EQUALITY*

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Having agreed to speak to the announced topic, I now begin, somewhat in the manner of Oxford philosophers, by cavilling at its terms. First, "The Burger Court." That form of appellation is handy, and its use is so frequent that it feels natural. But, unlike our practice of captioning cases by individual's names, referring to the Court by the name of the Chief Justice does have a significant tendency to affect our thinking. Without denying the special influence that the role of "first among equals" may give even in the decisional process, it remains true that the substantive stance taken by a Chief Justice may not represent the posture of the Court as a whole. The object of our attention is not Chief Justice Burger or Chief Justice Warren; it is the Supreme Court of the United States. Although it may not always be precise, to avoid any aura of personification I shall often use "present Court" to refer to the Burger Court and terms such as "predecessor Court" for the Warren Court.

There are other problems in the focus on "The Court." It is not only that by using the collective noun we tend to anthropomorphize an assembly of nine distinct individuals. When the nine or a stable majority thereof have coalesced on governing doctrine, or even on the terms in which disagreement is to be carried forward, analysis in collective terms may be both accurate and helpful. But while that coalescence has occurred in part of the area of our present concern, that is certainly not true as to other important parts. I do not raise this here to bemoan the fact. The point at the moment is that, when combined with a focus on "The Court," lack of meaningful doctrine comes to compel emphasis on results alone.

That pressure is reinforced by the way our subjects are broken down today. To direct attention to the subject of "equality" is to call for thought about a moral or societal problem area, rather than about a field of constitutional or statutory law. I do not mean to suggest that this is an inappropriate angle of examination. I simply wish to note that our format today tends to put outcomes and social policy at center stage, to relegate legal analysis to a supporting role, and to leave other matters—such as lack of consistent stated principle—in the wings entirely.

Finally by way of preface, it does not require an Oxford philosopher to note that the term "equality" fairly cries out for definition. But I shall not attempt that here. The intellectual realm of the Court's work is at best, as Louis

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Jaffe pointed out, a "search for intermediate premises."[1] In the time available today, we cannot carry even that search very far. I think we can agree that the core of the problem areas of equality in America at this time is found in our dealing with discrimination on the basis of race and sex.[2] I shall thus proceed by examining some major instances of the present Court's work along the frontiers in those areas.

It is important to note where those frontiers had moved in the 1970s. By the time the Warren Court era had come to a close, the elimination of formal discrimination against racial minorities had largely been accomplished. It would have been hard to find statutes or official action based overtly on racial lines,[3] and if one was found, its invalidity would hardly have been open to question. The ending of that explicit discrimination, however, revealed underlying problems far more complex, deepseated, and difficult to extirpate. It was the efforts to attack these problems that became the new frontiers of the drive for racial equality.

I

One important facet of what was revealed was that virulent discrimination can take more subtle forms. Legislation or official action purportedly neutral can in fact be designed to maintain or extend the prior patterns of subjugation. But while this generality is hardly open to question, it is not always easy to identify which apparently neutral statutes should be held invalid as discriminatory. Where actual hostile intent can be established, that surely would suffice.[4] But such proof will often be difficult if not impossible.[5]

One possible approach that at first blush has great appeal is to judge statutes by their effects, looking to invalidate those having particular negative impact on minorities. There is much sense in the classic formula that a person

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1. Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986 (1967).

2. This is particularly true from our present point of view, which focuses on the Supreme Court. Economic inequality is clearly more pervasive, and there is, of course, substantial intersection between problems arising therefrom and those of race. *See, e.g.*, W. WILSON, THE DECLINING SIGNIFICANCE OF RACE (1978). But those of race are surely more at the core of the Court's responsibility. *See also* notes 6 & 7, *infra*.

3. An illustration of this point is the ending of formal discrimination in state medical schools. In 1948, twenty-six of the country's seventy-seven medical schools publicly refused to admit blacks. D. REITZES, NEGROES AND MEDICINE 8 (1958). By 1964, only five schools had still not complied with the requirements of *Brown v. Board of Education*. R. Raup & E. Williams, *Negro Students in Medical Schools in the United States*, 39 J. MED. EDUC. 444, 445 (1964). The last formal barriers were dropped in 1971. M. SEHAM, BLACKS AND AMERICAN MEDICAL CARE 45 (1973).

4. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886); Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960); White v. Regester, 412 U.S. 755, 765-70 (1973).

