling state interest.[26] This is, of course, the strictest standard of justification, and it was really the first time the Supreme Court clearly said that strict scrutiny is the governing standard for these types of programs. For this reason, it is hard to limit *Croson* just to set-asides. There is a very strong argument that it also affects any sort of affirmative action program, including employment or anything else that a city or state government unit has adopted.[27]

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22. *Id.* at 724-25.

23. *Id.* at 728.

24. *Id.*

25. 448 U.S. 448 (1980).

26. *See* City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 721-22 (1989).

27. Prior to *Croson*, the Supreme Court was unable to get a majority of Justices to agree on an equal protection standard to apply to affirmative action programs. *See, e.g.*, University of California Regents v. Bakke, 438 U.S. 265 (1978) (plurality opinion).

The Supreme Court also was very critical of the lack of sufficient evidence in the *Croson* record to support the remedial use of race.[28] The Court held that, in order to use race as a criterion, it has to be for the purpose of remedying a problem which is shown to be, in fact, racial.[29] The thirty percent figure had been pulled out of the air, as far as the Supreme Court could tell, and there was an insufficient showing that alternative methods of obtaining sufficient minority participation had been tried and been found wanting.[30] The Supreme Court very strongly indicated that before a goal, quota, or whatever you wish to call it, can be adopted, there has to be some sort of showing that there were alternatives available, that alternatives were tried, and that they did not work.[31]

So, there are a number of things to learn from *Croson*. One is that there has to be a record developed to support these types of plans. They cannot be enacted just because somebody feels that it would be a good thing to do. And, that record has to establish a number of things. It has to show, for example, the market from which the contractors come, what types of evidence there are regarding the portion of contractors that are minority, and what sort of evidence there is showing that minority contractors have been excluded from participation either by the government agency itself or by other contractors, who would get contracts and then refuse to use minority firms as subcontractors.

The statistical showing has to demonstrate the nature of the market and what needs to be corrected. Any goal or quota that is set up has to bear a direct relationship to that showing. You cannot arbitrarily pick a figure that is not shown to be related to the market. It also would be helpful to put annotative evidence in the record showing actual acts of discrimination to support such a program.

Second, there has to be flexibility in the program so that, if contractors who have received a contract can demonstrate that they tried to find minority subcontractors and there simply

28. *Croson*, 109 S. Ct. at 730.
29. *Id.* at 727.
30. *Id.* at 724, 728.
31. *Id.* at 728.

were not any that were interested or qualified, then those contractors will not be shut out. The Supreme Court made it very clear that it was unhappy with the lack of flexibility in Richmond's set-aside program.[32]

Finally, there has to be a demonstration that other alternatives will not accomplish the same goal. For example, one of the problems in obtaining city and local government contracts is the bonding requirements. It has been shown that often it is very difficult for minority-owned businesses, either because they are new or because of discrimination, to fulfill those bonding requirements. If a city government, for example, can demonstrate that it has waived bonding requirements, or it has provided bonding itself, or done other things to remove that particular barrier, but the measure still has not resulted in sufficient minority enterprise participation, then that would support going to the type of plan that was held unjustified in *Croson.*

The basic message in *Croson* is that a set-aside program must be supported by a solid record in terms of demonstrating that there really is a need and that the program established is actually directed to fulfilling that need.

As I mentioned before, one of the problems was that, after *Fullilove*,[33] people just assumed that anybody could institute a program, and it would be upheld. The Supreme Court distinguished what the federal government could do and, thus, said it was not overruling *Fullilove* since, under section five of the fourteenth amendment, Congress has the power to take action that goes beyond what states are prohibited from doing.[34] This has raised the question of whether Congress, if we say that Congress, in enforcing the fourteenth amendment, is approving state and local programs that meet certain requirements, could approve local programs through statutes that would produce programs similar to that created by statute in *Fullilove.* That sort of statute has been discussed and one version was already introduced; however, the upshot of all of that is up in the air.

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32. *Id.* at 728-29.

33. Fullilove v. Klutznick, 448 U.S. 448 (1980).

34. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 719-20 (1989).

But, there has been a lot of theorizing over how far Congress would go given the language in *Croson.*

Let me turn now to *Patterson*[35] and *Jett.*[36] *Jett* was the sleeper of the Term, so I will talk about it later since, once you understand what happened with *Patterson, Jett* falls into place. Both deal with the scope of 42 U.S.C. § 1981, which was held a number of years ago to prohibit discrimination in employment.[37]

*Patterson* raised the question of whether claims of harassment because of race were covered by section 1981.[38] Every circuit except the Fourth Circuit had held that they were, and it became a very important remedy in the lower courts because, under section 1981, you could get to a jury and get punitive and compensatory damages.[39] It was the only effective remedy for racial harassment, since, under Title VII, you can only get injunctive relief.[40]

After oral argument on the harassment issue in February of 1988, the Supreme Court announced that it, or five members of the Court, had decided that it was going to re-examine the question of whether section 1981 applied to private employment at all.[41] That is, it was going to re-examine its twelve-year-old decision in *Runyon v. McCrary.*[42] This action by the Court created a firestorm: amici briefs signed by two-thirds of the Senate, forty-seven state attorney generals, and hundreds

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35. Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), *aff'g in part, rev'g in part*, 805 F.2d 1143 (4th Cir. 1986), *aff'g* 42 Fair Empl. Prac. Cas. (BNA) 659 (M.D.N.C. 1985). In *Patterson*, the Supreme Court vacated the Fourth Circuit's holding that petitioner could succeed in her claim under section 1981 only by proving she was better qualified for the position to which a white employee was promoted, while upholding, however, the Fourth Circuit's dismissal of the petitioner's claim for racial harassment as not actionable under section 1981. 109 S. Ct. at 2379.

36. Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702 (1989).

37. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975).

38. *Patterson*, 109 S. Ct. at 2369.

39. 42 U.S.C. § 1981 (1982); *Patterson*, 109 S. Ct. at 2375 n.4.

40. 42 U.S.C. § 2000e-5(g) (1982).

41. *See Patterson*, 109 S. Ct. at 2369.

42. 427 U.S. 160 (1976).

of civil rights organizations were filed on this issue. The Supreme Court backed down and said it would uphold *Runyon.*[43]

Then, when the Court got to the issue about which the case had started, the same five justices proceeded to construe section 1981 extremely narrowly. Without paying very much attention to the legislative history of the statute, they said that section 1981 covers only making and enforcing contracts in the narrow sense of being able to go into court and get the legal remedies to which you are entitled in case of a breach. Section 1981 does *not* cover any post-contract conduct, including breaches of the contract by the employer.[44] The Court said, therefore, that section 1981 does not cover racial harassment because that has to do with the terms and conditions of the contract and conduct after the contract had been entered into.[45]

Even though it is arguable, we believe that the legislative history demonstrates that the main concern of Congress when it passed the statute in 1866, right after the Civil War, was that discriminatory terms and conditions of contracts were being used by the former slaveholders to keep blacks, who were supposed to be free now, in a state of virtual slavery. The problem was not the making of contracts—blacks could get jobs on plantations—but once they got those jobs, they were subject to extremely onerous and discriminatory conditions.[46] Therefore, arguably, the Court's interpretation is at odds with the intent of the statute. The Supreme Court went on to say that promotions were covered only when they could be said to constitute new contracts.[47] The Court did not decide whether discharges and terminations were covered, and that is still a major question. There are literally dozens of cases in the lower courts that are being thrown out, and there are at least two cases on their way to the Second Circuit right now raising that question. The lower courts all had held that section 1981 covers discharges

43. *See Patterson*, 109 S. Ct. at 2369-70.

44. *Id.* at 2369, 2375-76.

45. *Id.* at 2369.

46. Brief for Petitioner at 22-23, 40-47, 50-51, Patterson v. McLean Credit Union, 109 S. Ct. 2263 (1989) (No. 87-107).

47. *Patterson*, 109 S. Ct. at 2377.

and terminations since the case holding that section 1981 applied to private employment in the first place, *McDonald v. Santa Fe Trail Transportation Co.*,[48] was a discharge case.[49]

There is also a lot of chaos in trying to decide what you now do with all these cases that had been going along until *Patterson* was decided. There is now a case, which we also are handling in the Supreme Court, called *Lytle v. Household Manufacturing, Inc.*[50] The central question is the right to a jury trial, but the underlying claim is a discharge claim under section 1981. The respondent's brief raises the question of whether discharge is covered by section 1981, so it is possible the Supreme Court will decide this Term whether or not discharges are covered in light of *Patterson.*

The week following *Patterson*, the Court decided *Jett v. Dallas Independent School District.*[51] That case was a section 1981 action against a local government, and it happened to involve a white teacher who was complaining about discrimination by a black principal.[52] Everyone thought, given *Runyon* and what they had done in *Patterson*, that it was clear that section 1981 covered state and local governments. Well, the Supreme Court pretty much decided that it did not, since five years after section 1981 was passed, section 1983, which covered state action, was passed, and it more or less wiped out section 1981.[53] We have been having a debate in our office as to whether the Court actually held as such or if there were just four votes for that proposition.

What the Court clearly did say is that, in order to prevail in a racial discrimination claim under section 1981 or section 1983 against a state or local government, the doctrine of respondeat superior does not apply.[54] The plaintiff is required to show, under a whole line of decisions under section 1983, be-

48. 427 U.S. 273 (1976).
49. *Id.* at 275.
50. 831 F.2d 1057 (4th Cir. 1987), *cert. granted*, 109 S. Ct. 3239 (1989).
51. 109 S. Ct. 2702 (1989).
52. *Id.* at 2706-08.
53. *Id.* at 2722.
54. *Id.*

ginning with *Monell v. Department of Social Services*,[55] that the action was part of a *policy* of the state and local government.[56] This creates an interesting paradox for a black employee who has a claim of racial discrimination against a city under section 1981. There are going to be very few cities that have anything that looks like a policy of discrimination against blacks. There usually is going to be an individual supervisor doing something bad, but that will not win under *Jett*.

But, of course, if you have a *Croson* claim, meaning that whites are challenging an affirmative action plan, that plan is something adopted by the state or local government, and it is a policy of that government. Thus, under *Jett* and *Monell*, whites would seem to have a claim. The net result is that the Supreme Court has interpreted a statute that was clearly enacted to protect the rights of blacks and flipped it around so that whites, challenging discrimination against themselves, have a wonderful remedy that includes damages, whereas, in most cases, blacks and other minorities will have no remedy at all.

Let me stop there and wait for your questions later.

*Judge Leon Lazer:*

I now will introduce another very distinguished speaker, Paul D. Kamenar, who participates in the making of the law of this country. Mr. Kamenar is the Executive Legal Director of the Washington Legal Foundation, a public interest policy center that engages in litigation and the administrative process. Its purpose is to promote free enterprise principles, a strong national security and defense, civil liberties, and the rights of crime victims.[57]

Mr. Kamenar is a Georgetown Law Center graduate and was a Law Review editor. He was clerk to the Senate Watergate Commission, served in the United States Attorney's Office, and on the Federal Election Commission. He teaches at Georgetown Law Center and has been the Director of Litiga-

55. 436 U.S. 658 (1978).

56. *Id.* at 690-91; *see also* Polk County v. Dodson, 454 U.S. 312 (1981); Owen v. City of Independence, 455 U.S. 622 (1980).

57. *See* WASHINGTON LEGAL FOUNDATION, 1988 ANNUAL REPORT (1989).

tion for the Washington Legal Foundation since 1980. He filed amicus briefs in both *Patterson v. McLean Credit Union*[58] and *City of Richmond v. J.A. Croson Co.*,[59] cases that he will be discussing. He also has filed many other amicus briefs, has been seen many times on the screen, and is quoted often by the media.

