EMPLOYMENT DISCRIMINATION IN THE UNITED STATES IN 1989: REVISIONS OR A PAUSE*

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This is the second time I have participated in the Roundtable on Employment Law organized by Professor Vogel-Polsky at the Institute. Needless to say, I am very honored by your kind invitation, and very pleased to be here. Since everybody here is well acquainted with the "law of employment discrimination" in the United States, I will limit my remarks to a few very recent decisions of the Supreme Court of the United States which have generated some controversy, and indeed, some fear that the era of continuous expansion in the civil rights area may be ending.[1]

The decisions here under consideration were issued this year, in 1989, the year in which we celebrate the twenty-fifth anniversary of the Civil Rights Act of 1964. Title VII of the Act provides in part:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .[2]

This proposition, when read in isolation, sounds simple enough. Discrimination on account of the suspect classifications is prohibited. Discrimination, it might appear, is a factual matter, e.g., unequal

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[1] *E.g.*, The New York Times on June 13, 1989 published commentaries on some of the recent decisions under the subtitles "Shift to Right Seen" and "Ruling Called Setback to Blacks and Women in Affirmative Action." The article states:

> The actions [of the Court] showed that former President Ronald Reagan has largely accomplished his goal of creating a conservative Supreme Court majority willing to reverse the Court's direction on civil rights . . . 'The Supreme Court is dealing blow after blow to 25 years of progress in civil rights law,' said Representative Don Edwards, the California Democrat who heads the Judiciary Committee's Subcommittee on Civil and Constitutional Rights.

N.Y. Times, June 13, 1989, at 1, col. 6.

[2] 42 U.S.C. § 2000e-2(a) (1981).

pay of men and women for equal work. It must be proven, and if so proven it violates the Act. When one considers that, as a practical matter, the beginning of the end of racial segregation in the United States came only in 1954,[3] a fact-sensitive approach to discrimination cases may have been practical in the early stages of the development of law under Title VII.

As we all know, courts in the United States are to a certain extent—and within the limits of political prudence—lawmaking bodies. In the constitutional arena, the Supreme Court of the United States, and to a lesser extent lower courts, "construe"[4] our living Constitution, in that the Court is constantly adapting the 18th century constitutional text to modern society and conditions. This constitutional role of the Court has served the United States extraordinarily well, particularly if one compares the evolutionary constitutional continuity in the United States with wide swings of legal and political regimes in a number of civil law countries in the last two hundred years. The role of the courts in the civil rights area has been what a Yale law professor, Owen Fiss, has characterized as bringing "a recalcitrant reality closer to our chosen ideals."[5] Fiss' proposition is a broad one, related to his view of the role of the courts as organs of state interventionism, and as such has a heavy ideological bent. Yet, in the employment discrimination area, it cannot be doubted that the American society has accepted that, in the abstract, discrimination on account of suspect classifications is reprehensible.

American industry has quickly adapted to the idea that discrimination is not only prohibited, but also that it is very expensive. As is well known, American corporations of any substance are constantly seeking and receiving legal advice. They have special departments such as Human Resources departments and Affirmative Action officers which constantly deal with legal and contractual employment matters. Cases of overt employment discrimination which would lend themselves to relatively easy proof by plaintiffs at some point in time between 1964 and today receded into the background when compared with various subtle forms of discrimination, and, in particular, with a goal of a truly systemic change: race, gender, etc. must not only be irrelevant to employment decisions, but also members of these

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[3] Brown v. Board of Education of Topeka, 349 U.S. 294 (1955).

[4] The term construction, as a creative process, is often contrasted with "mere" interpretation.

[5] Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1089 (1984).

suspect classifications must have a special and, perhaps, accelerated opportunity to become integrated in management, professions, and the work force in general at all levels. The goal became a homogenization of the work force in the context of pervasive past discrimination, and in the context of psychological vestiges of the bygone era of pronounced and then acceptable intolerance. To achieve this goal, members of the suspect classifications, or "minorities,"[6] received, through judicial decisions, somewhat favored treatment designed to remedy the effects of past discrimination. Very roughly there have been two categories of devices to achieve the goal: affirmative action and various legal devices such as inferences or presumptions inherent in e.g. mixed motive or disparate impact cases.