5. Indeed, in times past, the Court had strongly suggested that the motives of legislators enacting a bill could not be relied upon as a basis for challenging the validity of the law. Palmer v. Thompson, 403 U.S. 217, 224 (1971); United States v. O'Brien, 391 U.S. 367, 382-83 (1968); *but cf.* Griffin v. County School Bd., 377 U.S. 218, 232 (1964). In *Washington v. Davis*, 426 U.S. 229 (1976), the Court made clear that intent is a material constitutional issue.

intends the foreseeable consequences of his or her actions. But it is also true that a person may act despite certain anticipated consequences rather than because of them. Precisely because a long legacy of discrimination has disproportionately relegated members of racial minorities to lower economic and unskilled labor status,[6] it would be impossible in a free enterprise society—even a modified one—to hold that every legislative, executive, or administrative action that impinges with disproportionate severity on minorities is invalid. By that standard, virtually every tax would be open to question, as would deferment of skilled workers in war time, minimum wage legislation, or indeed, any raise in urban municipal bus fares.[7]

The difficulty in using an effects theory lies not simply in holding that all measures with disparate impact would be invalid. It extends even to holding all such measures "suspect," thus requiring governments to show sufficient justification for each measure to sustain its validity. There would obviously be the question of whether those governments could adequately demonstrate the requisite "compelling" need in each of the wide range of legislative matters thus brought into question.[8] Perhaps even more important, the result of requiring them to try would be to make the courts the arbiters of public policy virtually across the board. There would be relatively few statutes or other official measures that could not be challenged in court, their validity determined by whether the judges considered the social policies being advanced sufficiently important or wise. Though some may see no difficulty in this, the conventional wisdom—and my own—does not support judges having quite that large a role in our polity.[9]

It was essentially this reasoning that led the present Court to declare explicitly in *Washington v. Davis*[10] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[11] that the constitutional barrier to racial and ethnic

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6. For example, in 1977 approximately 8.9 percent of whites and 29.0 percent of other races had incomes below the poverty level. See STATISTICAL ABSTRACT OF THE UNITED STATES (1978 ed.) Table 756.

7. Reasoning parallel to that in the text obviously applies to any suggestion that poverty be considered an impermissible or even a "suspect" classification. Claims of discrimination against the poor are typically asserted on a de facto or "effects" basis; instances of explicit, hostile discrimination against the poor as such are rare. *But cf.* James v. Valtierra, 402 U.S. 137 (1971).

In any event, it is a mistake to equate discrimination against the poor, even if intentional, with discrimination against minorities. While it is true that a substantially higher percentage of racial minority groups than of whites are poor, see note 6 *supra*, it is also true that two-thirds of the poor are white. *See* STATISTICAL ABSTRACT OF THE UNITED STATES (1978 ed.) Table 756.

8. A "suspect" classification is "unconstitutional unless the State can demonstrate that such laws are *'necessary* to promote a *compelling* governmental interest.' " Dunn v. Blumstein, 405 U.S. 330, 342 (1972) (quoting Shapiro v. Thompson, 394 U.S. 618, 634 (1969)) (emphasis in original). As has been noted, this standard is most often " 'strict' in theory and fatal in fact . . . ." Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

9. For a discussion of the larger problem, with references to different sources, see Ely, *The Supreme Court, 1977 Term, Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978).

10. 426 U.S. 229 (1976).

11. 429 U.S. 252 (1977).

discrimination hinged on a finding of intentional discrimination, action shown to be purposefully hostile to racial or ethnic minorities.[12] This definition of the constitutional standard in terms of intentional discrimination was seen by some as a blow to the cause of equality, and as a retreat from the predecessor Court's position. The latter is simply not faithful to reality. The Court had never declared otherwise than that intention to discriminate was the key,[13] and if we look to individual votes, we find the surviving members of the previous Court joining on this point.[14]

It remains true, of course, that impact is relevant.[15] It is entirely rational to infer from the disparate effects of an official action that its purpose may well have been to harm those who were harmed. Indeed, at times, that may be virtually sufficient to prove hostile intent. In circumstances where other explanations are simply not very likely, as for example in selecting jury panels, disproportionately low representation of minorities will often lead directly to an inference of hostile purpose.[16] At all times, the willingness to make the inference from effects will be important; a substantial reluctance to do so would, of course, permit hostile legislation to survive. But such reluctance is not a necessary concomitant of establishing intention as the constitutional standard. And there is no adequate warrant for believing that the present Court will be grudging in making these judgments.

Indeed, there is evidence to the contrary, some in the context of constitutional adjudication,[17] and more from what the present Court has done in the construction of congressional statutes aimed at ending discrimination. In 1971, in *Griggs v. Duke Power Co.*,[18] the Court unanimously read the employment discrimination provisions (Title VII) of the Civil Rights Act of 1964[19] as prohib-

12. 426 U.S. at 239-41; 429 U.S. at 265.