*Paul Kamenar:*

Thank you very much. I appreciate the opportunity to be here today. The Washington Legal Foundation is a nonprofit, public interest law and policy center based in Washington, D.C. Maybe some of you have not heard about our group, but we are considered the conservative counterpart to the ACLU and NAACP in a number of cases involving discrimination, drug testing, and so forth. A lot of times we get calls from state attorney generals and county attorneys who are being sued by one or the other group, or both. Sometimes we are able to help in providing amicus or other support. So, feel free to contact us if you have some of those kinds of legal problems. I brought with me several copies of our Annual Report and a monograph we did several years ago called "Affirmative Action From Kennedy to Reagan, Redefining American Equality."

In the interest of time, I will address the *Patterson* and *Croson* cases briefly. It was our position in Court, where we represented several members of Congress, that *Runyon v. McCrary*[60] should have been reversed. Section 1981 gives a very clear and distinct legal right to blacks to make and enforce contracts.[61]

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58. 109 S. Ct. 2363 (1989).

59. 109 S. Ct. 706 (1989).

60. 427 U.S. 160 (1976).

61. 42 U.S.C. § 1981 (1982) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

*Id.*

The Act was passed in 1866,[62] and, for over a hundred years, no court had held that section 1981 created a cause of action against a private entity for discrimination. *Runyon* finally came along with such a holding,[63] but even Justice Stevens, who concurred in that case, stated as follows:

> There is no doubt in my mind that that construction of the statute [which provides a private cause of action] would have amazed the legislatures who voted for it. Both its language and the historical setting in which it was enacted convince me that Congress intended only to guarantee all citizens the same legal capacity to make and enforce contracts, to obtain, own, and convey property, and to litigate and give evidence.[64]

Nevertheless, Justice Stevens concurred in *Runyon*.[65] But, if section 1981 was designed, as we just heard, to cure the abuses that the slaves suffered under former slave masters,[66] where were all those lawsuits by the freed slaves using section 1981 back in the 1860's and 1870's? There was not a single case. The very first case that we found was commenced about two days after that law was passed in Indiana, where a black person sued his private employer for back wages and the employer defended by saying that, under the Indiana Constitution, the black person did not have a right to sue because he was legally incapacitated.[67] The Court rejected that argument, saying, in effect, that under this new federal law, blacks now have the legal capacity to sue the white employer for breach of contract.[68]

So, what we argued in our brief was that section 1981 merely gave persons the legal *capacity* to make and enforce contracts, to sue, and so forth. There were plenty of legal *remedies* for breaches of contract and private torts, including filing criminal charges, because blacks were now able to give evi-

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62. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (re-enacted as Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144).

63. *Runyon*, 427 U.S. at 168.

64. *Id.* at 189 (Stevens, J., concurring).

65. *Id.*

66. *See supra* note 46 and accompanying text; *infra* notes 114-16 and accompanying text.

67. *See* Kamenar, *Reconsidering* Runyon: *The Right Course*; Civil Rights Groups Off the Mark, Legal Times, Oct. 10, 1988, at 20, col. 1.

68. *Id.*

dence in court, whereas before they were not. It was not until *Runyon* and some of the related cases that the Court first extended section 1981 to create a cause of action itself.

Now, in *Patterson*,[69] which came along in 1987, the plaintiff tried to enlarge *Runyon* by taking the language on the right to make and enforce contracts and extending it to harassment on the job.[70] So, at the first oral argument, the Justices were scratching their heads, recognizing that they had extended section 1981 in *Runyon* beyond what the Congress in 1866 intended, but wondering how harassment on the job equated with the making and enforcing of a contract. The plaintiff's theory went something like this: my at-will employment contract is really a new contract that I make each day I go to the job; so if I get harassed on the job, harassment on the job is a condition precedent to the making of the contract that I make each day.

Well, it is no wonder that the Justices were confused with this political chaos and asked for reargument on that precise point.[71] I mean, why stop at the theory of making a contract every day on the job? Since many employees are paid by the hour, you could argue that you are making a contract every hour on the job and that harassment during that hour violates section 1981. It was obviously becoming very confusing, and we thought that it was time for the Court to clean up its mess, reverse *Runyon*, and put things back where Congress had originally intended.

Admittedly, the Court in *Patterson* did not reverse *Runyon*, but it did not extend it either.[72] The majority cited *stare decisis* as a reason for keeping *Runyon* intact[73] but not because they thought *Runyon* was correctly decided,[74] though Justice Brennan thought the Court should have reaffirmed *Runyon* be-

69. Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989).

70. *Id.* at 2369, 2374.

71. *Id.* at 2369.

72. *Id.* at 2369-70, 2372-75.

73. *Id.* at 2370.

74. *See id.* "Some Members of this Court believe that *Runyon* was decided incorrectly, and others consider it correct on its own footing . . . ." *Id.*

cause it was correctly decided.[75] The majority expressly rejected the argument advanced by the NAACP and the amicus brief of two-thirds of the Senate, both asserting that Congress had ratified this broad interpretation of *Runyon* by subsequent legislation.[76] The Court quickly made mincemeat of that, saying in footnote one: "It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation."[77]

The argument made by the senators and congressmen in their brief was that they had ratified *Runyon* by not taking any action to reverse it legislatively; thus, they did not want the Court to reverse it because, if it did, Congress was going to have to revisit the issue and that would cause 'divisive debate' in the Senate.[78] Heaven forbid we should have divisive debate in the Senate! I mean we might have an outbreak of democracy at some point here! So you see, *Runyon* was really legislative action disguised as judicial interpretation, which is not our view of a democratic way to enact these kinds of remedies.

The *Patterson* Court did hold that section 1981 applies only to the initial formation of a contract and might not always apply to promotion.[79] The Court said, with respect to promotion:

> whether a promotion claim is actionable under § 1981 depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer. If so, then the employer's refusal to enter [into] the new contract is actionable under § 1981.[80]

This promotion must result in what the Court said is "a new and distinct relation between the employee and the employer [if] such a claim [is to be] actionable under § 1981."[81] Accord-

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75. *Id.* at 2380 (Brennan, J., concurring in part and dissenting in part).

76. *See Patterson*, 109 S. Ct. at 2372 n.1.

77. *Id.* (citing Johnson v. Transportation Agency, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting)).

78. *See* Brief for 66 Members of the United States Senate and 118 Members of the United States House of Representatives as Amici Curiae at 28, Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (No. 87-107).

79. Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2369 (1989).

80. *Id.* at 2377.

81. *Id.*

ing to the *Hishon*[82] case, where there was a lawyer who was an associate and wanted to be promoted to partner,[83] such a situation involves a new and distinct relationship, so I guess the Court would think that that might be an actionable promotion claim under section 1981.[84]

Where do we go from here? There is chaos out there. Chaos caused, however, by *Runyon* and some of those other decisions. You are going to have chaos until the Court decides to reverse *Runyon.*

How are the lower courts interpreting *Runyon*? There was a case recently decided in the district court of Colorado called *Jordan v. United States West Directory Co.*[85] It was a promotion claim and the court said that it might be actionable under section 1981 based on some of the language I just read to you from *Patterson*; but, as to demotion, the district court said no; that is not covered.[86] The court said: "In the case of an alleged wrongful demotion, as opposed to a failure to promote, there is no refusal by the employer to enter into a new contract with the employee. Wrongful demotion allegations thus are included in racial harassment at the workplace."[87]

Let me now turn briefly to the *Croson*[88] case. We filed a brief in that case on behalf of a number of entities, including the Lincoln Institute for Research and Education, a black think tank in Washington, D.C. In *Croson*, of course, the Court applied strict scrutiny to a race-conscious plan.[89] It was our argument that competitive bidding is quintessentially nondiscriminatory, as opposed to the employment situation where you look at somebody you are going to hire and can see the color of their skin and determine the person's gender. Perhaps discrimination can enter into the determinations in that context but not with respect to contracting where you look only at the

82. Hishon v. King & Spalding, 467 U.S. 69 (1984).
83. *Id.* at 71.
84. *See Patterson*, 109 S. Ct. at 2377.
85. 716 F. Supp. 1366 (D. Colo. 1989).
86. *Id.* at 1368.
87. *Id.*
88. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989).
89. *Id.* at 721.

lowest number on the bid sheet. It is, we believe, the purest form of non-discrimination in which a city can engage.

The evidence of discrimination presented by the City of Richmond was weak to nonexistent. The main argument was that Richmond was fifty percent black, and, therefore, the fact that less than one percent of its contracts went to minority business enterprises (MBEs) was, somehow, evidence of discrimination.[90] But, the Court said that you do not look at the general population statistics (by the way, I found out there are two Eskimos who do live in Richmond, believe it or not, and neither of them owns a contracting firm);[91] instead, look at the percentage of the MBEs.[92] But even there, it was not accurate to use that kind of statistic. For example, with respect to teachers, policemen, or firemen, they are somewhat fungible, meaning that a policeman is a policeman, and a teacher is a teacher, and, therefore, the percentage of black teachers employed versus the number of black teachers available in the labor pool might be a relevant statistic. But, not all government contractors are construction contractors. Thus, if the city wanted a bid for road construction and the minority contractors are in the plumbing industry, that does not mean that those minority contractors belong in this relevant labor pool. So, you have to look at qualified MBEs for the particular job that is being bid.

The other "evidence" of discrimination was the lack of membership of black companies in building or construction trade associations.[93] Again, that fact really does not mean anything. First of all, many minority contractors belong to minority trade associations. Second, there are numerous non-discriminatory reasons why blacks are not in construction industries: capital requirements, bonding requirements, and business experience. Construction contracting is a risky business. There is, roughly, only a ten percent return on profit. The Washington, D.C. area, for example, has one of the highest per capita incomes for blacks in the country. But, blacks have decided not

90. *Id.* at 723-24.
91. *See id.* at 713.
92. *Id.* at 725.
93. *Id.* at 726.

to go into the construction industry. Instead, they have chosen to focus on retail industries, service industries, and so forth.

The Court also said that the *Croson* set-aside plan was not narrowly tailored to meet this alleged discrimination.[94] There are about four or five characteristics that I am just going to mention that were rejected by the Court in *Croson*, characteristics which the Court said were inadequate to support the race-conscious program. First was the legislative body's pronouncement that the racial classification was made for benign or remedial reasons.[95] The Court in *Croson* said, however, that "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight."[96] Second were general statements in the legislative history of the plan concerning past racial discrimination in the construction industry.[97] Here, the Court said that "[a] governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists."[98] And that, essentially, is what happened in the City Council of Richmond, which simply decided that they had a problem, right here in River City, and that they would enact a thirty percent quota, without any evidence demonstrating that discrimination existed.[99] A third criterion was a "showing that minority businesses received a disparately low number of construction contracts given their representation in the community."[100] Again, as I mentioned earlier, the Court said that is not the right figure to use because, when special qualifications are required, comparisons to the general population have little probative value.[101] Fourth, there was a showing of low minority participation in state and local contractor associations, and the Court said it was not probative of any discrimination in the local construction industry.[102] Finally, with respect to evidence of past

94. *Id.* at 728-29.
95. *Id.* at 724.
96. *Id.*
97. *Id.*
98. *Id.* at 725.
99. *See id.* at 725-26.
100. *Id.* at 725.
101. *Id.*
102. *Id.* at 726.

discrimination in the construction industry considered by Congress when it was legislating on the federal level, the Court said that Richmond could not impute that discrimination to a local situation because it was mixing apples and oranges.[103] There was no evidence of discrimination submitted in the *Croson* case;[104] there was not even one incident cited by the City of Richmond of a black suing a construction company for any discrimination. Nothing of that nature was presented.

The lower courts are following *Croson* fairly carefully and the legislatures in many states are rethinking this whole idea of set-asides. We argued some policy reasons why set-asides really do not make much sense; if you are really interested in trying to help minorities get an economic foothold, that is not the way to do it. Our research has found that, in many cases, it is just a windfall to established minority firms, the group that is least in need of government assistance. The Civil Rights Commission had a preliminary report on this subject, and some General Accounting Office studies showed that the cost of the contracts to the taxpayer, town, city, and state went up anywhere between ten percent and three hundred percent over the levels created in order to meet these so-called set-asides, which, in essence, are quotas.

