

Fall 9-1-2009

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Carter G. Phillips

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### Recommended Citation

Carter G. Phillips, *Lewis F. Powell Lecture*, 66 Wash. & Lee L. Rev. 1467 (2009),  
<https://scholarlycommons.law.wlu.edu/wlulr/vol66/iss4/3>

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# Lewis F. Powell Lecture

Carter G. Phillips\*

It is an honor and a pleasure to be invited to deliver the Justice Lewis F. Powell Lecture here at Washington & Lee. Because I did know the Justice, it seems fitting to begin with a personal comment or two about him. Hopefully, they will make clear why it was easy for me to accept the invitation to speak at this event.

In 1977, when I was clerking on the Seventh Circuit Court of Appeals for Judge Robert A. Sprecher, I applied to all of the Justices on the Supreme Court of the United States for a clerkship. I was fortunate enough to be invited to interview with Justice Powell. We had a conversation that lasted well over an hour. He served me tea and cookies and we talked (as I recall) mostly about foreign policy issues because that had been the subject of my undergraduate and masters theses. He had a deserved reputation as an engaging conversationalist.

I went away from the interview completely overwhelmed by the Justice's charm and thoughtfulness. A week or so later, I received the nicest rejection letter I have ever received. It turned out that the Justice actually had sent out an offer for his last available clerkship slot earlier on the day of the interview and so he no longer had a clerkship to offer me, but he rejected me in a way that made me feel better about myself than I would in being accepted for employment by virtually anyone else.

The story has a happy ending, which I did not learn about until many years later. On the day he rejected my application, Justice Powell hand wrote a letter to Chief Justice Warren Burger telling him that he had interviewed me as a candidate for one of his clerkships. Justice Powell explained that he was not in a position to offer me a clerkship, but he urged the Chief Justice to consider hiring me for one of his clerkships.

When I finally found out about the Justice's extraordinary act of kindness, I also was told by the Chief Justice's then-administrative assistant that Justice Powell had written such notes to the Chief Justice on three occasions and that all three times the Chief Justice had informed his law clerk interviewing

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\* Managing Partner, Sidley Austin LLP, Washington, D.C. This text was delivered as the seventh lecture in the Lewis F. Powell, Jr. Distinguished Lecture Series at the Washington and Lee University School of Law in April 2009.

committee to put the beneficiary of Justice Powell's gracious gesture at the top of the list of potential law clerks, and that the Chief Justice hired all three.

I suppose it is conceivable that I still might have clerked for Chief Justice Burger without that letter, but I have little doubt that Justice Powell was at least the "but for" cause of my career as an appellate lawyer. So, it seems quite likely that I would not be here as your speaker but for Justice Powell's touching act of kindness and generosity.

I will bore you with one more Justice Powell anecdote that has affected my career. In 2007, I received the Lewis F. Powell Award from the U.S. Chamber of Commerce. The award was created because Justice Powell had recognized that the quality of advocacy before the Supreme Court during the 1970s on behalf of business interests was not what it should be. It was better than most states could muster, but it was far behind the quality of the work of the Solicitor General of the United States.

To that end, Justice Powell was instrumental in creating the business litigation arm of the U.S. Chamber of Commerce, the National Chamber Litigation Center. The Center has filed amicus briefs in countless cases before the Supreme Court and assists litigators in their preparation for oral argument. I had a remarkable session at the Chamber last week before my argument in *Gross v. FBL Financial Services, Inc.*<sup>1</sup> on Tuesday, March 31, 2009, that I will talk some more about in a few minutes.

When my mentor and former partner, Rex E. Lee, resigned from the position of Solicitor General, Justice Powell encouraged him seriously to consider trying to develop a private practice aimed at upgrading the quality of business advocacy before the Court. That conversation helped motivate Rex to start what I believe was the first truly dedicated appellate practice in a major law firm. From that humble beginning an entire "Supreme Court Bar" has now developed that has dramatically reshaped litigation of business cases before the Court—and I would say clearly for the better.

Again, it is possible that all of this would have happened anyway, but it is hard not to give some measure of credit to Justice Powell for changing fundamentally how businesses litigate before the Supreme Court. As these anecdotes reveal, I owe many debts to Justice Powell and I never had an opportunity to express my appreciation to him personally before he passed away. So I am here to speak at a lecture series in his honor to repay some of that obligation.

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1. See *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2352 (2009) ("We hold that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action.").