In my judgment, which is probably not very controversial on this point, the Supreme Court and the lower federal courts have dealt with the facts of individual employment discrimination cases with a very broad "brush" to fashion goal oriented and conduct rules. In a robust and uniquely American way, the courts, through findings of liability and through new rules and dicta, have been sending a clear message to American employers: you ingenious capitalist enterprises, make sure that you work toward the inclusion of minorities in your work force, and make sure that you constantly instill in your work force the new, modern thinking concerning minorities; invent a way to hire minorities and teach them the necessary skills if they do not have them; we do not care how you do it, but do it. A part of the message has been, until 1989, a certain psychology which Supreme Court decisions have to some extent justified: if an employment discrimination case reaches the Supreme Court, there is a significant likelihood that the plaintiff will win.

When one deals with a goal oriented jurisprudence, even tangible progress rarely makes the goal less elusive. In the 1970's, the questions asked were, for example, how many lawyers or accountants are blacks or women,[7] how many blacks or women are in the managerial positions with corporations? Today, there are additional questions: how many blacks or women are partners in professional partnerships, how

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[6] The term "minority" sometimes loses linguistic meaning and becomes descriptive of a favored group. For example, women, who form a majority of the U.S. population, are referred to as a minority for purposes such as affirmative action. *Cf.* Frontiero v. Richardson, 93 S. Ct. 1764, 1770 and n.17 (1973).

[7] Today, roughly a third of the associates of large law firms are women. *See* Judith Kay, *Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality*, 57 FORDHAM L. REV. 111, 119, n.47 (1988).

many blacks or women are members of corporate boards? Yet, tangible results of remedies for past discrimination are likely to create reactions, including adverse reactions. There is a notion of "reverse discrimination,"[8] discrimination against one traditionally considered a member of the majority. In my judgment, an almost necessary tension has arisen in modern liberal democracy: individualism which, as the current self-destruction of communism appears to indicate, is inherent in man versus the goal of social justice and welfare for all. It seems to me that it is inherent in evolutionary process that there be pauses and balancing acts.

The Supreme Court decisions addressed here, as well as other recent Supreme Court decisions, changed the psychology, the expectations in the employment discrimination area. In my judgment, these decisions somehow "lowered" Title VII cases from the "policy level" to an "ordinary legal level": for instance, with respect to the quantum of the defendant's proof in mixed motive cases or to collateral attacks on consent decrees. Also, it appears that these cases, particularly *Price Waterhouse v. Hopkins*[9] and *Wards Cove Packing Company, Inc. v. Atonio*,[10] suggest greater attention to the actual facts of each case, more decision-making and less lawmaking. However, while the Justices of the Supreme Court themselves are in disagreement whether these decisions accomplished changes in law of any significance, these decisions do not detract from the sophisticated system of employment discrimination law which continues to benefit members of the suspect classifications, and which, I think, does not have a parallel in the contemporary Europe.

On May 1, 1989, the Supreme Court decided *Price Waterhouse v. Hopkins*.[11] Hopkins, the plaintiff, was a senior manager in Price Waterhouse, which is a giant national accounting firm with offices throughout the United States. In 1982, she was proposed for partnership, but the decision was to hold her candidacy for one year, which was the employer's action before the Court.[12] "Of the 622 partners at the firm at that time, 7 were women. Of 88 persons proposed for partnership that year, only 1—Hopkins—was a

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[8] *See, e.g.*, Regents of the University of California v. Bakke, 438 U.S. 265, 413 (1978).

[9] 109 S. Ct. 1775 (1989).

[10] 109 S. Ct. 2115 (1989).

[11] 109 S. Ct. 1775 (1989).

[12] Ms. Hopkins was later constructively discharged by denial of partnership. *Id.* at 1781 n.1.

woman."[13] She "played a key role"[14] in winning a 25 million dollar contract with the U.S. Government, functioning "virtually at the partner level."[15] She was aggressive but respected by clients who considered her "extremely competent [and] intelligent."[16] However, she was "overly aggressive, unduly harsh, difficult to work with and impatient with staff."[17] Her problems with subordinates in the office "doomed her bid for partnership"[18] in the firm's eyes. The trial court found those problems to be real. However, she was also a subject of sexual stereotyping. She was told to take "a course at charm school" and was described as "macho."[19] She was criticized for her use of profanities, and when advised of the firm's decision to put her candidacy on hold, she was told that she should "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled and wear jewelry."[20]