The courts are looking closely at these cases. There is an interesting case pending in the district court in Maryland, filed by the Maryland Contractors Association.[105] The State of Maryland has, essentially, a ten percent set-aside program.[106] There is another case pending in the Southern District of Mississippi.[107] Courts that recently ruled set-asides were constitutionally suspect include those in Birmingham, Alabama,[108] and

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103. *Id.* at 727.

104. *Id.*

105. Maryland Highways Contractors Ass'n v. Maryland, No. R89-2410 (D. Md. filed Aug. 22, 1989).

106. MD. STATE FIN. & PROC. CODE ANN. §§ 14-301 to 14-303 (1988).

107. Fordice Constr. Co. v. Marsh, No. W81-0028(W) (S.D. Miss. Mar. 14, 1990) (decision invalidated section 8(a) of the Small Business Administration set-aside program on an "as applied" basis).

108. Associated Gen. Contractors, Alabama Branch, Inc. v. Vann, No. 88-769 (Sup. Ct. Ala. Dec. 12, 1989) (remanded to Jefferson County Circuit Court for consideration of proposed consent decree).

Atlanta, Georgia.[109] There is a Florida case where the court is looking at some more evidence to see whether there was sufficient evidence of discrimination.[110] There was one case decided in Milwaukee where the court said that the waiver provisions in the plan were flexible enough, that the set-aside really was not a hard and fast quota, and it might survive exacting scrutiny.[111]

Thank you very much.

*Question from Panelist Gary Shaw:*

I would like to address my question to Mr. Kamenar. I would like to address it with respect to the *Patterson* case. Since the Court did indeed affirm *Runyon*, I have a problem with your decision that it is completely illogical to extend it to harassment. I do not consider it an extension in that I read section 1981 to say, "make and enforce contracts," and I do not think it is legal to make a contract that will provide for racial harassment. Implicit in any contract is that racial harassment will not take place. And, if that is true, can we then allow harassment and say it is not covered; we are saying, in effect, that you can make this contract but there is no right to enforce it when the terms are breached. Contracts say you will not harass, but go ahead and harass because, under *Patterson*, there is no enforcement right. I am confused as to why that does not constitute enforcement.

*Paul Kamenar:*

Why does it not constitute enforcement? I think you have hit the nail on the head. I think it is clear that harassment does not constitute the making of a contract. More precisely, the infinitive in the phrase in section 1981 is *to make* a contract,[112] again showing that Congress at that time was looking at removing legal disability. But, with respect to the right "to en-

109. American Subcontractors Ass'n, Georgia Chapter, Inc. v. City of Atlanta, 259 Ga. 14, 376 S.E.2d 662 (1989).

110. Cone Corp. v. Hillsborough County, 723 F. Supp. 669 (M.D. Fla. 1989).

111. Milwaukee County Pavers Ass'n v. Fiedler, 710 F. Supp. 1523 (W.D. Wis. 1989).

112. *See supra* note 61.

force" a contract, the Supreme Court harkened back to what that term "enforce" meant, and it meant to allow you to have legal process to enforce a contract.

I think that, even in *Patterson*, the plaintiff did not argue that the harassment was part of the section 1981 phrase "to enforce a contract." The plaintiff, I think, realized that the argument was bankrupt and tried to confront this novel theory about how to make harassment part of this day-to-day contract by saying it was a condition precedent to the *making* of the contract. So *you* may have trouble with the phrase "to enforce a contract," but I do not think the Court did, and I do not think the lower courts are going to have any problem with that either.

*Question from Panelist Alfred Blumrosen:*

The "novel theory" that an employment contract is made each day was first described in a book by Professor Wood on the law of master and servant,[113] which became the standard American legal doctrine up until about 1970. There is absolutely nothing novel about the at-will employment contract. Given that contracts that are not of a specified duration are at will, it seemed to me to make perfect sense to say that each day, or whatever short time period you choose, is, in fact, a new contract.

Justice Kennedy's distinction between making a contract and what happens after the contract has been made does not have any historical validity. This statute was passed in 1866, and Professor Wood's text was published in 1877. That is a fair reflection of the view of the law at the time. Therefore, I am in great doubt as to whether there is any sense at all to the distinction drawn between "making" and "post-making" activities.

*Charles Stephen Ralston:*

I could not agree more. And we did argue that, by the way, in our brief. We went extensively into the legislative history,

113. *See* Martin v. New York Life Ins. Co., 148 N.Y. 117, 121, 42 N.E. 416, 417 (1895).

and the period, and what these terms meant to Congress when they enacted them. In 1866, the plantation owners wanted to hire blacks and have the blacks work. But, they also wanted to keep them as close to slavery as possible. The problem was the conditions to which blacks were subjected in terms of wages, in terms of brutality, and in terms of hours, which differed from those of the white workers. If one really looks to the legislative history, Congress was not concerned that somebody out there was refusing to hire blacks to work on plantations. That just was not the problem.[114]

*Paul Kamenar:*

Well, I disagree. If you look at the legislative history, even as recognized by Justice Stevens, you will note that Senator Trumbull, who was the prime mover of this bill, stated that "this bill in no manner interferes with the municipal regulations of any State which protects all alike in their rights of person and property. It could have no operation in Massachusetts, New York, Illinois, or most of the States of the Union."[115]

The 1866 Congress was focusing primarily on the black codes that then existed. The codes had legal disabilities for blacks, making it illegal to hold property, to make contracts, and to go to court and enforce them. It seems to me that, if section 1981 covers harassment on the job just because the language is "to make contracts," there is another provision in section 1981 that says blacks have a right "to testify." So, does that mean that, if there is a lawsuit between two parties, and the prosecutor or the defense does not call a black witness to the stand, that there is discrimination because you are discriminating against him in the act of testifying? I mean that is just sheer nonsense. It seems to me that you may not find the distinction between "to make" and harassment and "enforce," but I submit that all the confusion was started back with *Run-*

114. Brief for Petitioner at 22-23, 40-47, 50-51, Patterson v. McLean Credit Union, 109 S. Ct. 2263 (1989) (No. 87-107).

115. Cong. Globe, 39th Cong., 1st Sess. 1761 (1866).

*yon.*[116] If you clean *Runyon* up and go back to the original meaning, we would not have all this debate right now.

*Question from Panelist Eileen Kaufman:*

I have to ask the obvious of Mr. Kamenar. It is the question presented by Justice Brennan in his dissent in *Jett.*[117] Your position, I take it, is that *Runyon* was wrongly decided and that *Jett* was correctly decided. Does that not raise the possibility, as Justice Brennan says, "that this landmark civil rights statute affords no civil redress at all."[118]

*Paul Kamenar:*

I would think that may be correct in the sense that section 1981, as we maintain, was the first civil rights law, and before you can add additional rights, you have to eliminate the negative law that was in existence. Once you have removed the legal disabilities, you can build on that. If section 1981 does cover all these types of discrimination, then what you are saying is that all these recent anti-discrimination laws were really unnecessary because you had section 1981 there to prohibit employment discrimination, housing discrimination, and so forth. So, in some respects, section 1981 succeeded in what it was supposed to do. You eliminate the legal disabilities and then you build from there to add additional positive rights. That is what Title VII did. So, in some respects, Justice Brennan is right.

*Charles Stephen Ralston:*

Let me make one very quick comment. The problem with that and the problem with the decisions in both *Jett* and *Patterson* is that the decisions totally disregard the fact that every time Congress passed one of these new statutes, for example Title VII, they very clearly stated that they did not intend the new statute to affect or diminish the rights under those other

116. Runyon v. McCrary, 427 U.S. 160 (1976).

117. Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702, 2724 (1989) (Brennan, J., dissenting).

118. *Id.*

statutes. You will not find a word of that in Justice Kennedy's opinion.

In 1972, when they amended the statute to cover state and local governments, both the Senate and House reports were extremely clear on that. But the reports were totally ignored by a Supreme Court that, I submit, has its own agenda; instead of writing to their Congressmen suggesting that they amend the law, the five justices in the majority exercised their power to amend the law themselves.

*Judge Leon Lazer:*

Our next speaker is William Bradford Reynolds, a distinguished scholar from the National Center for the Public Interest in Washington. He was, for eight years, the Assistant Attorney General in charge of the Civil Rights Division of the Department of Justice. Indeed, for the 1988-89 Term, Mr. Reynolds took part in every civil rights case that was before the Supreme Court.

He was not only the Chief of the Civil Rights Division, he was also, for two years, Counsel to the Attorney General of the United States. Looking back a number of years, he was Editor-in-Chief of the Law Review at Vanderbilt and an Associate at Sullivan and Cromwell. He is presently a partner in Ross and Hardie, which is a very prominent Chicago law firm. Mr. Reynolds practices in the Washington Office.

I decided I would get some information about him out of the computer. But, after a short time, feeling like the young law student who decided to see how many cases cited *Miranda*,[119] I ended up breaking the machine. Mr. Reynolds has written so many articles, briefed so many cases, lectured so many times, taught at so many places, and appeared on so many programs run by the print and electronic media that he is considered one of the leading authorities on civil rights in this country.

*William Bradford Reynolds:*

Thank you very much. It certainly is nice to be here; I am pleased to have been asked to attend this seminar. Gail

119. Miranda v. State of Arizona, 384 U.S. 436 (1966).

Wright-Sirmans (the next speaker) and I have been asked to cover a pretty broad swatch of Supreme Court civil rights cases that relate to the front end of the discrimination model: the question of how to prove discrimination.

*Martin v. Wilks*[120] finally gave the Court the question of access to the courts to assert claims of discrimination that arise as a result of consent decrees that have been entered into by employers and one element of their work force: decrees that are designed to give some advantage or preferential treatment to certain individuals in the work force by reason of race and, in the process, allegedly disadvantage others in the work force because of race.

*Martin* involved the Birmingham Fire Department. It is a long and convoluted litigation that has been going on since the early 1970's.[121] Originally, the case was brought because black fire fighters, or those who aspired to be fire fighters, claimed discrimination in the hiring and promotion of fire fighters in Birmingham.[122] Plaintiffs were able to win the case on the issue of liability.[123] When it came to the remedy stage, a consent decree was fashioned, and the court ordered a hearing on the consent decree.[124] The consent decree was, what I will call, a traditional affirmative action preference program of the sort most courts were using in the mid-1970's. This decree assigned a goal, a quota or a percentage for hiring and promotion, designed to be filled by blacks who sought to get into the fire department and who then would be eligible for promotion.[125]

At the time that the court scheduled a hearing for the consent decree, white fire fighters, individually and as an association, sought to intervene and challenge on the theory that the consent decree disadvantaged the white fire fighters by reason

120. 109 S. Ct. 2180 (1989).

121. *Id.* at 2183. After a bench trial, but before judgment, the parties entered into two consent decrees, one between black individuals and the city, and the other between black individuals and the Board, which set goals for the hiring of blacks as fire fighters. *Id.*

122. United States v. Jefferson County, 28 Fair Empl. Prac. Cas. (BNA) 1834 (N.D. Ala. 1981), *aff'd*, 720 F.2d 1511 (11th Cir. 1983).

123. *See id.* at 1837.

124. *Id.* at 1839.

125. *Id.* at 1834.

of race.[126] They were denied intervention and the consent decree was entered.[127] Shortly after, a separate action was brought by many of the same white fire fighters.[128] That is the case that found its way to the Supreme Court.[129]

The district court had said that the challenge made by the white fire fighters was barred by collateral estoppel and that they could not get into court to complain about what the city was doing because the city was acting pursuant to an approved consent decree that was insulated from challenge.[130] Therefore, they were not allowed to be heard. The court of appeals reversed, holding that a court cannot bind non-parties to a consent decree agreement and bar them from at least being heard in court.[131] That is the decision that went up to the Supreme Court.