13. Indeed, there had been clear indications earlier that it was. *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Jefferson v. Hackney, 406 U.S. 535 (1972); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). To be sure, there had also been some indications pointing in the other direction. *See* note 5, *supra*. A number of lower federal courts had explicitly held or said that a constitutional violation could be made out on racially disparate effect alone, and the Court's opinion in *Washington v. Davis* did go out of its way explicitly to undercut the authority of those decisions. 426 U.S. at 244-45. But extrapolations by lower courts are hardly to be taken as infallible indicators of what even an unchanged Supreme Court would have done.

14. In *Washington v. Davis*, Justice White wrote the majority opinion, which Justice Stewart joined on the constitutional point, 426 U.S. at 252. Although Justices Brennan and Marshall dissented on statutory grounds and declined to reach the constitutional issue in that case, *id.* at 257 n.1, they joined the part of the Court's opinion in *Arlington Heights* that required a showing of discriminatory intent to establish a violation of the equal protection clause. 429 U.S. at 271. See also their position in the cases cited in note 13, *supra*.

15. The opinions in both *Washington v. Davis* and *Arlington Heights* explicitly recognized this point. 426 U.S. at 241; 429 U.S. at 266.

16. *See, e.g.*, Turner v. Fouche, 396 U.S. 346 (1970); Sims v. Georgia, 389 U.S. 404 (1967); Whitus v. Georgia, 385 U.S. 545 (1967).

17. *See, e.g.*, Dayton Board of Education v. Brinkman, 99 S. Ct. 2971 (1979): Castaneda v. Partida, 430 U.S. 482 (1977); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

18. 401 U.S. 424 (1971).

19. 42 U.S.C. §§ 2000e to 2000e-17 (1976).

iting an employer from using a general intelligence test or requiring a high school diploma as a basis for hiring, because the effect of those criteria was to disproportionately eliminate black applicants, and the criteria had not been objectively demonstrated to predict job performance. The fact, found by the lower court, that the requirements had been adopted without a racially discriminatory intent only led the Supreme Court to hold that the Act was directed at "the *consequences* of employment practices, not simply the motivation;"[20] once racially disparate effect had been demonstrated, the employer had the burden of showing that its requirements had a functional relationship to the employment in question.[21]

The terms of the statute did not compel this result. Its basic text outlawed job discrimination in general terms,[22] and its explicit provision regarding administration of tests would easily have lent itself to a construction that focused on hostile purposes.[23] The present Court thus chose to assign to the Act a meaning which would more effectively advance the cause of racial equality. It has, moreover, continued to maintain that position.[24] At the same time, I believe that no one could assert with certainty that the Congress that enacted the statute had a majority for the construction assigned by the Court,[25] or even that a majority could have been mustered at some later time to command that result. The Court's actions in this regard surely reflect no reluctance to advance the cause of racial equality.

The Court's willingness to go further on the basis of disproportionate impact in areas in which Congress has acted has sound basis. A key element of

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20. 401 U.S. at 432 (emphasis in original).

21. *Id.*

22. Section 703(a)(2), 42 U.S.C. § 2000e-2(a)(2), makes it unlawful for an employer to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . , because of such individual's race, color, religion, sex, or national origin."

23. Section 703(h), 42 U.S.C. § 2000e-2(h), provides that is not an "unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

24. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Hazelwood School District v. United States, 433 U.S. 299, 308 (1977); Dothard v. Rawlinson, 433 U.S. 321, 328-32 (1977). *Cf.* Board of Education v. Harris, 100 S. Ct. 363 (1979).

The decision in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), holding lawful a bona fide pre-Act seniority system despite continuing post-Act racially discriminatory effects, is not inconsistent; in my judgment, that result can appropriately be attributed to Court implementation of a specific, hardfought compromise struck and enacted by Congress. See *id.* at 349-53.

See also note 57, *infra*.

25. The language of § 703(h), see note 23 *supra*, as well as its legislative history—even as described by the opinion in *Griggs*, see 401 U.S. at 434-36—is more consistent with adoption of an ambiguous text open to be read both ways than with any inference that there was a definite congressional majority for the result reached by the Court. Indeed, even the unanimous opinion in *Griggs* goes no further than to assert that "the EEOC's construction of § 703(h) to require that employment tests be job-related comports with congressional intent." *Id.* at 436.

the argument for a narrower constitutional rule which I sketched earlier[26] was precisely the across-the-board nature of any such rule. It is difficult for the Court simply to pick out particular areas, such as employment, and mark them for specially intense strutiny. Principled rationales for doing so are hard to define, and once the matter has been constitutionalized, modification is made more difficult. By acting on its own, the Court also removes the issue from the political process with its built-in means for developing wide acceptance if not actual consensus.