I want to focus this evening on an issue that is and has been for quite some time a source of significant debate both within the Court and among Court watchers and that was also of keen interest to Justice Powell. That is the question whether it is better for the Court to be closely divided and decide matters more broadly—perhaps adopting bright line rules that are designed to provide more clarity in the law—or whether it is more appropriate for the Court to seek greater unanimity even if it inherently requires the Court to be more incremental in its decisionmaking.

I am reasonably certain that Justice Powell would comfortably have advocated the latter approach, and there is no question that Chief Justice Roberts has been trumpeting the twin values of unanimity and incrementalism. The latter testified during his confirmation hearings that "one of the things that the Chief Justice should have as a top priority is to try to bring about a greater degree of coherence and consensus in the opinions of the Court."<sup>2</sup> You might wonder whether greater coherence may be the enemy of more consensus, but that probably depends on whether the focus is on the number of opinions in a particular case as opposed to how the Justices divide between two opinions. To be sure, fewer opinions is unquestionably better and, as I will discuss in a few minutes, nothing is worse—at least for potential litigants—than plurality opinions. So if that is the Chief Justice's concern, then he is surely correct that the Court and the public are "not benefited by having six different opinions in a case."<sup>3</sup>

But pressing for consensus can result in a Court that deals with an issue at its least common denominator, which may eliminate divisiveness among the justices in a particular matter, but hardly promotes coherence. Here, I have in mind a case like *eBay Inc., v. MercExchange, L.L.C.*,<sup>4</sup> which was a patent case decided by the Court a few terms ago. The issue was whether the plaintiff in a patent infringement action is entitled automatically to an injunction whenever the jury finds that a valid patent has been infringed.<sup>5</sup> The Court "unanimously" ruled that the United States Court of Appeals for the Federal Circuit was wrong

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2. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 371 (2006) (statement of John G. Roberts, Jr., Nominee to be C.J. of the United States).

3. *Id.*

4. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006) (explaining that "the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards").

5. *Id.* at 391.

in construing the relevant provision of the Patent Act as mandating injunctive relief.<sup>6</sup>

The Court reversed the Federal Circuit in an opinion by Justice Thomas that was joined by the other eight Justices.<sup>7</sup> If Justice Thomas's relatively short opinion had been all that the Court issued in that case, then it would have fallen squarely into the Chief Justice's preferred mode—decide as little as possible or perhaps as little as is necessary and move on to the next case.

The problem is that there were two concurring opinions—one of which was authored by the Chief Justice himself.<sup>8</sup> He wrote on behalf of two other Justices arguing that in future cases, it would be important to recognize that patent law fundamentally and historically protects patents by granting injunctive relief to protect the patent holder's paramount right to exclude infringers from the patented rights.<sup>9</sup>

In sharp contrast, Justice Kennedy wrote for four Justices, arguing that in the day of modern technology, there is a significant risk that a patent holder might assert rights to a very trivial patent that, nevertheless, is embedded in a complex manufacturing process and that the threat of injunctive relief might provide the patent holder with a negotiating power far beyond the true economic or inventive value of the particular patent.<sup>10</sup> In those circumstances, Justice Kennedy argued that injunctive relief should be used sparingly and that damages would be a far more appropriate remedy.<sup>11</sup>

The point of discussing *eBay* is not to bring you up to speed on patent law developments, but to show how narrowly written and seemingly unanimous opinions can mask deep and significant differences of opinion about how the ruling of the Court should be implemented. From the Chief Justice's perspective, he generally would prefer that the Court nevertheless show greater unanimity even though significant differences remain among the Justices. The underlying disagreement that deeply divides the Court on the availability of injunctive relief in patent cases clearly will require the issue to be revisited at some point before too long.

Just as an aside, the post-*eBay* decisions of the lower courts—mostly district courts—have followed Justice Kennedy's approach more often than the Chief Justice's.<sup>12</sup> It is nonetheless fair to say that the issue is open to serious

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6. *Id.* at 394.

7. *Id.* at 388.

8. *Id.* at 395.

9. *Id.* at 394–95 (Roberts, C.J., concurring).

10. *Id.* at 396 (Kennedy, J., concurring).

11. *Id.* at 396–97.

12. *See, e.g.,* *z4 Techs., Inc. v. Microsoft Corp.*, No. 6:06-CV-142, 2006 WL 1676893, at \*1

debate among the lower courts and seems almost certain to make its way back to the Supreme Court.