It is a decision, I think it is fair to say, that flew in the face of most appellate decisions on this issue up to that point. Most appellate courts had adopted the view that collateral estoppel, which bars a litigant from coming in after the fact to make a challenge to a decree, foreclosed challenges to consent decrees.[132] The *Martin* case went the other way, presenting a conflict for the Supreme Court to resolve. The Court took it and resolved it.

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126. *Id.* at 1835-36.

127. *Id.* at 1839.

128. In re Birmingham Reverse Discrimination Employment Litig., 36 Empl. Prac. Dec. (CCH) ¶ 35,022 (N.D. Ala. Feb. 19, 1985), *rev'd*, 833 F.2d 1492 (11th Cir. 1987), *aff'd sub nom.* Martin v. Wilks, 109 S. Ct. 2180 (1989).

129. Martin v. Wilks, 109 S. Ct. 2180 (1980).

130. In re Birmingham Reverse Discrimination Employment Litig., 36 Empl. Prac. Dec. (CCH) ¶ 35,022, 36,590 (N.D. Ala. Feb. 19, 1985), *rev'd*, 833 F.2d 1492 (11th Cir. 1987), *aff'd sub nom.* Martin v. Wilks, 109 S. Ct. 2180 (1989).

131. In re Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1498 (11th Cir. 1987), *aff'd sub nom.* Martin v. Wilks, 109 S. Ct. 2180 (1989).

132. *See, e.g.*, Bolden v. Pennsylvania State Police, 578 F.2d 912 (3d Cir. 1978) (non-minorities could not intervene after consent decree was entered because they had been fairly represented by collective bargaining agent); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975) (consent decree not invalidated because private parties not invited to participate in pre-decree negotiations). *But see* Grann v. City of Madison, 738 F.2d 786 (7th Cir. 1984); United States v. City of Miami, 664 F.2d 435 (5th Cir. Dec. 1981) (allowing intervention).

The Court held that you cannot close the courthouse doors to individuals with a claim of discrimination that arises as a result of an earlier consent decree in which they had not participated.[133] As I read *Martin*, it is really very much dependent on Rule 19 of the Federal Rules of Civil Procedure, which says that, in order to bind somebody to an agreement in a litigation context, you have to join them; if you do not join them, they are not going to be bound.[134] I think it is quite clear that Rule 19 is bottomed on fundamental due process principles,[135] and the opinion, as well as the cases cited in the opinion,[136] seems to be a due process argument. As I read it, the case holds that, regardless of whether you are minority or non-minority, you are going to have access to the courts if you have a claim of discrimination, and the Court will allow you to be heard.

How the claim will be resolved is less than clear. Another case that was decided last Term, the *Lorance*[137] case, involved women who mounted a challenge to a change in the way seniority was computed in the work force.[138] The change was made pursuant to a collective bargaining agreement; initially, seniority counted from the day that you entered the work force and was accumulated for any and every job you held in the work force.[139] Pursuant to the collective bargaining change, seniority counted only as to in-job seniority.[140]

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133. Martin v. Wilks, 109 S. Ct. 2180, 2188 (1989).

134. Federal Rule of Civil Procedure 19(a) provides:

> A person who is subject to service of process . . . shall be joined as a party in the action if . . . [he] claims an interest relating to the subject of the action and is so situated that the disposition of the action in [his] absence may . . . as a practical matter impair or impede [his] ability to protect that interest . . . .

FED. R. CIV. P. 19(a).

135. *See Martin*, 109 S. Ct. at 2186 ("Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree.").

136. *See id.* at 2184 (citing Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Blonder-Tongue Laboratories, Inc. v. University Found., 402 U.S. 313 (1971); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969)).

137. Lorance v. AT & T Technologies, Inc., 109 S. Ct. 2261, 2264 (1989).

138. *Id.*

139. *Id.*

140. *Id.*

There was an economic downturn, and people either were demoted or laid off. The three women who brought suit had not accumulated sufficient seniority in the job they held and had been demoted.[141] They would not have been demoted had they been able to accumulate the time they had spent in prior positions with the same company.[142]

The Court ruled that the women had failed to come into court within the required 300-day limitation period that the statute places on mounting a challenge to these kinds of seniority provisions.[143] Therefore, the legislative statute of limitations barred their claim.[144]

If you look at *Wilks*, which addresses access to the courts, and you also look at *Lorance*, I think that what the Court is really saying is that, in light of *Wilks*, you are going to get your foot in the door; but once you get in, you are still going to have to litigate your case. If there is a statute of limitations within which to file, you are going to have to meet that deadline and satisfy the trier of fact that you made a timely challenge as required by statute.

The Justice Department filed an amicus brief in *Lorance*[145] in support of the women, and it is actually the only case that the Department lost last Term. We thought that the women

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141. *Id.*

142. *Id.* The tester position traditionally had been held almost exclusively by men and non-tester positions by women. The women alleged that the "alteration of the rules governing tester seniority was [made] . . . in order to protect incumbent male testers and to discourage women from promoting into the traditionally-male tester jobs." *Id.*

143. *Id.* at 2269.

144. *Id.*

> There is no doubt, of course, that a facially discriminatory seniority system (one that treats similarly situated employees differently) can be challenged at any time, and that even a facially neutral system, if it is adopted with unlawful discriminatory motive, can be challenged within the prescribed period after adoption. But allowing a facially neutral system to be challenged, and entitlements under it to be altered, many years after its adoption would disrupt th[e] valid reliance interests [of those employees who worked for many years under the assumption that the seniority system was lawful].

*Id.* (footnote omitted).

145. Brief for the United States and the Equal Employment Opportunity Comm'n as Amici Curiae, Lorance v. AT & T Technologies, Inc., 109 S. Ct. 2261 (1989) (No. 87-1428).

had made a timely filing.[146] Even so, I think that the effort by some in the press to describe the *Martin* and *Lorance* cases as being at cross-purposes is really not accurate. Rather, as indicated, they fit together very well.

*Wards Cove Packing Co. v. Atonio*[147] really caused most of the consternation last Term. This case demonstrates, again, what happens once you get into court. If you have a claim of discrimination, *Wilks* says you can come in, but *Wards Cove* talks about what you have to do to prevail.

The case involved a claim of discrimination by minority cannery workers against two companies in Alaska.[148] Basically, the unskilled labor force in the company was predominantly black; the skilled labor force was predominantly white; and the challengers claimed that hiring practices of the company stratified the work force in a racially skewed manner.[149] They claimed that the disparate impact was clear from a comparison of the skilled work force with the unskilled force and, therefore, made out a Title VII violation.[150]

The Supreme Court used the case to take a hard look at burdens of proof and proof of claims. I think it is fair to say that the seminal case in this area is *Griggs v. Duke Power Co.*[151] *Griggs* was the 1971 decision where the Court stated that, if you have a demonstrable disparate impact claim (that is, if you can come in and demonstrate that the work force is skewed in a way that disproportionately represents a certain segment of the relevant labor market and it is closing out or excluding another element of the labor market), and you can demonstrate that the employer's activities or practices are responsible for that kind of skewing, then you will have raised a cognizable inference of employment discrimination under Title

146. *Id.* Brief at 7.

147. 109 S. Ct. 2115 (1989).

148. *Id.* at 2119.

149. *Id.* at 2120. The challengers claimed that nepotism, separate hiring channels, rehiring preferences, and subjective decisionmaking created both disparate treatment and disparate impact, but neither the district court nor the Ninth Circuit en banc found disparate treatment. *Id.* at 2120 n.4.

150. *Id.* at 2120.

151. 401 U.S. 424 (1971).

VII.[152] In other words, without finding the "smoking gun" of intent, you have made out probable cause. It is a claim that still can be rebutted, but you have made out a prima facie case.

Since the Court announced the *Griggs* ruling in 1971, the federal courts have wrestled with where the burdens lie and who proves what in a disparate impact case. Not much consistency has emerged from the federal courts on this point. Part of the reason is that labels get in the way of what it is that people are actually saying. Many times the federal courts spoke only in terms of "burdens," not specifying whether they meant "burden of proof," "burden of production," or "burden of going forward." That kind of loose language has caused different results and different theories to arise under the *Griggs* formula.

*Wards Cove* was an opportunity for the Supreme Court to state rather clearly the respective burdens under Title VII. The Court said that the plaintiff, who has a claim of discrimination, has to prove that claim.[153] Plaintiff can use statistics, but the Court said that it is impermissible to point to two different parts of the work force, one skilled and the other unskilled, and call a disparity between them suspect.[154] The Court said that you must look to the job position and the relevant labor market outside to correctly identify statistical disparities,[155] the proper focus for any kind of a discrimination claim.[156] If you do have a statistical disproportion, the plaintiff has to demonstrate which practice of the employer is responsible for the disparity.[157]

Once the plaintiff has made those two showings, a prima facie case is made. According to the Court, the defendant then has the burden of production—which is not a shifting of the

152. *Id.* at 430 ("practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices").

153. *See* Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2122-23 (1989).

154. *Id.* at 2122.

155. *Id.*

156. *Id.*

157. *Id.*

burden of proof—to come in and show that the practices allegedly causing the disparity serve a legitimate business purpose.[158] If that is demonstrated by defendant—if defendant satisfies his burden of production—the plaintiff can still show pretext in those circumstances and prevail; or the plaintiff can show that there was an alternative procedure or process not having the same kind of a racially disparate impact that the employer could have used and that would not have been unduly costly, but that the employer declined to use it.[159] In that case, the Court said, the plaintiff would be able to rebut, or surrebut, the defendant's claim of a legitimate business practice.[160]

The Court made clear that the burden of proof stays with the plaintiff throughout the litigation.[161] That conclusion is not, in my view, all that remarkable. The burden of proof stays with the plaintiff in Title VII cases when you are talking about intent or disparate treatment.[162] There has not been any departure in that regard by the Court. It is the case of the employer possessing a presumption of innocence, as does every other defendant in our jurisprudential system. That presumption of innocence stays with the employer, not until he walks into the courtroom, nor until he has gotten past the opening arguments, nor until he is halfway through the trial, nor only up to closing arguments, but until the end of the case when there is a judgment or verdict going against the defendant. That is a fairly common notion in our system, and saying that the burden of proof remains with the plaintiff aligns the disparate impact cases, to the extent they had been misaligned by federal courts, with traditional Title VII law and, also, with case law in other fields.

I think *Wards Cove* cleans up some untidiness. It is helpful because it lays out, at least from an academic standpoint, where the burdens are and who has them. But, I would say, as

158. *Id.* at 2126.
159. *Id.*
160. *Id.*
161. *Id.*
162. *See id.*; Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777, 2790 (1988).

a footnote, that, for all of you who are litigators, this decision will probably not make much practical difference. As litigators, you walk into court and the plaintiff puts on the best case the plaintiff can put on; the defendant puts on the best case the defendant can put on; and then the judge, or jury, simply weighs the evidence and sides with the party having the preponderance of the evidence in his or her favor. No one stops to think whether they have the "burden of proof" here, or a "burden of production" there, and is it shifting back and forth, or "who's on first." So, I think that, in the practical scheme of things, *Wards Cove* is probably not going to make a very dramatic difference, if any at all, in the actual litigation of these cases.