Indeed, one might well have wondered about the political astuteness of a Court that either undertook an across-the-board "effects" rule or selected specific areas for such treatment without legislative support. For example, in *Washington v. Davis*, the Court would have been opening to question the entire realm of civil service examinations across the country—and doing so on its own, unbacked authority. In *Arlington Heights*, the other case cited for the intent standard, the law in question was a typical suburban zoning ordinance. However strongly one may feel about the exclusionary effect of such ordinances, one must acknowledge that often these ordinances exclude minorities simply as a function of economic stratification of the suburbs. Partly for that very reason, a wholesale questioning by the Supreme Court would have undoubtedly raised substantial political hackles throughout the nation.[27]

The general point is reinforced when one considers the application of the intent, rather than effects, standard in the area of sex discrimination. That was the basis on which the Court recently refused to invalidate veterans preference legislation that grossly limited women's opportunities for state government jobs.[28] Here again, however much importance one may attach to eliminating gender-based discrimination, one must acknowledge both that any totally sincere effort to reward veterans of our past wars would inevitably have a disproportionate impact by sex and that it would be exceedingly difficult, both rationally and politically, to hold that the Constitution prohibits rewarding of veterans.[29]

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26. *See* text at 6-7, *supra*.

27. The subsequent history of the *Arlington Heights* case provides an interesting comparison. Rejecting the constitutional claim, the Supreme Court remanded for determination of the remaining claim that the single-family zoning ordinance violated the Fair Housing Act (Title VIII of the 1968 Civil Rights Act), 42 U.S.C. §§ 3601-3631 (1976). The court of appeals then held that the appropriate standard under that Act was effects, and not intent. Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977). However, since the majority of those excluded by the economic barrier of the ordinance were white rather than minority (*cf.* note 7 *supra*), even the focus on effects did not *per se* establish racial discrimination. The court of appeals went on to hold that the Act should be construed as barring the zoning ordinance if "the Village's refusal to rezone has a strong discriminatory impact because it effectively assures that Arlington Heights will remain a segregated community . . ." 558 F.2d 1283, 1294 (7th Cir. 1977). Supreme Court review was again sought, but certiorari was denied. 434 U.S. 1025 (1978).

28. Personnel Administrator of Massachusetts v. Feeney, 99 S. Ct. 2282 (1979).

29. Or, on the other hand, that it makes a special exception for veterans' preference legislation—as Congress did in Title VII. *See* 42 U.S.C. § 2000e-11 (1976).

II

A second frontier in the core race area also grew out of the effective dismantling of formal racial barriers in the 1960s. It had been thought, at an earlier, more innocent time, that the ending of those barriers would bring equality of opportunity for members of racial minorities. But the problem was not that simple. The legacy of long and pervasive discrimination included hobbling effects that precluded members of racial minorities from entering the formally open competition on anything like equally competitive terms. In the specific context of access to professional education, particularly in law and medicine, this problem was compounded by the sharp increase in the general demand for such education that took place in the same period of the 1960s. That demand became so great that not all qualified applicants could be admitted.[30] The continuing effects of historic discrimination meant that unless specific corrective measures were undertaken, there would be virtually no members of racial minorities in any of the major law schools in the country or in all but two of the medical schools.[31] As you know, racially conscious special admissions programs were undertaken in the late 1960s, and those produced the *Bakke* case.[32]

Before turning to *Bakke*, I feel obliged to state that I served as special counsel for the University of California in the Supreme Court and was lead author of its main brief in that case. Although I considered, for this reason, not dealing with *Bakke* today, I concluded that to speak about the work of the present Court in the realm of equality without referring to that case would be to try to play Hamlet without the ghost.

Although I realize that it is hardly beyond debate, I take the view that special admissions programs advance the cause of racial equality in this country. Without them, the channels of upward mobility for racial minorities would remain constricted; the nation's medical schools, top law schools, and status professions generally would remain virtually all-white. The resolution of the "American Dilemma" would be retarded, in the present and for the future.

The *Bakke* decision preserved those programs. Marginal changes in some details were required, but the programs remained essentially intact. Recent reports confirm that access of minorities to professional schools has not dimin-

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30. In medical schools, for example, 14,397 persons applied for 8,560 places in 1960-61. In 1975-76, 42,303 persons applied for 15,365 places. *Medical Education in the United States, 1975-76,* 236 J.A.M.A. 2949, 2961 (1976). In law schools, 83,100 persons applied for 39,038 places in 1974-75. White, *Legal Education: A Time of Change*, 62 A.B.A.J. 355, 356 (1976).