While the Chief Justice pushes publicly for incrementalism and unanimity, Justice Scalia has openly criticized decisions that are too narrow. And Justice Brennan was legendary for observations in his heyday that, as long as he had five votes, he could do virtually whatever he wanted. Frankly, there is something to say for that. It was often in response to Justice Brennan's efforts that Justices Powell and Stewart—those who at the time occupied the middle of the Court—would try to stake out narrower grounds and, in some instances, would file separate opinions to limit the ultimate holding of the Court. *Regents of the University of California v. Bakke*<sup>13</sup> is the classic illustration of the principle as applied by Justice Powell. Justice Stewart's separate opinion in the obscenity case, *Jacobellis v. Ohio*,<sup>14</sup> is more memorable for its quip about knowing obscenity when he sees it than for having forced the case to be decided with a plurality opinion that required several later rounds of litigation over the meaning of obscenity. So the debate about unanimity versus clarity is a matter of some controversy among the members of the Court and has been for some time. And it is a debate in which Justice Powell played an active part.

My purpose here is to add to the debate the vantage point of the advocate. Generally, the consequences of narrow, unanimous rulings can be both positive and negative. A ruling that largely decides only the case before the Court does provide for relatively clear winners and losers. A 9–0 defeat on a narrow basis is generally less painful to an advocate than a 5–4 decision. There is always that nagging doubt when the decision is close as to whether there wasn't something that could have been said or done to tip the fifth vote in the other direction.

As an aside, I lost a case earlier this term, 5–4 in *Vaden v. Discover Bank*,<sup>15</sup> where the dissenters were the Chief Justice and Justices Stevens,

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(E.D. Tex. June 14, 2006) (finding that monetary damages was an adequate remedy at law for a future infringement of software activation patents).

13. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 267 (1978) (opinion of Powell, J.) (holding that race may be used as a factor in university admissions). In *Bakke*, Justice Powell provided the fifth vote in favor of invalidating a race-based admissions program at the Medical School of the University of California at Davis. *Id.* at 271. Justice Powell also joined four other Justices separately in holding that race may be used as a plus factor in university admissions program. *Id.* at 272.

14. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (finding that under the First and Fourteenth Amendments, criminal laws are constitutionally limited to banning "hard-core pornography," a term which is difficult to define).

15. See *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1273 (2009) (approving the "look through" approach to petitions to compel arbitration to determine whether a federal court has jurisdiction over the petition).

Breyer, and Alito.<sup>16</sup> In the three years since Justice Alito joined the Court, this is the only case with this particular alignment of Justices. Indeed, if I had been told that the Chief Justice and Justice Stevens were on my side or that Justices Breyer and Alito agreed with me, I would have predicted a likely unanimous win. To get all four and still lose was a bitter pill to swallow. Obviously, *Vaden* was not an ideologically charged case.<sup>17</sup>

The other good news for advocates in narrow 9–0 decisions is that the Court likely will have to revisit the issue sooner rather than later. Unfortunately, this may be good only for people who make a living litigating before the Court.

The problem with narrow decisions is that they do not provide much guidance either to lower courts or litigants on how they should proceed in future cases. Indeed, to go back to the *eBay* example, if all the Court had issued was Justice Thomas's opinion, then the lower courts would have had virtually no guidance as to how to approach the issue of injunctive relief for infringement. The incentives to litigate rather than to settle are significantly increased when there is uncertainty. In this situation, the district courts almost assuredly will reach inconsistent results, which of course will lead to unseemly forum shopping—already a serious problem in patent litigation.

The dueling concurring opinions in *eBay* do not really advance the ball much, if at all. They do provide clear alternative paths from which the lower courts can choose, but deciding which course to follow is left to the individual judge to work out. And there is no certainty that the judge will choose correctly when the issue makes its way back to the Supreme Court in due course and Justices Thomas and Alito will be forced to choose sides.

By contrast, imagine the situation if the Court had attempted to resolve the differences between the concurring opinions by attempting to reach a majority for either approach. In those circumstances, it would be far more likely that litigation would settle because the parties would have a better idea whether injunctive relief is more probable than not at the end of the process and can evaluate more accurately the costs and benefits of the litigation. Moreover, litigated cases likely would be resolved with more consistency among the lower courts.

I want to spend the bulk of the rest of this lecture focusing on another illustration of the problems that arise when the Court either cannot reach a majority or acts too narrowly. The problems and their implications for

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16. *Id.* at 1279.