Now, on to *Price Waterhouse v. Hopkins*,[163] a case that aligns the several parts of Title VII *in toto*. *Price Waterhouse* involved a claim by a woman named Anne Hopkins who was recommended for promotion to partnership at Price Waterhouse.[164] Her promotion was put on hold until the following year.[165] The next year when she was told that she was not going to get promoted, she brought suit.[166] Her claim was that sex-stereotyping by some of the male partners prevented her from being elevated to partner status.[167]

I think it is fair to say the documentary evidence quite clearly indicated stereotypical notions about how feminine a woman ought to be if she is going to operate in this arena. This included some of the partners' suggestions that Anne Hopkins was too abrasive, too insensitive in her dealings with staffers, and overbearing to a fault.[168] Those gender-based observations, at least in some respect, were implicated in the decision to deny her the promotion.[169]

The Court said that if a plaintiff can demonstrate that there is an illegitimate motive that was responsible for the decision,

163. 109 S. Ct. 1775 (1989).
164. *Id.* at 1781.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 1782.
169. *Id.*

even if there are also legitimate motives (and there were, in this case, conceivably legitimate motives that the Court said were mixed in with the illegitimate ones), then this is sufficient to make out a prima facie case.[170] The employer then is going to have to demonstrate, by a preponderance of the evidence, that the negative decision against this woman would have been made notwithstanding the gender-related illegitimate motives—that the decision would have been made in any event, irrespective of those improper considerations.[171]

Justice Brennan, writing for the plurality, said that the defendant's burden in this regard is not the clear and convincing evidence standard but the preponderance of the evidence standard.[172] I think that Justice Brennan's decision, when read together with the concurring decisions by Justices White and O'Connor, said, yet again, that, if the plaintiff, having the burden of proof, makes out a prima facie case, then the defendant is going to have a burden of production. However, the burden of proof throughout is going to stay with the plaintiff, and it is going to be the plaintiff who will have to make the ultimate case.[173]

Again, in the academic world, we can have this barometer flip back and forth. But, in *Price Waterhouse*, as in *Wards Cove*, during the actual trial, where the plaintiff is going to come in and put on the best case the plaintiff can muster, and then the defendant is going to come in and respond with his best, the Court has told us that the party with the preponderance of the evidence at the end will prevail. The burden of going forward shifts from the plaintiff, to the defendant, and

170. *Id.* at 1788-90.

171. *Id.* at 1785.

172. *Id.* at 1790.

173. *Id.* at 1798. Justice White would not require objective evidence that legitimate motives caused a hiring decision when there are both legitimate and illegitimate reasons. *Id.* at 1796 (White, J., concurring in the judgment). Justice O'Connor would shift the burden to the employer only when the employer has knowingly given substantial weight to an impermissible criterion. *Id.* (O'Connor, J., concurring in the judgment).

back to the plaintiff, but the ultimate burden of proof stays, at all times, with the plaintiff.[174]

I see these several cases as helping immeasurably to clean up some of the muddiness with which we have been dealing for some period of time because of loose language and imprecise decision-writing at the court of appeals level. If you put all of the cases together, including *Croson*,[175] what the Court has come down with in the civil rights area is very similar to what it has come down with in most other areas of the law: the plaintiff is going to have his or her day in court; the courthouse door is not going to be closed. Once in, however, the plaintiff has to prove the claim, without relying upon statistics alone. Statistics are relevant—not dispositive, but relevant—as long as they provide a proper comparison. Moreover, once the plaintiff has shown disproportionality, he or she must link it to the responsibility of the employer. Having done so, the employer is going to be required to come back and demonstrate that there were legitimate business reasons for what the employer did. Then, only if that business justification is shown by plaintiff to be a pretext, or if there were other alternative means available to the employer that would not have had so great an adverse impact, will the plaintiff prevail.

Beyond this, as you have heard earlier today, assuming the plaintiff does make his or her case, the Court has said that the remedy is going to have to be narrowly tailored, as defined in the *Croson* decision, so as to fit the wrong that has been shown to exist.[176] To the extent that it can be done, all efforts should be made to fashion this remedy without preference for one group as opposed to another group in the work force by reason of race or gender. However, as a last resort, if you cannot cure the wrong by neutral measures, the Court has said that, on a narrowly tailored basis, you can put in place preferences for a short term, as long as they are tied to the wrong and they are tailored as to scope, duration, and application.[177]

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174. *Id.* at 1788; Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2136 (1989).

175. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989).

176. *Id.* at 727-30.

177. *Id.*

Thank you.

*Judge Leon Lazer:*

Gail Wright-Sirmans is a very distinguished lawyer and Professor of Law at Pace Law School. She is a graduate of Harvard Law School, and she served for ten years as Assistant Counsel with the NAACP Legal Defense and Educational Fund. She also has served in the General Counsel's Office of the Equal Employment Opportunity Commission. While Professor Wright was at the NAACP Legal Defense Fund, she specialized in trials and appeals of employment and voting rights cases. She has argued and briefed many cases in the federal and state courts. She taught at Cornell and has written many articles, particularly in the equal rights area. She serves on the Judicial Nominations Committee of the New York State Bar Association and is General Counsel for the National Conference of Black Lawyers. She is a leading authority on equal rights, and it is a privilege for us to have her here at this seminar.

*Gail Wright-Sirmans:*

Thank you very much. Believe it or not, my reading of the very same opinions that Mr. Reynolds discussed leads me to a very different conclusion. My review of those five decisions[178] reflects that, within a very short period of time, actually within sixty days, from May 1st to June 22nd, the Supreme Court interpreted civil rights statutes that had been enacted between 1866 and 1972 in a way that eviscerated the heart and soul of laws designed to eliminate discrimination in this nation.

I have the same concern that the former Secretary of Transportation William T. Coleman[179] expressed to Attorney General Dick Thornburgh. He voiced his concern that the substantial shifts in the Court's interpretation of civil rights laws

178. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989); Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989); Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989); Martin v. Wilks, 109 S. Ct. 2180 (1989); Lorance v. AT & T Technologies, Inc., 109 S. Ct. 2261 (1989).

179. William T. Coleman served as Secretary of Transportation during the Ford Administration.

resulted from the five-to-four majority created by President Reagan's appointments, with the exception of Justice Stevens. Further, he indicated that the role of the executive branch of the federal government in the Court's consideration of these cases was almost as troubling as the decisions themselves.[180] Finally, he noted something that Mr. Reynolds has neglected to mention, and that is the position of the Justice Department in these cases.

In *Martin v. Wilks*,[181] the Justice Department reversed its position from the time the case was resolved in the lower courts to the time that it went before the United States Supreme Court. Initially, the Justice Department was with the plaintiffs and, therefore, with justice. Somehow, it changed its position by the time the Supreme Court heard the case. I cannot explain these inconsistences. Perhaps, during the rebuttal time, these "changes of mind" can be explained by Mr. Reynolds. In *Wards Cove Packing Co. v. Atonio*,[182] the Solicitor General and the Civil Rights Division urged the Supreme Court to narrow the interpretation of Title VII of the Civil Rights Act of 1964 that had been established in *Griggs v. Duke Power Co.*[183] and *Dothard v. Rawlinson*,[184] which served to re-enforce *Griggs*.[185] Notably, the Justice Department did support the plaintiff's position in *Lorance v. AT & T Technologies, Inc.*[186] but, now that the opinion has been rendered, it suggests that the decision is correct. The Justice Department contends that the only difficulty it has with the case has to do with some minor technicalities. Finally, in 1981, Mr. Reynolds made it very clear, and actually announced, that the Civil Rights Division of the Justice Department would seek to overturn the Supreme Court's ruling in *Weber*,[187] which sanctioned an em-

180. *See generally* N. AMAKER, CIVIL RIGHTS AND THE REAGAN ADMINISTRATION (1988).

181. 109 S. Ct. 2180 (1989).

182. 109 S. Ct. 2115 (1989).

183. 401 U.S. 424 (1971).

184. 433 U.S. 321 (1977).

185. *Id.* at 332.

186. 109 S. Ct. 2261 (1989).

187. United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979).

ployer's voluntary adoption of affirmative action plans.[188] Fortunately, that has not happened, but there has been something afoot in affirmative action cases, as we can see in *City of Richmond v. J.A. Croson Co.*[189]

Those are my concerns, and, now, I would like to give you my analysis of the cases, starting in chronological order with *Price Waterhouse v. Hopkins*.[190] Sometimes, I cannot figure out what the Court is doing, so I go to my magic ball to try to see something and make some sense out of it. Well, maybe something was conjured up between the time the case was argued on October 31st, Halloween, and the time that it was announced on May 1st, which is Law Day. Maybe there is some connection there.

Usually, the summaries of the cases or opinions are very brief, lasting only ten seconds. In this instance, Justice Brennan gave a very long analysis. There are multiple opinions for the majority, and we are living during a time when it is critical that we read *all* of the opinions in order to fully understand exactly what the Court is saying. Four justices joined in the main opinion;[191] there were concurrences by Justices White[192] and O'Connor,[193] and Justice Kennedy dissented.[194]

The *Hopkins* case is significant because the Supreme Court, as well as the lower courts generally, have not addressed employment discrimination in the white-collar arena of partnership or tenure or any area that extends beyond the traditional employer-employee relationship. An article written by Elizabeth Bartholet in the Harvard Law Review several years ago identified the difficulties of instituting and substantiating alle-

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188. In *Weber*, the Court upheld the use of narrowly tailored voluntary affirmative action plans designed to rectify past discrimination, provided that the plan was a temporary measure, did not unnecessarily trammel the rights of whites, and constituted a flexible goal rather than a rigid quota. *Id.* at 208.

189. 109 S. Ct. 706 (1989).

190. 109 S. Ct. 1775 (1989).

191. *Id.* at 1780.

192. *Id.* at 1795 (White, J., concurring in the judgment).

193. *Id.* at 1796 (O'Connor, J., concurring in the judgment).

194. *Id.* at 1806 (Kennedy, J., with whom Rehnquist, C.J., and Scalia, J., joined, dissenting).

gations of discrimination in upper level jobs.[195] This is one of the first cases to confirm that discrimination at the white-collar level is unlawful.[196]

Ann Hopkins, who worked as an officer and manager for Price Waterhouse, a major accounting firm, alleged that she was denied a promotion up the corporate ladder because of her sex and in violation of Title VII of the Civil Rights Act of 1964.[197] Her cohorts, colleagues, and supervisors testified that her work performance was exemplary and that her accounts were outstanding.[198] They also testified that she was too abrasive, too overbearing, and too macho.[199] For these reasons, she was not awarded a promotion.[200]

The case is also significant because it reflects the Court's acceptance of evidence presented by social scientists, including industrial psychologists and social psychologists, to prove discrimination.[201] The testimony from these experts, which discussed and analyzed sex stereotyping in our society and in certain occupations, was critical in establishing that Hopkins was a victim of sex-stereotyping.[202] The value of this form of expert testimony should be seriously considered in a broader context.

The first of the two questions presented to the Court for the first time was whether the rule articulated in *Mt. Healthy School District v. Doyle*,[203] stating that a claim of racial discrimination could be defended on the ground that there were other non-discriminatory reasons for the decision,[204] should apply in a Title VII case. This is a "mixed motive" question. The second question was whether, once an employee has proven

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195. Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947 (1982); *see also* Newman, *Remedies for Discrimination in Supervisorial and Managerial Jobs*, 13 HARV. C.R.-C.L. L. REV. 633 (1978).

196. *But see* Hishon v. King & Spalding, 467 U.S. 69 (1984) (Supreme Court concluded Title VII covers law firms and promotion decisions involving partnership).

197. Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1781 (1989).

198. *Id.* at 1782.

199. *Id.*

200. *Id.*

201. *See id.* at 1793.

202. *Id.* at 1782-83, 1793.

203. 429 U.S. 274 (1977).

204. *Id.* at 285-86.

that unlawful discrimination was a factor in the employment decision, the employer has to show by "clear and convincing" evidence that it would have reached the same decision for a legitimate reason, or whether the employer only has to show by a "preponderance of the evidence" that the action would have occurred.[205] The central issue was who has the burden of proof in a case alleging discrimination.[206]

The Supreme Court responded by applying the *Mt. Healthy* rule in a Title VII case for the first time.[207] In *Mt. Healthy*, a public employee proved that the exercise of his first amendment rights was a substantial factor in the decision not to rehire him.[208] The Supreme Court held that the employer could defend itself by proving that the plaintiff would not have been rehired even in the absence of retaliation for the exercise of his first amendment rights.[209] The employer merely had to prove a lack of causation by a preponderance of the evidence.[210]

The Court applied *Mt. Healthy* in *Hopkins* and held that an employer can defeat *all* liability by proving, with a mere preponderance of the evidence, that the same decision would have been made in the absence of proven, unlawful, intentional discrimination.[211] As a result, the more stringent clear and convincing standard is no longer applicable.