Obviously, looking like a lady and behaving like a lady is not a "bona fide occupational qualification" for a manager who proved herself extremely successful with clients. The finding of sexual stereotyping and of interpersonal problems make this a "mixed motive case," one of both illegitimate and legitimate motives. If the employer took the adverse employment action without reliance on the illegitimate cause, he did not violate the act. It is readily apparent that the rules on distribution of burden of proof, the type and quantum of evidence, may come close to being outcome determinative in difficult cases. There is no question that the plaintiff must prove that the employer relied upon prohibited consideration in reaching a decision adverse to the employee. In the *Hopkins* case, this is easy to do. The testimony of the partners who evaluated Hopkins will suffice. The question presented is who has the burden to show what would have happened to Hopkins had Price Waterhouse not taken gender into account.

The Supreme Court's plurality opinion was written by Justice Brennan and joined in by Justices Marshall, Blackmun, and Stevens. According to the plurality, once the plaintiff proves that "the em-

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[13] *Id.* at 1781.
[14] *Id.* at 1782.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*

ployer relied upon sex based considerations"[21] the burden shifts to the employer to prove that "even if it had not taken gender into account, it would have come to the same decision regarding a particular person."[22] For the plurality, "the employer's burden is most appropriately deemed an affirmative defense."[23] The employer "should be able to present some objective evidence . . . [and] must show that its legitimate reason, standing alone, would have induced it to make the same decision."[24]

Justice Kennedy, the author of the dissenting opinion of which Chief Justice Rehnquist and Justice Scalia joined, rejects the burden shifting approach, and interprets the statute and prior decisions of the court as requiring the plaintiff prove "but-for" causation, that the prohibited motive was the cause of the adverse action.[25]

The decision of the Court is in fact defined by concurring opinions of Justices White and O'Connor. According to Justice O'Connor, shifting the burden of proof as per the plurality view should be limited "for use in cases such as this one, where the employer has created uncertainty as to causation by knowingly giving substantial weight to an impermissible criterion."[26] Justice White agreed and rejected the proposition of objective contemporaneous evidence: If "the employer credibly testifies that the action would have been taken for the legitimate reasons alone, this should be ample proof."[27] Justice Kennedy interprets the actual holding in *Hopkins* as follows:

> I read the opinions as establishing that in a limited number of cases Title VII plaintiffs, by presenting direct and substantial evidence of discriminatory animus, may shift the burden of persuasion to the defendant to show that an adverse employment decision would have been supported by legitimate reasons. The shift in the burden of persuasion occurs only where a plaintiff proves by direct evidence that an unlawful motive was a substantial factor actually relied upon in making a decision. . . . [T]he evidentiary scheme created today is not for every case in which a plaintiff produces evidence of stray remarks in the workplace. . . . Where the plaintiff makes the requisite showing, the burden that shifts to the employer is to show

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[21] *Id.* at 1786.
[22] *Id.*
[23] *Id.* at 1788.
[24] *Id.* at 1791-92.
[25] *Id.* at 1808-09.
[26] *Id.* at 1796.
[27] *Id.*

> that legitimate employment considerations would have justified the decision without reference to any impermissible motive. . . . The employer's proof on the point is to be presented and reviewed just as with any other evidentiary question. . . .[28]

The Court held that the employer must make his showing by a preponderance of the evidence under "conventional rules of civil litigation"[29] rather than by clear and convincing evidence as the courts below deemed appropriate.

The *Hopkins* decision demonstrates the pitfalls for plaintiffs in mixed motive cases, which are more typical today than the relatively simple pretextual cases. The greater the preoccupation with technical legal dogmatics, the more difficult it is for the lower courts to resort to a functional analysis promoting the broad purposes of Title VII. The *Hopkins* decision is a balancing act between the interests of the plaintiff and the traditional rights of the employer, in which the Court takes a less overtly activist role than it formerly did.

The Court decided a disparate impact case, *Wards Cove Packing Company, Inc. v. Atonio*[30] on June 5, 1989. The opinion of the Court was delivered by Justice White and joined by the Chief Justice and Justices O'Connor, Scalia and Kennedy.