17. *Id.* (holding that the district court lacked jurisdiction to consider Discover Bank's petition seeking an order to compel arbitration).

advocates arise in the context of employment discrimination and the specific issue is when, if ever, does the burden of proof shift to the defendant to show that it would have taken the same adverse employment action against an employee, if there had been no discriminatory animus that affected the employer's decision. This is an issue near and dear to my heart because it was an issue that I argued at the Supreme Court two days ago in *Gross*. But aside from being very much on my mind, the case and the law as it has developed that gave rise to this case illustrates nicely the problems posed by the Court moving in fits and starts and allows me to draw a few conclusions in a concrete setting. I apologize for those of you not interested in employment law, but a little bit of background is necessary to put the problem and the case into perspective.

Twenty years ago the Court decided *Price Waterhouse v. Hopkins*.<sup>18</sup> In that case the plaintiff was denied partnership in a large accounting firm.<sup>19</sup> The partnership decision was made by a committee based on input from many partners who worked with the plaintiff.<sup>20</sup> Many of the comments suggested that sexual stereotyping might have influenced the process.<sup>21</sup> Other comments suggested perfectly legitimate reasons for not promoting the plaintiff, including her inability to get along with fellow workers.<sup>22</sup>

The District Court for the District of Columbia decided that the plaintiff had shown that sex was a motivating factor in the employer's decision because of the importance attached by the committee to the partners' comments.<sup>23</sup> The court then considered whether Price Waterhouse had proved by clear and convincing evidence that it would have declined to promote Hopkins regardless of her gender and concluded that defendant had not sustained that unusually high standard of proof.<sup>24</sup> The Court of Appeals for the D.C. Circuit affirmed,<sup>25</sup> and the Supreme Court granted Price Waterhouse's petition for certiorari.<sup>26</sup>

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18. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (plurality opinion) ("[W]hen a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant" must prove "by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account").

19. *Id.* at 231–32.

20. *Id.* at 232.

21. *Id.* at 235.

22. *Id.* at 234.

23. *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1119–20 (D.D.C. 1985).

24. *Id.* at 1120.

25. *Hopkins v. Price Waterhouse*, 825 F.2d 458, 471–72 (D.C. Cir. 1987).

26. *Price Waterhouse v. Hopkins*, 485 U.S. 933 (Mar. 7, 1988) (No. 87-1167).

Although in theory the Court could have decided narrowly and unanimously that the district court erred by imposing the clear and convincing standard on *Price Waterhouse*, it did not settle for that narrow resolution of the case. Query whether Chief Justice Roberts, had he been on the Court, would have pushed the Court toward that narrow approach.

In any event, a plurality of the Court, in an opinion written by Justice Brennan, ruled that it was proper to shift the burden of proof to the defendant once the plaintiff had proven that sex was a motivating factor;<sup>27</sup> that the defendant should show by objective evidence that the same decision would have been made regardless of sex;<sup>28</sup> but that the courts below erred in applying the clear and convincing evidence standard.<sup>29</sup> Remember, I already have alluded to Justice Brennan's view of what can be done with five votes, but with four votes, the result can be somewhat chaotic.

There were two concurring opinions. Justice White argued that it was permissible to shift the burden of proof, but only when sex (or race or some other protected characteristic) was a "substantial factor" in the employer's decision.<sup>30</sup> How substantial factor relates to "motivating factor" as formulated by Justice Brennan was not explained by Justice White, but he suggested that his approach was consistent with Justice O'Connor's separate concurrence.<sup>31</sup> He disagreed, however, with the plurality on whether the employer needed to show that the individual's sex would have made no difference by "objective" evidence, arguing that any evidence would suffice.<sup>32</sup>

Justice O'Connor in her separate concurrence agreed that it was permissible to shift the burden of proof to the defendant in the unusual case where the employee, as in *Price Waterhouse*, shows with "direct evidence" that sex was a substantial factor in the employer's decision.<sup>33</sup> Both substantial factor and direct evidence were, however, left undefined in Justice O'Connor's opinion.<sup>34</sup>

To complete the picture, Justice Kennedy dissented, joined by Justice Scalia and Chief Justice Rehnquist.<sup>35</sup> Justice Kennedy argued that the Court had decided in a long line of cases that the burden of proof never shifts to the

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27. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244–45 (1989) (plurality opinion).

28. *Id.* at 252.

29. *Id.* at 252–53.

30. *Id.* at 259 (White, J., concurring).

31. *Id.* at 259–60.

32. *Id.* at 260–61.

33. *Id.* at 261 (O'Connor, J., concurring).

34. *Id.* at 276.