*Hopkins* is problematic because it says that, even though a court may recognize and accept the fact that unlawful discrimination has taken place, the employer can escape liability merely by showing, by a preponderance of the evidence, that the result would have been the same in the absence of the discriminatory conduct. The correct approach would have been for the Court to confirm that the *Mt. Healthy* rule is inapplicable in the context of Title VII and to hold that, once discrimi-

205. *See* Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1792 (1989).

206. Both the district and appellate courts had concluded that an employer who permitted a discriminatory motive to play a part in an employment decision must prove by clear and convincing evidence that it would have made the same decision in the absence of discrimination. *Id.*

207. *Id.* at 1789-90.

208. Mt. Healthy School Dist. v. Doyle, 429 U.S. 274, 287 (1977).

209. *See id.* at 287.

210. *Id.*

211. *Hopkins*, 109 S. Ct. at 1790.

nation is found to be a motivating factor, the statute is violated. If the same employment decision would have been made in the absence of discrimination, the nature of the relief could differ, but the underlying finding of unlawful discrimination would remain. However, for the Court to recognize that there is discrimination but find that, because there is some other motive, it will not find the employer liable for his bad acts (as if the law had not been violated), is incongruent with the long line of cases establishing the burden of proof in Title VII cases.[212] In essence, this standard encourages employers to disguise their true motives and invent new ones. In the professional work world, where employment decisions are based upon subjective factors, there is always another reason for anything that is done. So, we will have to wait to see how the lower courts actually interpret *Hopkins*. We will have to see how the trial courts actually play out the scenario that is given to them by the Supreme Court.

*Wards Cove Packing Co. v. Atonio*[213] was decided on June 5, 1989.[214] It is, perhaps, one of the most foreboding of the Term's decisions. The lawsuit was initiated in 1974 by Alaskan and Filipino workers against a salmon cannery in Alaska pursuant to Title VII of the Civil Rights Act of 1964.[215] Statistical data presented by the plaintiffs demonstrated that they were overrepresented in the unskilled, lower paying jobs and that whites held the majority of the more lucrative white-collar positions.[216] In this regard, the jobs fell into two categories: unskilled cannery jobs, filled predominantly by non-whites, and skilled non-cannery jobs, held by whites.[217] Justice Stevens, in his dissenting opinion, remarked that the company's racial stratification and segregation resembled a "plantation econ-

212. The Supreme Court's ruling in *Hopkins* overruled the decisions of a number of lower federal courts that had held that *Mt. Healthy* did not apply to Title VII, and that full relief could be avoided only by a showing of "clear and convincing" evidence. *Id.*

213. 109 S. Ct. 2115 (1989).

214. *Id.*

215. *Id.* at 2120.

216. *Id.* at 2121.

217. *Id.* at 2119.

omy."[218] The work environment was so segregated that the native Alaskans and the Filipinos had one kitchen, one set of dormitories, and there were special cooks for that dormitory. There was another kitchen and another set of dorms and cooks for whites.[219] If you cannot prove employment discrimination in a case with these facts, what kind of facts do you have to produce to prove discrimination?

In the opinion, written by Justice White and joined by Justices O'Connor, Scalia, Kennedy, and Chief Justice Rehnquist, the Court determined that the statistical evidence introduced by the plaintiffs was not probative.[220] The plaintiffs' statistics, which compared the racial composition of the cannery work force and non-cannery work force, did show a racially imbalanced work force.[221] However, because plaintiffs compared the internal work force statistics, and because there was no showing that there was a qualified majority pool, the Court rejected this evidence on the grounds that the plaintiffs failed to compare the racial composition of the work force to the racial composition of the qualified population in the relevant labor market.[222] The Supreme Court could have stopped right there. We all know the *Hazelwood*[223] opinion in which the Supreme Court articulated the concept of the relevant work force. Under *Hazelwood*, in order for statistics to be probative, the employer's work force statistics must be compared to the relevant work force.[224] There is nothing talismanic about that. The Court simply could have held that the plaintiffs' statistical proof did not fulfill the standards enunciated in *Hazelwood* and ended the matter.

But, this is an active Court. It went further, citing the language in *Watson v. Fort Worth Bank & Trust*,[225] and I quote: "we note that the plaintiff's burden in establishing a prima fa-

218. *Id.* at 2127 n.4 (Stevens, J., dissenting).
219. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2120 (1989).
220. *Id.* at 2121.
221. *Id.*
222. *Id.*
223. Hazelwood School Dist. v. United States, 433 U.S. 299 (1971).
224. *See id.* at 305, 313 n.20.
225. 487 U.S. 977 (1988).

cie case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the *specific* employment practice that is challenged."[226]

In *Wards Cove*, the plaintiffs alleged that nepotism, the use of separate hiring and rehiring channels, and subjective decisionmaking had a disparate impact on the Alaskans and Filipinos.[227] The Court said no; that is not enough! The Court imposed a "specific causation" requirement, demanding that the plaintiffs demonstrate which specific practice caused the disparity.[228] Those of you who litigate in this area know the difficulty of proving that.

However, we are not just talking about the difficulty of proof. We are lawyers; that is our job; we do encounter difficulties, and we expect that. What we did not expect was that the Supreme Court would obliterate the unanimous position it took in *Griggs v. Duke Power Co.*, in 1971,[229] and, again, in *Dothard v. Rawlinson*, in 1977.[230] Our most important concern must be why the Court would overrule nearly twenty years of Title VII law that had been solidly ratified by the courts and Congress.[231]

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226. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2124 (1989) (emphasis added).

227. *Id.* at 2120.

228. *Id.* at 2124.

229. 401 U.S. 424 (1971).

230. 433 U.S. 321 (1977).

231. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977):

> Disparate treatment such as alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate impact theory.

In previous opinions, the Court confirmed that one of the chief purposes of Title VII is to eliminate racially neutral employment devices that have an adverse impact on a protected class. We, and the courts, know that racial discrimination in our society will not be proven with a smoking gun. Therefore, in a disparate impact case, the question of intent or motive is irrelevant. Instead, statistical evidence is essential to establish a prima facie disparate impact case.

Under *Griggs* and *Dothard*, the employees have the initial burden of demonstrating that there is a significant disparity in the employment opportunities of blacks as compared to whites, or men as compared to women.[232] Once the plaintiffs meet their burden of demonstrating a disparity, the burden shifts to the defendant to prove that the employment device that has a disparate exclusionary or adverse effect is essential to the business.[233] That is, the employer has to prove that the device is a job-related requirement that accurately measures or predicts the employee's ability to do the job. Finally, even if the business necessity argument is met by the defendant, the plaintiffs can demonstrate that there are alternative means of selection that do not have an adverse impact.[234]

In *Wards Cove*, the Court formulated a new standard that requires that the plaintiffs determine which *specific* device caused the disparity.[235] For example, in a case involving promotions, the plaintiff would have to determine which component of the promotion process caused the disparity. Was it the employee evaluation process; an interview; time on the job; attendance? Identifying the specific device that caused the disparity will prove to be difficult for employees, who have little access to employment records and documents. When we look back at the legislative history of Title VII of the Civil Rights Act, it is clear that this is not a burden Congress intended to place on plaintiffs. Certainly, this is not a burden the Supreme

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*Id.* (citations omitted).

232. *See Griggs*, 401 U.S. at 431; *Dothard*, 433 U.S. at 329.

233. *Griggs*, 401 U.S. at 432; *Dothard*, 433 U.S. at 329.

234. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

235. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2124-25 (1989).

Court heaped upon plaintiffs when *Griggs* and *Dothard* were pronounced.[236]

The cost of developing statistical studies is already astronomical. Again, that is the lawyer's job. Plaintiffs should not be allowed to go into court and raise fanciful arguments without substance. None of us argues that. Yet, we should argue that it may cost so much money that no one will ever be able to make out a case of discrimination using statistical proof. In fact, the Court acknowledged that "some will complain that this specific causation requirement is unduly burdensome"[237] but sheepishly added that the "liberal civil discovery rules give plaintiffs broad access to employers' records"[238] and the Uniform Guidelines[239] require employers to maintain those records. The Court's presumption that employers properly maintain records is untrue. Those of us who practice in the area know that presumption is untrue.

The Court went on to say that, even if employees make out a prima facie case, the burden shifts to the employer to justify this disparity as a "legitimate employment goal."[240] Under this softened definition of "business necessity," the employer is required only to provide a "legitimate business justification" for the challenged practice and need not prove that the practice was "essential" or "indispensable" to its business.[241] Now, the

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236. With regard to demonstrating disparate impact, the Supreme Court, in Griggs v. Duke Power Co., 401 U.S. 424 (1971), held that the disparate impact of a high school education requirement was established by census statistics showing that blacks were less likely to meet the requirement. *Id.* at 431. Similarly, in Dothard v. Rawlinson, 403 U.S. 321 (1977), the Court held that it was not required that statistics be adduced as to the impact of minimum height and weight requirements of actual applicants. *Id.* at 330. The disparate impact was shown by general statistical data. *Id.*

237. *Wards Cove*, 109 S. Ct. at 2125.

238. *Id.*

239. *See* Uniform Guidelines on Employee Selection Procedures, 29 CFR § 1607.4(A) (1988). These guidelines were promulgated for use by employers, labor organizations, employment agencies, and licensing and certification boards to assist in compliance with federal requirements prohibiting discriminatory employment practices. *Id.* § 1607.1(B).

240. *Wards Cove*, 109 S. Ct. at 2125.

241. *Id.* at 2126.

employer has only a burden of production and no longer has a burden of persuasion.[242]

Finally, the Court's perception that the employee can persuade the trier of fact that there are alternatives that are equally effective is actually a misperception. The Court stated that it will consider those alternatives that are equally effective *but* will still consider "factors such as the cost or other burdens of the proposed alternative selection devices."[243] The Court added that the courts are less competent to restructure business practices, and, "consequently, the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternative selection or hiring practice in response to a Title VII suit."[244] So, even if the employee produces alternative devices that are less burdensome, under the ruling in *Wards Cove*, the courts are going to be reluctant to require an employer to put those devices in place.

The dissent of Justice Stevens (with Justices Brennan, Marshall, and Blackmun joining) candidly stated that the *Wards Cove* opinion flies in the face of *Griggs* and the nation's goal of eliminating discrimination in all of its many forms.[245] For this reason, the dissenting Justices determined that they could not "join this latest sojourn into judicial activism."[246] The dissenters remind us that the statute was created, and intended, to look at the consequences of discrimination, not simply the motivation.[247] It is important to have these Justices remind us of what the law was and what the law should be.

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242. *Id.*

243. *Id.* at 2127.

244. *Id.*

245. *Id.* (Stevens, J., dissenting).

246. *Id.* at 2127-28.

247. Justice Stevens, in his dissent, recalled that, under *Griggs*, the employer has the burden of showing a "manifest relationship" between the challenged employment practice and the successful job performance. *Id.* at 2129. In disparate impact cases, the burden is on the employer to produce proof of an affirmative defense of business necessity. According to Justice Stevens and his reading of *Griggs* and its progeny, there is no need for the plaintiffs to show which practice caused the disparity since "proof of numerous questionable employment practices ought to fortify an employee's assertion that the practice caused racial disparities." *Id.* at 2133.