The plaintiffs-respondents, a class of non-white cannery workers, brought this Title VII action in 1974. They alleged that a variety of employers' practices "were responsible for the racial stratification of the work force . . . ."[31] The Ninth Circuit Court of Appeals held that the plaintiffs made "a prima facie case of disparate impact . . . solely on respondents' statistics showing a high percentage of non-white workers in the cannery jobs and a low percentage of such workers in the non-cannery positions."[32]

The facts of the case are fairly simple. The petitioners "operate salmon canneries in remote and widely separated areas of Alaska."[33] The canneries operate only during the salmon runs in the summer months. "Cannery jobs" are unskilled positions on cannery lines, filled by non-whites, Filipinos, and Alaskan natives who reside near the canneries. The Filipinos are hired through a hiring hall agreement

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[28] *Id.* at 1806.
[29] *Id.* at 1792.
[30] 109 S. Ct. 2115 (1989).
[31] *Id.* at 2120.
[32] *Id.* at 2121.
[33] *Id.* at 2119.

with a union local. The "non-cannery" jobs are filled predominantly by whites "who are hired during the winter months from the companies' offices in Washington and Oregon."[34] The non-cannery jobs are better paid than cannery jobs, and include such jobs as accountants, electricians, and doctors.[35] The Court points out that "comparing the number of non-whites occupying these jobs to the number of non-whites filling cannery workers positions is nonsensical."[36]

The Court continued:

> Such a result cannot be squared with our cases or with the goals behind the statute. The Court of Appeals' theory, at the very least, would mean that any employer who had a segment of his work force that was—for some reason—racially imbalanced, could be haled into court and forced to engage in the expensive and time-consuming task of defending the "business necessity" of the methods used to select the other members of his work force. The only practicable option for many employers will be to adopt racial quotas, insuring that no portion of his work force deviates in racial composition from the other portions thereof; this is a result that Congress expressly rejected in drafting Title VII.[37]

The Court held that " 'the proper comparison (is) between the racial composition of (the at-issue jobs) and the racial composition of the qualified . . . population in the relevant labor market.' "[38]

Since the statistical disparity was not sufficient to make a prima facie case, the question remained whether the disparity was caused by specific challenged employment practices, and whether such practices have been justified by business considerations. The burden of persuasion again became the central issue in the opinion. The plaintiff must identify specific employment practices challenged, and must demonstrate that the application of such practices has a significantly disparate impact on the employment opportunities of whites and non-whites.[39] The rest of the opinion deserves to be quoted in its totality; the case citations will provide the European reader with important sources of our present day law of employment discrimination.

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[34] *Id.*
[35] *Id.* at 2122.
[36] *Id.*
[37] *Id.*
[38] *Id.* at 2121, *quoting* Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).
[39] *Id.* at 2124-25.

If, on remand, respondents meet the proof burdens outlined above, and establish a prima facie case of disparate impact with respect to any of petitioners' employment practices, the case will shift to any business justification petitioners offer for their use of these practices. This phase of the disparate-impact case contains two components: first, a consideration of the justifications an employer offers for his use of these practices; and second, the availability of alternate practices to achieve the same business ends, with less racial impact. *See, e.g., Albermarle Paper Co. v. Moody*, 422 U.S., at 425, 95 S. Ct., at 2375. We consider these two components in turn.

(1)

Though we have phrased the query differently in different cases, it is generally well-established that at the justification stage of such a disparate impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. *See, e.g., Watson v. Fort Worth Bank & Trust Co.*, 487 U.S., at ____, 108 S. Ct. at 2777; *New York Transit Authority v. Beazer*, 440 U.S., at 587, n.31, 99 S. Ct. at 1366, n.31; *Griggs v. Duke Power Co.*, 401 U.S., at 432, 91 S. Ct., at 854. The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices. At the same time, though, there is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils we have identified above. See *supra*, at 2122.

In this phase, the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff. To the extent that the Ninth Circuit held otherwise in its en banc decision in this case, see 810 F.2d, at 1485-1486, or in the panel's decision on remand, see 827 F.2d, at 445, 447—suggesting that the persuasion burden should shift to the petitioners once the respondents established a prima facie case of disparate impact—its decisions were erroneous. "[T]he ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff *at all times*." *Watson, supra* 487 U.S. at ____, 108 S. Ct., at 2790 (O'Connor, J.) (emphasis added). This rule conforms with the usual method for allocating persuasion and production burdens in the federal courts, see Fed. Rule Evid. 301, and more specifically, it conforms to the rule in

disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration. See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256-258, 101 S. Ct. 1089, 1095-1096, 67 L.Ed.2d 207 (1981). We acknowledge that some of our earlier decisions can be read as suggesting otherwise. See *Watson, supra*, 487 U.S. at ____, 108 S. Ct., at 2777 (Blackmun, J., concurring). But to the extent that those cases speak of an employer's "burden of proof" with respect to a legitimate business justification defense, *see, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 329, 97 S. Ct. 2720, 2726, 53 L.E.2d 786 (1971), they should have been understood to mean an employer's production—but not persuasion—burden. Cf., *e.g., NLRB v. Transportation Management Corp.*, 462 U.S. 393, 404, n.7, 103 S. Ct. 2469, 2475, n.7, 76 L.Ed.2d 667 (1983). The persuasion burden here must remain with the plaintiff, for it is he who must prove that it was "because of such individual's race, color," etc., that he was denied a desired employment opportunity. See 42 U.S.C. § 2000e-2(a).

(2)

Finally, if on remand the case reaches this point, and respondents cannot persuade the trier of fact on the question of petitioners' business necessity defense, respondents may still be able to prevail. To do so, respondents will have to persuade the fact finder that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interest[s];" by so demonstrating, respondents would prove that "[petitioners were] using [their] tests merely as a 'pretext' for discrimination." *Albermarle Paper Co., supra*, 422 U.S., at 425, 95 S. Ct., at 2375; see also *Watson*, 487 U.S., at ____, 108 S. Ct., at 2779 (O'Connor, J.); *Id.*, at ____, 108 S. Ct., at 2781 (Blackmun, J.). If respondents, having established a prima facie case, come forward with alternatives to petitioners' hiring practices that reduce the racially-disparate impact of practices currently being used, and petitioners refuse to adopt these alternatives, such a refusal would belie a claim by petitioners that their incumbent practices are being employed for nondiscriminatory reasons.

Of course, any alternative practice which respondents offer up in this respect must be equally effective as petitioners' chosen hiring procedures in achieving petitioners' legitimate employment goals. Moreover, "[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining wither they would be equally as effective as the challenged practice in serving the employer's legitimate business goals." *Watson, supra*, at ____, 108 S. Ct., at 2790 (O'Connor, J.). "Courts are generally less

> competent than employers to restructure business practices," *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578, 98 S. Ct. 2943, 2950, 57 L.E.2d 957 (1978); consequently, the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternate selection or hiring practice in response to a Title VII suit.[40]

A somewhat angry dissent of Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, begins as follows:

> Fully 18 years ago, this Court unanimously held that Title VII of the Civil Rights Act of 1964 prohibits employment practices that have discriminatory effects as well as those that are intended to discriminate. *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L.Ed.2d 158 (1971). Federal courts and agencies consistently have enforced that interpretation, thus promoting our national goal of eliminating barriers that define economic opportunity not by aptitude and ability but by race, color, national origin, and other traits that are easily identified but utterly irrelevant to one's qualification for a particular job. Regrettably, the Court retreats from these efforts in its review of an interlocutory judgment respecting the "peculiar facts" of this lawsuit. Turning a blind eye to the meaning and purpose of Title VII, the majority's opinion perfunctorily rejects a longstanding rule of law and underestimates the probative value of evidence of a racially stratified work force. I cannot join this latest sojourn into judicial activisim.[41]

Admittedly, things are not as bad as Justice Stevens would make us believe. Yet, I must admit, I would not like to be an attorney representing a client on a contingency fee basis in a disparate impact case unless the facts (and inferences) would come close to evidence establishing a single motive case.

In *Martin v. Wilks*[42] decided on June 12, 1989, the court, in the opinion of the Chief Justice joined by Justices White, O'Connor, Scalia, and Kennedy, held that those not designated or made parties to a litigation resulting in consent decrees are not precluded from challenging employment decisions made in compliance with such decrees. The issue was viewed as concerning the ordinary application of the Federal Rules of Civil Procedure. At issue was a challenge by white fire fighters to consent decrees with included goals for the

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[40] *Id.* at 2125-27.
[41] *Id.* at 2127-28.
[42] 109 S. Ct. 2180 (1989).

hiring and promotion of black fire fighters in the City of Birmingham, Alabama.

It can be said that this case will now occupy a footnote in Conflict of Laws books, in chapters on judgments.