35. *Id.* at 279 (Kennedy, J., dissenting).

defendant under Title VII and he could see no reason why the rule should be different in this particular situation.<sup>36</sup>

For twenty years now the lower courts have struggled hopelessly to decide what is a substantial factor in an adverse employment decision and what constitutes direct evidence of an impermissible consideration by the employer. To make the issue even more complicated, Congress passed the Civil Rights Restoration Act of 1991<sup>37</sup> two years after *Price Waterhouse* and adopted a completely different approach under Title VII, but only under Title VII. Under that statute, if race, etc., is a "motivating factor," using Justice Brennan's term and the language from prior Supreme Court cases involving proof of discrimination by governmental bodies under the Fourteenth Amendment, then the defendant is liable under Title VII.<sup>38</sup> The employer is then permitted to prove that regardless of race, etc., it still would have taken the same adverse action against the employee.<sup>39</sup> But the effect of that showing is to limit the remedy available to the plaintiff; it does not eliminate liability. Congress in the 1991 Act limited this provision to Title VII; by reasonably clear implication, it is irrelevant to claims under the Age Discrimination in Employment Act of 1967 (ADEA),<sup>40</sup> the Americans with Disabilities Act of 1990 (ADA),<sup>41</sup> and other anti-discrimination provisions.<sup>42</sup> This inference is strengthened by the fact that Congress specifically adopted amendments to the ADEA that conformed to amendments it made to Title VII on other issues,<sup>43</sup> but did not do that here.<sup>44</sup>

After allowing the issues of burden shifting to percolate hopelessly among the lower courts for more than fifteen years, the Supreme Court revisited *Price Waterhouse* again two terms ago in *Desert Palace, Inc. v. Costa*.<sup>45</sup> In that case,

36. *Id.* at 279-95.

37. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

38. *Id.* § 107, 105 Stat. at 1075 (codified as amended at 42 U.S.C. § 2000e-2(m) (2000)).

39. *Id.* § 107, 105 Stat. at 1075-76 (codified as amended at 42 U.S.C. § 2000e-5(g)).

40. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602.

41. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327.

42. *See, e.g.*, Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (prohibiting discrimination based on gender in wages paid by employers engaged in commerce or in the production of goods for commerce).

43. *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 115, 105 Stat. 1071, 1079 (amending the ADEA by limiting the time period for bringing a civil action).

44. The Supreme Court, in its opinion in *Gross v. FBL Financial Services, Inc.*, which post-dated this speech, actually attached particular significance to this point. *See* *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2349 (2009) (holding that the ADEA does not authorize mixed-motive age discrimination claims).

45. *See* *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003) (holding that direct evidence

which arose under Title VII as amended in 1991, the employee prevailed in the district court where the jury was instructed that the case involved mixed motives.<sup>46</sup> Thus, the jury was told that the plaintiff was required to prove that sex was a motivating factor in the employer's decision to fire her, but the employer was permitted to prove in response that regardless of the prohibited considerations it would have fired her anyway.<sup>47</sup> The Ninth Circuit affirmed, but it did so in an *en banc* opinion that recognized that most circuits were following Justice O'Connor's concurring opinion in *Price Waterhouse* and requiring the plaintiff to prove by direct evidence that sex was a motivating factor under the 1991 Amendment.<sup>48</sup> Because the plaintiff in *Desert Palace* had relied solely upon circumstantial evidence, her case presumably would have been decided differently by other circuits.

The Court granted the employer's petition,<sup>49</sup> ostensibly to provide content to Justice O'Connor's direct evidence requirement. Instead, the Court affirmed unanimously based on the specific language in the 1991 Amendments, which the Court held had superseded *Price Waterhouse*, including Justice O'Connor's concurrence.<sup>50</sup> Congress had defined the burdens of proof, had not required direct evidence, and, thus, the imposition of liability was permissible.<sup>51</sup> As an aside, Justice O'Connor wrote separately to observe that her opinion would have been the holding of the Court in *Price Waterhouse* if Congress had not intervened<sup>52</sup>—a proposition that is far from clear, but her opinion does appear to be a bit protective of her prior handiwork.

In any event, a unanimous Court resolved the case cleanly, but narrowly (and in my judgment correctly). The decision also is a perfectly legitimate exercise of restraint in that it did not opine about the meaning of Justice O'Connor's opinion and simply assumed that it spoke for the Court because that issue could only arise in a non-Title VII case. Nonetheless, the Court left the lower courts in disarray on an issue that many thought the Court would resolve.