*Wards Cove* is a drastic departure from the Supreme Court's earlier precedents, particularly the Court's 1971 decision in *Griggs* and the Court's 1977 opinion in *Dothard*. In sum, the Court diminished the value of statistical evidence as proof that an employment practice has a discriminatory impact. Under *Wards Cove*, plaintiffs bear an extraordinarily heavy burden. They can no longer rely exclusively on statistics to show a historic pattern of racial stratification but must identify the specific component of the employment scheme that caused the discriminatory pattern.[248] *Wards Cove* requires that the burden of persuasion remain with the plaintiff.[249] In order to rebut the employer's claim that the practice is a business necessity, the burden is on the plaintiff to prove that the defendant's contention is meritless,[250] and, even then, the court will look at the plaintiff's evidence with a jaundiced eye.

*Martin v. Wilks*.[251] June 12, 1989.[252] The Court seemed to be on a real roll—backward. Blacks in Alabama—we can remember the history of Alabama. Birmingham, Alabama. Most of us can remember pictures of white fire fighters and white policemen charging at blacks with dogs and pressing blacks down against the pavement with water hoses. Well, those same fire and police departments were at issue in *Wilks*.

The original lawsuit was filed in January of 1974 by black individuals and the NAACP, who alleged that the City of Birmingham's employment practices were racially discriminatory in violation of Title VII of the Civil Rights Act of 1964.[253] After years of litigation, including a complete trial in 1976 addressing the issue of hiring and a second trial in 1979 pertaining to promotions, the parties negotiated a consent decree.[254] The decree established a remedial program for hiring and promoting blacks in the fire department.[255] As with all consent

248. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989).
249. *Id.*
250. *Id.*
251. 109 S. Ct. 2180 (1989).
252. *Id.*
253. *Id.* at 2183.
254. *Id.*
255. *Id.*

decrees, before the consent decree was filed and approved by the federal court, there was an opportunity for all persons to step forward to express their approval or disapproval at a fairness hearing.[256] Anyone who wanted to allege that the consent decree involved fraud, or was collusive, or should not be accepted for any other reason, could have said something. Some white fire fighters sought to intervene, but their motion was denied.

However, subsequent to the approval of the decrees, another group of white fire fighters filed a separate lawsuit attacking the consent decree.[257] They claimed that they were denied promotions in favor of less qualified blacks based upon race and in reliance of the consent decree.[258] They alleged that the provisions in the decree constituted impermissible reverse discrimination. Notably, they did not allege that the decree was collusive, fraudulent, or transparently invalid.

The question presented to the Supreme Court was: to what extent can a consent decree in a Title VII class action be challenged by collateral attack from whites who had notice of the consent decree but chose not to intervene in a timely manner?[259]

The Supreme Court, in an opinion delivered by Chief Justice Rehnquist and joined by Justices White, O'Connor, Scalia, and Kennedy, established that white employees are not precluded from challenging employment decisions made pursuant to consent decrees.[260] The Court interpreted Rules 24 and 19 of the Federal Rules of Civil Procedure to require that affected parties be joined in the action in order to be bound.[261] The Court acknowledged that there is some merit to the argument that the need to join affected parties may be burdensome and, ultimately, may discourage civil rights litigation, but said to otherwise interpret the Rules would require rewriting the Federal

256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.* at 2184-85.
260. *Id.* at 2184.
261. *Id.* at 2185-86.

Rules.[262] The Court went on to assert that plaintiffs who seek the aid of the court are best able to bear the burden of designating who will be adversely affected if plaintiffs prevail.[263] Moreover, the Court found that the petitioner's argument that whites should be precluded from instituting a tardy challenge because they could have challenged in a timely fashion but chose not to was inconsistent with the purpose of the Rules.[264]

The Court also responded to the petitioner's submission that the congressional policy favoring voluntary settlement of employment discrimination claims supports the "impermissible collateral attack doctrine."[265] The Court's mysterious reply was that *one* group of employees and employers cannot possibly "settle" claims of others who do not join in the agreement.[266] In this regard, Justice Stevens's dissent stressed that there *is* a difference between actual parties (and their right to participate) and persons with an interest that may be impaired by the outcome of the case, who have a right to intervene in a timely fashion.[267]

*Wilks* is a most dangerous opinion with explosive potential in that the decision may lead to the reopening and relitigation of well-settled affirmative action plans agreed to by employers and employees through consent decrees. We have already witnessed the reincarnation or resurrection of issues that we thought were well settled. Clearly, to afford non-parties who are unhappy or dissatisfied with the outcome of a case to re-

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262. *Id.* at 2187.
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.* at 2188.
267. *Id.* (Stevens. J., dissenting).

> Persons . . . have a right to participate in a trial and to appeal from an adverse judgment; depending on whether they win or lose, their legal rights may be enhanced or impaired. . . . [Others] have a right to intervene in the action in a timely fashion, or they may be joined as parties against their will. But if they remain on the sidelines, they may be harmed as a practical matter even though their legal rights are unaffected. One of the disadvantages of sideline-sitting is that the bystander has no right to appeal from a judgment no matter how harmful it may be.

*Id.* (footnotes omitted).

open the litigation, even though those individuals knowingly bypassed opportunities to intervene, is to open a Pandora's box. It is also most likely that parties to an action will be less willing to enter into consent decrees and more likely to engage in protracted and expensive litigation because of the fear of future "reverse discrimination claims." Why settle that which is unsettled? After all, what is the motivation? If you know that you can enter into a consent decree, and you know that subsequently other individuals can come in and challenge that consent decree, what would be the purpose of entering into the settlement agreement? Undoubtedly, the impact of the case is unimaginable. What is imaginable and foreseeable is that, in addition to vitiating the likelihood that parties will enter into consent decrees, already existing consent decrees will be vulnerable to attack.

In *Lorance v. AT & T Technologies, Inc.*,[268] the question was whether women employees who may be affected adversely by a seniority system have to file a charge when the system is adopted, or whether they may wait until they are directly and personally affected by the system's operation before filing charges.[269] In this regard, Title VII requires that a complaint of employment discrimination be filed with the Equal Employment Opportunity Commission within 180 days of the alleged incident of discrimination.[270] Obviously, I disagree with Mr. Reynolds when he says that the Supreme Court's decisions in *Martin v. Wilks*[271] and *Lorance*,[272] which were decided on the same day, are consistent. It also should be noted that the U.S. Solicitor General filed a brief on behalf of the United States, which argued that the time limitations should begin to run when the system actually affects the employees, rather than when the employer and the union negotiated the system.[273]

Justice Scalia's majority opinion, in which Justice O'Connor did not participate, held that the time for the women employ-

268. 109 S. Ct. 2261 (1989).
269. *Id.* at 2264.
270. 42 U.S.C. § 2000 e-5(e) (1982). *See* 109 S. Ct. at 2264 n.2.
271. 109 S. Ct. 2180 (1989).
272. Lorance v. AT & T Technologies, Inc., 109 S. Ct. 2261 (1989).
273. *See supra* notes 145-46 and accompanying text.

ees to institute an action started to run when the employer and union negotiated and adopted a new seniority system with the intent of discriminating.[274] Hence, pursuant to *Lorance*, a challenge to an intentionally discriminatory seniority system has to be instituted within 180 days of the system's adoption, or it is waived—forever.

What does that say about the potential claims of women who did not work there at the time the system was devised? How do you know that a seniority system is going to adversely affect you until it is put into place? In this situation, how could the women employees know, until there was actual use of that aspect of the provision in the seniority system, that they would be affected? Does the opinion serve to immunize seniority systems, generally? Is the reasoning in *Lorance* limited to seniority systems?

As Justice Marshall noted in his dissent, under *Lorance*, employees will be compelled to file speculative, anticipatory, or premature lawsuits.[275] Consequently, *Lorance* serves to discourage conciliation and attempts by employers to resolve claims in the absence of a lawsuit.

Those who do follow the reasoning in *Lorance* and institute a lawsuit still may be fearful of other legal repercussions. There is something else that looms around the heads of civil rights lawyers and that is Rule 11 of the Federal Rules of Civil Procedure.[276] The Rule challenges the best of lawyers for bringing cases that are "unfounded." Will lawyers, particularly civil

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274. *Lorance*, 109 S. Ct. at 2268-69. Section 703(b) of Title VIII provides that a bona fide seniority system is immune to Title VII challenges. 42 U.S.C. § 2000e-2(h) (1982). However, a facially neutral system that was implemented with a discriminatory purpose is not entitled to the Act's exemption. *See, e.g.*, Pullman-Standard v. Swint, 456 U.S. 273 (1982).

275. *Lorance*, 109 S. Ct. at 2273 (Marshall, J., dissenting).

276. Rule 11 provides:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

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rights lawyers, be subjected to Rule 11 sanctions if they file a lawsuit before there is an actual case or controversy in order to comply with *Lorance*?

Finally, an opinion that was not mentioned by Mr. Reynolds, but which puts the cap on everything, is *Independent Federation of Flight Attendants v. Zipes*,[277] decided on June 22nd.[278] In this unusual opinion, authored by Justice Scalia, the Supreme Court concluded that, absent conduct by the intervenor that is "frivolous, unreasonable or without foundation," prevailing civil rights plaintiff's attorneys cannot recover fees from intervenors who have unsuccessfully attempted to overturn or block relief in a civil rights case.[279] So, even though counsel protect plaintiff's victory in a case, they will not be entitled to compensation. Normally, a prevailing plaintiff's counsel is awarded fees; however, pursuant to this decision, plaintiffs who have defended a prior ruling are not entitled to compensation.[280] This ruling represents another departure from the Supreme Court's earlier opinions, which recognized that attorneys who represent plaintiffs are acting as private attorney generals and serving our national interest to eliminate unlawful discrimination for which they deserve compensation.[281] Within the last several years, the Supreme Court has handed down several decisions limiting the amount and scope for counsel fees in civil rights cases.[282] Collectively, these decisions threaten the viability of the civil rights bar and law.

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277. 109 S. Ct. 2732 (1989).

278. *Id.*

279. *Id.* at 2735-36.

280. *Id.* at 2736. Section 706(K) of Title VII provides for an attorney's fees award to a prevailing plaintiff unless such an award would be unjust. 42 U.S.C. § 2000e-5(k) (1982).

281. *See* Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 402 (1968).

282. North Carolina Dep't of Transp. v. Crest St. Council, 479 U.S. 6 (1986) (no counsel fees for civil rights claim resolved on the merits in administrative proceeding); Library of Congress v. Shaw, 478 U.S. 310 (1986) (federal agencies, unlike other defendants, are not liable for an adjustment to their fee to compensate for the delay in the award); Evans v. Jeff D., 475 U.S. 717 (1986) (defendant can make settlement offer contingent on waiver of fee claim); Marek v. Chesny, 473 U.S. 1 (1985) (right to fees can be cut off by offer of judgment); Webb v. Board of Educ., 471 U.S. 234 (1985) (no counsel fees for time spent pursuing optional administrative remedies prior to filing action).

It goes without saying that, during the Term, the Supreme Court was dominated by a five-to-four conservative majority. I do not need to say how I feel about that, do I? This has had a devastating impact on civil rights cases and a demoralizing effect on the status of civil rights in America. It is now more difficult for victims of discrimination to institute lawsuits. Look at *Lorance*. It is now more costly for victims to litigate. Look at *Wards Cove*. It is now more burdensome for victims of discrimination to prove their claims. Look at *Price Waterhouse*. It is now more difficult for victims of discrimination to maintain the gains that they have obtained through litigation. Consider *Wilks*. It is now more difficult for those attorneys pursuing civil rights cases to be fairly compensated when they are seeking to eliminate a societal wrong. Consider *Zipes*.

In light of these Supreme Court opinions, now is the time for us to respond, and the question is: will we? I leave you with Justice Harry Blackmun's dissent in *Wards Cove*: "One wonders whether the [Court] still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was."[283]

Thank you very much.