In *Lorance v. AT&T Technologies*,[43] yet another case decided on June 12, 1989, plaintiffs, three women, attacked a contractual modification on seniority of a tester classification on the ground of intentional discrimination based on sex. At issue was when the period of limitations under Section 703(h) of Title VII[44] begins to run. The Court concluded, "Because the claimed invalidity of the facially nondiscriminatory and neutrally applied tester seniority system is wholly dependent on alleged illegality of signing the underlying agreement it is the date of that signing which governs the limitations period."[45]

The factual problem in the case was that the plaintiffs had been demoted, feeling the effects of the contract, long after it was signed. As a practical matter, few union members are fully conversant with provisions of labor agreements.

Justice Marshall, in his dissenting opinion, joined by Justices Brennan and Blackmun, pointed to "the harsh reality of today's decision,"[46] which he deemed to be "glaringly at odds with the purposes of Title VII."[47]

There are various ways to view these cases. In the United States, it is the conventional wisdom to approach civil rights cases with one dominant criterion in mind: did the Court expand or contract the civil rights in question—employment rights of "*minorities*" and hence civil rights. Contraction of civil rights by the Supreme Court is deemed to be historically impermissible.

As was already suggested, the decisions are couched in abstract, technical terms—shift of the burden of persuasion, burden of persuasion versus burden of production of evidence, etc.—and in terms of conformity or non-conformity with precedents. At the same time, it is palpably obvious that the philosophical shift, if any, which these decisions represent involves a degree of recognition of "rights" of those who are not in a position identical to that of plaintiffs, as

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[43] 109 S. Ct. 2261 (1989).
[44] 42 U.S.C. § 2000e-2(h) (1982).
[45] 109 S. Ct., at 2268.
[46] *Id.* at 2270.
[47] *Id.*

opposed to *exclusive* preoccupation with plaintiffs and social change. For instance, an emphasis on legitimate business reasons of defendants—employers, a factual evaluation of the particular reason in a particular case, represents a recognition of some freedom of the employer. Treating consent decrees, i.e. settlements, under Title VII like any other judgments represents a recognition of rights or opportunities of those (non-minorities) who may arrive on the scene without participating in the settlement negotiations. Enforcement of seniority rules under labor agreements represents equality of treatment of all employees.

The balancing of rights in individual cases from a conceptual and philosophical standpoint is often quite easy. For instance, knowing that qualified and highly skilled non-white employees such as doctors, nurses, boat captains, etc. are in relatively short supply in the United States, and subject to competition among employers for affirmative action reasons even in choice locations in the United States, one must ask how Wards Cove is supposed to get such skilled non-whites to remote locations in Alaska for seasonal work and still remain in business? Is it not obvious that any highly skilled employee has to be lured to remote regions of Alaska by benefits which the unskilled laborer does not, and cannot economically command?

Obviously, a partnership should be able to demand that partners be pleasant and civil people. Of course, when a partnership is akin to a "factory" of accountants and when sexual stereotyping becomes palpably obvious, the approach of Justice O'Connor is almost dictated by the facts of the case, and is a rational solution to such facts as those in *Hopkins*.[48]

The problem is that without social engineering the term "sexual stereotyping" would be without legal significance, and no incentive would exist to overcome prejudice and to create a single entity—a person—for purposes of employment decisions.

Social engineering, remedies to overcome past discrimination as it is called by the American courts (the principal agents of social engineering in the United States), is like shock treatment. The goal must be the state of society in which there are only persons, and no minorities, and in which persons are treated as individuals rather than as parts of a "collective." At some point, the shock treatment must begin to give way to individual rights. The notions of fairness

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[48] 109 S. Ct. 1775 (1989).

of the American people will influence the outcome of the competition of ideas between the current majority of the Supreme Court and the liberal interest groups in the area of employment rights.

In my judgment, there is an argument for paying greater attention to facts in individual employment discrimination cases: recognized minorities, such as blacks, Hispanics, other non-whites, women, handicapped persons, religious groups, and those who aspire to achieve the legal status of a "minority," such as homosexuals, are becoming more and more diverse with respect to their status (as groups) in the American society. At the same time, there is an increasing diversity within each group. For instance, being a woman is less of a dominant characteristic for employment purposes today than it was in the 1960s. Handicapped persons have access to buildings which they did not have in the 1960s, etc. These advances are, of course, the beneficial and intended result of the shock treatment by social engineering in the civil rights area. All this, however, requires that the emphasis on group rights, as opposed to individual rights, does not remain static.

In conclusion, as mentioned above, I believe that the 1989 Supreme Court decisions in the Title VII area signal a greater attention to the facts of discrimination cases by American courts.