Fortunately for litigators (and in this case me), unresolved issues do not stay that way forever and we can fast forward to Tuesday when the Court heard

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is not required to obtain a mixed-motive jury instruction under 42 U.S.C. § 2000e-2(m)).

46. *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 857 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003).

47. *Id.* at 858.

48. *Id.* at 851–53.

49. *Desert Palace, Inc. v. Costa*, 537 U.S. 1099 (Jan. 10, 2003) (No. 02-679).

50. *Desert Palace*, 539 U.S. at 98–101.

51. *Id.* at 101–02.

52. *Id.* at 102 (O'Connor, J., concurring).

arguments in *Gross*. Once again, the court was asked to bring clarity to *Price Waterhouse*.<sup>53</sup>

In this case, the employee was demoted as part of a reorganization of the company.<sup>54</sup> His claim is that nothing else explains the employer's actions except for his age—56.<sup>55</sup> The district court, over the employer's objection, gave the burden shifting instruction derived from Title VII: If the plaintiff shows by a preponderance of the evidence that age was a motivating factor, then the employer bears the burden of proving that nonetheless the employee would have been demoted.<sup>56</sup> The case is unusual in that there is no testimony that anyone at the company ever made hostile comments about age, no other employee whose job was adversely affected by the reorganization complained about age discrimination, and there is certainly no direct evidence of discrimination as that term is commonly understood. Instead, the plaintiff's theory is that all other explanations are unbelievable (or, in the language of employment discrimination, pretextual) and so age has to be the real reason.<sup>57</sup>

At trial, the jury found for the plaintiff and awarded approximately \$50,000 in lost wages and lost stock options because of the demotion.<sup>58</sup> The Eighth Circuit reversed and remanded for a new trial.<sup>59</sup> The court of appeals held that Justice O'Connor's separate opinion constituted the holding in *Price Waterhouse* under the Supreme Court's decision in *Marks v. United States*.<sup>60</sup> The court of appeals expressly interpreted Justice O'Connor's reference to direct evidence to mean proof showing a "specific link" between evidence of discrimination and the adverse employment action.<sup>61</sup> Here the plaintiff's lawyer had conceded in the district court that there was no smoking gun evidence; that plaintiff's proof was purely inferential or circumstantial and the court of appeals held that this was effectively a concession that there is no

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53. Brief for Petitioner at 55, *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343 (2009) (No. 08-441).

54. *Id.* at 2346-47.

55. *Id.* at 2347.

56. *Gross v. FBL Fin. Servs., Inc.*, 526 F.3d 356, 360 (8th Cir. 2008), *vacated*, 129 S. Ct. 2343 (2009).

57. *Gross v. FBL Fin. Group, Inc.*, No. 4:04-CV-60209-TJS, 2006 WL 6151670, at \*5 (S.D. Iowa June 23, 2006), *rev'd sub nom.* *Gross v. FBL Fin. Servs., Inc.*, 526 F.3d 356 (8th Cir. 2008).

58. *Gross*, 526 F.3d at 358.

59. *Id.*

60. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (addressing how to identify the precedential holding when there is no majority opinion).

61. *Gross*, 526 F.3d at 359.

direct evidence.<sup>62</sup> Thus, the district court erred in shifting the burden of proof to the defendant and the case was remanded for a new trial.<sup>63</sup>

So the case gets to the Supreme Court; what are the options on the table?

1. The Court can adopt the plaintiff's view of the case, hold that the relevant distinction embodied in the court of appeals's decision is between "direct" and "circumstantial" evidence, and then the Supreme Court can declare that the distinction is meaningless and reverse on that ground. I have very little (actually, no) doubt that all nine Justices can agree that the direct versus circumstantial evidence distinction will not withstand scrutiny. But if you take seriously the injunction to approach each case with a strong preference for unanimity and incrementalism, then this is the least the Court absolutely needs to do to decide this case.
2. The Court could decide more broadly under what circumstances, if ever, it is proper to shift the burden of proof to the defendant. But on that issue, the Court could take one of two approaches:
  - A. It could accept Justice O'Connor's separate opinion as the proper approach and attempt to give content to the term direct evidence—frankly not an easy undertaking.
  - B. Or it could decide that Justice O'Connor's approach commanded a grand total of one vote and thus is largely beside the point, and then go in search of a different analytical approach altogether.