*Question from Panelist Alfred Blumrosen:*

I would like to ask whether both of you agree that the following advice ought to be given to the employers' lawyers who make up the audience here.[284]

*Martin v. Wilks*[285] has created a risk of opening up consent decrees, with a possibility of monetary liability against the employer. Would it not be wise for all of the attorneys of these towns and cities that have consent decrees or other affirmative action plans, whether consent decrees or not, to rush down and

283. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2136 (1989) (Blackmun, J., dissenting).

284. For a more extensive discussion of these points, see Blumrosen, *The 1989 Supreme Court Rulings Concerning Employment Discrimination and Affirmative Action: A Minefield for Employers and a Goldmine for Their Lawyers*, 15 EMPLOYEE REL. L.J. 175 (1989).

285. 109 S. Ct. 2180 (1989).

examine the EEOC's Guidelines on Affirmative Action[286] and make sure that their plans conform to those Guidelines?

The Guidelines were written in 1978. Employers should state in the plan that it conforms to those Guidelines. If the plan does conform, the employer will have an immunity from damage liability, at least in any "reverse discrimination" suit brought under Title VII that claims the Affirmative Action Plan was improper. I believe that the immunity you get under Title VII may also extend to sections 1981 and 1983. There is a second piece of advice, and I would like you to comment on this one, too. Although *Wards Cove*[287] certainly puts a burden on plaintiffs, there is a reverse twist. The reverse twist is that the Court assumed that every employer in the country was busily engaged in complying with the EEOC Uniform Guidelines on employee selection procedures, which require the employer to identify each selection procedure that has a disparate impact and keep records of the disparate impact. Now, if employers were not doing that, they run the risk that an adverse inference could be drawn from their failure. That adverse inference would cure some of the difficulties that appear to exist in connection with the *Wards Cove* case.

I am suggesting that there is a way of partially coping with *Martin v. Wilks*, at least to the extent of reducing the risk of damage actions being successfully maintained by whites, and that plaintiffs may have it a little bit easier than one might think if the employers have failed to comply with the Uniform Guidelines. Could the two of you comment on that?

*Gail Wright-Sirmans:*

My comment would be to follow your advice.

*William Bradford Reynolds:*

I do not have any problem with the advice. I would just alert you that the Guidelines have been revised in the last eight years.[288] *Teal*, which is the "bottom-line decision" of the

286. 29 C.F.R. § 1608 (1989).

287. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989).

288. *See* 29 C.F.R. §§ 1604-1607 (1989).

Court, is what I suspect precipitated it.[289] Now, it has not been totally overhauled, but there have been some revisions.

So, I would just say, if you do it, be sure that you are attuned to what the Guidelines say. My own sense is that the Guidelines may not provide too much cover in this instance for employers that are in serious disagreement with the Court. Given *Croson*—an interesting point on which nobody commented earlier is the impact of *Croson* on federal programs and the Guidelines—it seems to me that employers are best advised to either fashion or re-fashion these kinds of affirmative action programs so as to emphasize the traditional outreach and training programs that are neutral on race and gender parameters. This is something that we did with remarkable success in terms of opening up employment opportunities for minorities and women for eight years while I was at the Justice Department.

But, I do not have any problem with looking at the Guidelines. It is good advice. I would just caution that *Croson* has some impact at the federal level that is going to be felt, if it has not already. The Supreme Court's remand of *H.K. Porter*[290] suggested that federal programs may be equally vulnerable if they do, indeed, proscribe any kind of affirmative action preference. If this is the case, the EEOC Guidelines suffer some; so, I am not sure that Professor Blumrosen has an airtight answer. But, it certainly helps to look at the Guidelines.

*Question from Panelist Eileen Kaufman:*

Mr. Reynolds, I am eager to hear your response to Professor Wright-Sirmans's characterization of the Court's conduct in

289. Connecticut v. Teal, 457 U.S. 440 (1982) (basing promotions on written test, which is not related to job performance and which has a disparate impact on black candidates, violates Title VII even if employer actually promotes greater percentage of blacks than whites who passed test in order to have nondiscriminatory "bottom line").

290. H.K. Porter Co. v. Metropolitan Dade County, 825 F.2d 324 (11th Cir. 1987) (upholding, under equal protection clause, affirmative action program that required five percent of transit system construction to go to minority business enterprises), *vacated sub nom.* City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989).

the cases that were described this afternoon as judicial activism. She used *Wards Cove*[291] as an example,[292] and *Patterson*[293] is certainly another good example of that. Would you agree with that characterization?

*William Bradford Reynolds:*

You know, when you turn these labels around, it is interesting that the dissent always assumes that the other side is being activist, and it does not matter what the case is or what the issue is. I think that *Wards Cove*, for example, fits very nicely with what the Court originally said in *Griggs*. It seems to me that the Court had returned to the mosaic that it put in place in the 1971 case.[294] *Price Waterhouse* is not a case that suggests the Court operated in what I would call an "activist" mode. These were cases dealing with interpretation issues. The Court had many courts of appeal decisions that it also tried to deal with that were going in different directions. I think that it was a very valiant effort to bring things back into line.

One of the things I would mention, and this was mentioned earlier, is that these battles really move to the legislative front; and that is probably the right response. If racial harassment is something that is not reached by section 1981, and the Supreme Court has told us so,[295] and it is reached by Title VII, but Title VII does not give a sufficient enough remedy to make the prohibition meaningful, then Congress certainly can address and repair that problem. I also think that, if *Wards Cove* is a case that causes sufficient discomfort, the political process has a mechanism for dealing with that concern, and it can cer-

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291. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989).

292. *See supra* notes 215-52 and accompanying text.

293. Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989).

294. The *Wards Cove* Court noted:

> *Griggs* . . . construed Title VII to proscribe "not only overt discrimination but also practices that are fair in form but discriminatory in practice." Under this basis for liability, which is known as the "disparate impact" theory and which is involved in [*Wards Cove*], a facially neutral employment practice may be deemed violative of Title VII without evidence of the employer's subjective intent to discriminate that is required in a "disparate treatment" case.

*Wards Cove Packing Co.*, 109 S. Ct. at 2119 (citations omitted).

295. *See* Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989).

tainly amend the provisions of Title VII or some other civil rights statute to address that. My own sense is that *Wilks* and *Croson* are very much of a constitutional stripe, and, therefore, legislative action in those areas might be more difficult. *Lorance* and the statute of limitations cases are, I would also say, capable of being dealt with legislatively.

*Gail Wright-Sirmans:*

When I mentioned the *Wards Cove* case, one of the other statements made, and something that has been articulated by the Justice Department and, ultimately, by the EEOC, upon which they are all taking a very conservative bent, was that *Griggs* had not worked. But, this notion that the burdens of proof in disparate impact cases had not worked was really speculative and actually just a statement without any support at all. In fact, the notion that *Griggs* had somehow encouraged employers to develop or use goals and quotas was something else that was speculative.

These kinds of arguments tend to frighten us because when we look for the truth of them, when we look for some facts, something to substantiate those really bold assertions, there seems to be nothing there. That concerns me. Now, when the Court itself begins to accept or adopt those kinds of assertions, a Court, as I tell my students, that is built upon fact and law, then I think that we need to be concerned. We need to read the opinions and perhaps need to ask former members of the Justice Department where the facts were that supported those assertions. Because, otherwise, I think that they are very unfair, and very unfounded, and create a certain type of fear and unneeded paranoia within our society.

The notion that there are legislative efforts and initiatives going on is true. We still speak to the same people, even though I am no longer in the Fund, and Representative Hawkins and Senator Kennedy, Democrats from California and Massachusetts, respectively, already are putting together and looking at bills to present that will deal with some of the fallout. And, in that sense, I guess we can say our system of government does work.

*Question from Panelist Gary Shaw:*

I guess I was struck by the contrast in presentations of Mr. Reynolds and Professor Wright-Sirmans. It is actually a contrast that a number of us on the faculty at Touro have discussed over the years. When Mr. Reynolds got up, what I heard was a discussion of five cases based, ostensibly, upon neutral legal principles. He, I thought very ably, explained what the Court said in these five cases and proceeded to tie the cases together and tried to make them consistent vis-a-vis these neutral legal principles. When Professor Wright-Sirmans spoke, her comment was not so much on neutral legal principles, although she certainly addressed those issues as well, but, rather, she proceeded to talk about the fact that the result of these neutral legal principles, these decisions that purportedly were made according to neutral legal principles, all seem to disadvantage minorities. They all seem to make it much more difficult for minorities to gain redress within the legal system.

I guess the first question, via Professor Wright-Sirmans, is that I take it that you do not consider that to be a coincidence. Second, to give Mr. Reynolds some rebuttal, could you explain how it is that this discourse in neutral legal principles ultimately resulted in five cases whose cumulative effect seems to have made it significantly more difficult for minorities to gain redress in the legal system.

*Gail Wright-Simans:*

I think the better discussion will come from Mr. Reynolds on that question. But, I should say that even a conservative like Bruce Fein and I agree on something. I find it hard to believe that Mr. Fein and I agree on anything, but, in discussing or speaking on the *Wards Cove* case, he said, and I quote: "its practical effects will be to enormously increase the burden on the plaintiffs in challenging business hiring practices."[296] I do not think there is any mystery as to what the impact will be, and I do not think that Mr. Reynolds will disagree.

Now his position may be that there should be increased burdens. But I would say that, in our society, we should look at

296. N.Y. Times, June 11, 1989, § 3, at 1.

the fact that we are still very much a racially stratified country. When we look at employment and employment statistics, and we go back and look at the very thing that Congress looked at when it created Title VII of the Civil Rights Act of 1964 and when it amended it in 1972, we find that we are facing the same kinds of problems within our work force. I think that those problems still need to be addressed in the same way that the Court has addressed them.

*William Bradford Reynolds:*

Well, I guess that my first reaction is that I think our court system and our legislators deal with the policy ramifications that result. I am not sure that I have the same degree of agreement in response on the kind of burdens that we are talking about here. I think that what the Court did is put the civil rights laws, with regard to burdens of proof, in the same place that all our other laws are on the books. But, I have no problem at all if Congress wants to change the landscape. That is Congress's domain.

It seems to me that one fundamental principle to which the Court adhered in all the cases was the principle of nondiscrimination on account of race or on account of gender. The Court says that runs both ways and in all directions, and it matters not whether you are black, white, Hispanic, or woman or man because the laws as they are written do not assign preferences unless there is a compelling reason to do so. Now, if Congress wants to change that fundamental principle, that is Congress's prerogative and I think that is where it ought to be changed. So, I guess in terms of talking about the cases in the context of what was decided and with some degree of neutrality, I would hope that our Supreme Court, and all of our federal courts, would, indeed, approach these legal issues that way.

Remember, courts get these issues in a very truncated, limited way. They get a case and they have to deal with it on the four corners of the facts. They do not have the benefit of all the great policy discussions and debates that can go on in Congress or elsewhere. They are presented with the case by briefs, which are, at best, adequate. To then suggest that we have our courts make great pronouncements that go beyond the legal

principles presented in the case is asking them to do something that they are not very well-equipped to do.

When the issue comes up in Congress, I may well argue that some of the changes, if, indeed, there are changes proposed, move us in a direction that is not faithful to the principles of non-discrimination. I am willing to engage that debate in the halls of Congress, and, if I lose, that is the way the process works. I am prepared to accept that. But, I think that the focus on the policy implications and these fundamental legal principles should be with Congress so that the courts will not get involved in what they would prefer the result to be and who they would prefer to see advantaged or disadvantaged by a particular ruling.

*Gail Wright-Sirmans*

I think it is clear that we need to read the cases ourselves, and I think that we certainly need to read the *Wards Cove* case. When we look at the opinion and consider the dissenting opinions, particularly the dissent of Justice Stevens,[297] it becomes very clear that the Court itself is concerned about the role that it is playing in changing the law from what it has been. The dissenting opinions of the Court itself are very troubled by the very active role the Court is taking in reducing the law from what it was to making it what it is.

297. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2128 (1989) (Stevens, J., dissenting); *id.* at 2136 (Blackmun, J., dissenting).