If the Court follows the latter course, which seems quite reasonable, then it probably has two available options:

3. The Supreme Court can conclude that Congress used the formulation "motivating factor" in Title VII and so the Court should import that approach into the ADEA, even though Congress did not incorporate that standard into the age discrimination statute; or
4. The Court can completely rethink *Price Waterhouse*—either because it is unclear what that case means or because it is hard to extend a decision governing a bench trial to a jury trial

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62. *Gross v. FBL Fin. Servs., Inc.*, 526 F.3d 356, 360 (8th Cir. 2008), *vacated* 129 S. Ct. 2343 (2009).

63. *Id.* at 362.

situation, which would require the Court to formulate meaningful instructions for the jury that might be less likely to be confusing. In that situation, the Court, almost certainly by a razor-thin 5–4 majority, would hold that the burden of proof never shifts to the defendant.

This prolonged, if only partial, treatment of the road from *Price Waterhouse* to *Gross* does have relevance to my main thesis. Stated differently, what lessons can an advocate draw that are relevant to the debate about how the Court should approach each case? First, as a Supreme Court lawyer, I learned a long time ago this important principle: Count to five. Generally, I do consider what will succeed in capturing a majority of the Court. But in a world where the Court is under some internal pressure to decide cases narrowly, I have to be aware of that risk. Thus, it is incumbent on me to anticipate the preference for narrower decisions and to argue that the preference should not control in my particular case.

On Tuesday, March 31, 2009 (and in the briefing), we pushed hard the proposition that deciding only the direct versus circumstantial evidence issue will accomplish nothing. That is not the basis for much, if any, confusion among the lower courts and frankly was not the problem with the decision of the Eighth Circuit.<sup>64</sup> That may not be enough to persuade the Justices, but it is certainly a point that a litigator has to take into account and should guide his or her advocacy.

The risk of the Court seeking unanimity on narrow grounds in some ways is even more acute as the Court approaches the end of the term. Arguments in March and April are much more prone to efforts to pursue artificial unanimity simply because there is not enough time to work out all of the differences among the Justices' views and still get the crush of opinions completed before the end of June.

Of course, the litigator also has to consider what is the narrowest possible holding in his client's favor. And in *Gross*, I argued that the Court could declare that Justice White's opinion is controlling and still requires that age be a substantial factor in the employer's decision. That test applies at least arguably a higher standard than a motivating factor, which only requires that age "play a part or a role" in the adverse employment decision.<sup>65</sup> Such a

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64. See *supra* notes 58–63 and accompanying text (discussing the Eighth Circuit's narrow ruling in *Gross* that there was no direct evidence and therefore the burden of proof did not shift to the defendant).

65. See *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2359 (2009) ("All that a plaintiff can know for certain in such a context is that the forbidden motive did play a role in the employer's decision.").

holding would leave significant issues open for future litigation and would create all of the problems for litigants that I mentioned earlier. But a lawyer acts at his or her client's peril if that lawyer fails to consider the unanimity-incrementalism mandate and to make sure that there is a theory on the table that allows the Court to rule favorably on some narrower, less controversial ground. What do I want the Court to do in *Gross*? My own preference would be that the Court in a 5–4 decision hold that the burden of proof never shifts to the defendant.

If you wonder whether the issue of burden shifting is really all that important, I should tell you that a majority of the jurors in the *Gross* case informed my co-counsel in the post-verdict interviews that they understood the judge's instruction as requiring them to enter a verdict for the plaintiff, which is why the damages were so small. They thought the evidence of discrimination was very slim and therefore that the plaintiff did not deserve very much compensation. So assigning the burden of proof probably makes more of a difference in employment discrimination cases than we lawyers generally may have assumed.

My basic proposition is that the Court should not have a general preference for unanimity and should not approach each case incrementally. Particularly in cases involving statutory interpretation, the Court should act more boldly, even if the split reflects a close division. At least in that circumstance, Congress can fix the issue politically; and if it does not, then the potential litigants will have less to litigate about. Indeed, a strong argument could be made that employment law would have been better for employers and employees alike if Justice Brennan could have garnered a fifth vote, although his decision was demonstrably pro-employee. In that circumstance, employers, employees, and lower courts would not have consumed millions of dollars in legal fees and thousands of hours (and pages of paper) litigating the issues left open by the failure of the opinions to adopt some kind of bright line rule.

Thus, while I understand the Chief Justice's preference for unanimity and narrower decisions as a matter of judicial philosophy, as the person who stands on the other side of the bench and advises clients on a real time basis about how to proceed, I confess that I have a strong preference for decisions that may command narrow majorities but provide greater clarity in the law. I also realize that this preference was not shared by Justice Powell. His view of judicial restraint—born of a genuine sense of modesty—is quite admirable; but the reality is that, if the Court is not all-knowing (and it is not), it is a court of laws and not of errors and it should strive to make the law clearer, even if that creates some divisiveness within the Court.

I close with one last story about my relationship with Justice Powell. As a litigator before the Court, the one thing that most of us dread more than anything else is being quoted by the Court as having made some kind of concession that might be viewed as fatal to the case. It is the lawyer's worst nightmare: The answer counsel offers to a Justice's unanticipated hypothetical brings the whole case down.

The only time I have had a statement made at oral argument quoted in an opinion was in a little known case—*City of Port Arthur v. United States*<sup>66</sup>—when I was a young lawyer in the Solicitor General's office. The issue involved § 5 of the Voting Rights Act of 1965<sup>67</sup> and whether an annexation by Port Arthur required Attorney General pre-clearance.<sup>68</sup> The proposition in Justice Powell's *dissenting* opinion was: "Finally, the Government concedes that purpose is not a factor in this case."<sup>69</sup> And the Justice dropped a footnote:

The following exchange took place at oral argument:

The Court: And may I get clear, is purpose still in this case at this level?

The Government: Not in terms of the submission to this Court, no, Your Honor.

The Court: So we consider only the effect?

The Government: Yes, Your Honor. I don't believe that the district court's opinion or order can fairly be read to cast any doubt on the purpose of the plan as adopted.<sup>70</sup>

Justice Powell did not have a habit of asking a lot of questions, but when he did it was for a reason. Although I think the concession was correct, fortunately for me (and for the United States whom I represented), Justice White, speaking for five other Justices, decided that Port Arthur's purpose was obvious enough—even without any input from the three-judge district court—that the Court could decide that pre-clearance was mandated anyway. I suppose the other fortunate fact is that the transcript says "Government" and not "Carter Phillips." But knowing Justice Powell, even if it had, he would not have

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66. *City of Port Arthur v. United States*, 459 U.S. 159 (1982).

67. Voting Rights Act of 1965, 42 U.S.C. § 1973c (2000).

68. *City of Port Arthur*, 459 U.S. at 161–62.

69. *Id.* at 174.

70. *Id.* at 174 n.6 (quoting Transcript of Oral Argument at 30, *City of Port Arthur*, 459 U.S. 159 (No. 81-708)).

included my name because he would not have wanted to embarrass me personally.

Hopefully, you can tell I admired Justice Powell a great deal. I think it is wonderful that his alma mater honors him with this lecture series and I am very humbled to have been invited to present a lecture in his name.

Thank you for being such a good audience.

### *Post Script*

The Powell Lecture, as reprinted above, was delivered on April 2, 2009, just two days after the oral argument in *Gross*. On June 18, 2009, the Supreme Court decided by a vote of five to four that in cases brought under the Age Discrimination in Employment Act, the burden of proof never shifts to the employer; it remains at all times on the plaintiff-employee.<sup>71</sup> The majority held that it never had applied the burden-shifting framework of Title VII embodied in *Price Waterhouse* to ADEA claims and it "declin[e]d to do so now."<sup>72</sup> The Court reasoned that discrimination "because of . . . age" imposes a requirement that the employee "prove that age was the 'but-for' cause of the employer's adverse action."<sup>73</sup> This proof requirement, in the absence of some contrary congressional intent, carries with it "the risk of failing to prove" a claim and therefore means that the burden remains with the plaintiff and never shifts to the defendant.<sup>74</sup>

In response to Justice Stevens's dissent, the majority reasoned that *Price Waterhouse* does not control, both because it has proven virtually impossible to apply consistently for the past twenty years (a point I made both at the argument and during the lecture) and because Congress amended Title VII to incorporate a variant of the burden-shifting approach in *Price Waterhouse* without making a similar change in the ADEA (a point we particularly emphasized in our brief).<sup>75</sup> Accordingly, the Court's outcome is very close to what my lecture described as the preferred outcome. Plainly, the holding does not reflect incrementalism or an effort to achieve unanimity. Instead, the sharply divided Court adopted a very clear rule for parties and courts to apply in future litigation. That is an outcome that will provide needed clarity for litigants and trial courts, even if the division on the Court would have made Justice Powell wince a bit.

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71. *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2348–51 (2009).

72. *Id.* at 2349.

73. *Id.* at 2350.

74. *Id.* at 2351.

75. *Id.* at 2349 & n.2.

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# ARTICLES

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