31. F. Evans, APPLICATIONS AND ADMISSIONS TO ABA ACCREDITED LAW SCHOOLS: AN ANALYSIS OF NATIONAL DATA FOR THE CLASS ENTERING IN THE FALL OF 1976 (Law School Admissions Council 1977); Waldman, ECONOMIC AND RACIAL DISADVANTAGE AS REFLECTED IN TRADITIONAL MEDICAL SCHOOL SELECTION FACTORS: A STUDY OF 1976 APPLICANTS TO U.S. MEDICAL SCHOOLS (Assoc. of Amer. Med. Colleges 1977).

32. Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

ished in the wake of the Court's action.[33] I think this outcome could be anticipated, and I think it was the outcome intended by the Court.

I am, of course, aware of the way the Court split. Nevertheless, I do not think it captious or fallacious to continue to speak in terms of "the Court" here. It is not merely that there were five votes to uphold the essential elements of special admissions programs, nor even that there was a brief official, and technically binding, "Opinion of the Court" which said precisely that.[34] It is also important that not one member of the Court took the position that race-conscious affirmative action programs violated the Constitution. Moreover, even those justices who condemned the Davis medical school program as being in violation of Title VI of the Civil Rights Act[35] studiedly kept that statutory holding as narrow as possible.[36] At the very least, this suggests that one (and possible more) of those justices was steadfastly opposed to invalidating such programs generally. That makes at least six members of the Court who were prepared to see such programs continue.

The significance of this willingness to accept the necessity, if not the desirability, of these kinds of programs appears more sharply if one remembers the contemporary context of the decision. I am sure that I need not rehearse that in detail, but it may be useful to recall the difficulty the Government had in arriving at its amicus position in support of affirmative action.[37] If that was true of a Democratic administration whose election was at least partially dependent upon substantial minority support, it surely indicates that principle provided no sure answer, and that the political terrain was rough and its at-

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33. *See, e.g.*, Middleton, *Bakke Ruling Seen Having Little Effect*, The Chronicle of Higher Education, July 30, 1979, at 1, col. 2.

34. Justices Brennan, White, Marshall, and Blackmun explicitly joined section V(C) of Justice Powell's opinion, which reads:

> In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

438 U.S. at 320.

35. 42 U.S.C. §§ 2000d *et seq.* (1976).

36. The opinion of Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist, held in favor of Bakke solely on statutory grounds. That opinion supporting that result did invalidate the Davis Medical School program, but provided no general rule or principle that could be applied to determine the validity of the vast majority of special admissions programs, which did not share the specific features of Davis's. It also construed the California judgment as not directed to whether race can ever be used as a factor in admissions decisions, and decided on that basis that this issue was not presented in the case before the Court. *See* 438 U.S. at 409-10.

37. *See U.S. Brief to Support Minority Admissions*, N.Y. Times, Aug. 24, 1977, at A1, col. 2; *Justice Dept. Brief Opposes Race Quota at Coast University*, N.Y. Times, Sept. 8, 1977, at A1, col. 1; *Carter Said to Back Bar to Race Quotas*, N.Y. Times, Sept. 12, 1977, at 1, col. 4; *Carter Called Firm Against Race Quotas*, N.Y. Times, Sept. 13, 1977, at 15, col. 1; *U.S. Backs Minority Admissions But Avoids Issue of Racial Quotas*, Sept. 20, 1977, at 1, col. 1.

mosphere highly charged. The context of the times thus makes clear, in my judgment, that the result in the *Bakke* case represented the action of a Court fundamentally responsive to the cause of racial equality, including the elimination of the continuing legacy of past discrimination.

Of course, Allan Bakke himself was admitted to the Davis medical school, and the program at that school was held invalid. It could hardly be denied that that program, with its combination of a fixed number of special admission slots and a separate procedural track for filling them, exhibited the features that most quickly stir intense emotional opposition. I think there is also much to be said for the proposition that a program with those features takes a form that in its continuing operation is most likely to re-arouse and maintain awareness of distinctions based on race, thus having potential to retard achievement of the objective of eliminating race-consciousness itself. Whether or not one accepts this proposition, whether or not one agrees with Justice Powell—and in that sense the Court—on this point, the fact remains that the result in *Bakke* did defuse the issue in the country. Indeed, the view has been expressed, and is certainly tenable, that the symbolic significance of admitting Allan Bakke may well have precluded a legislative backlash that could have followed a total sustaining of the University's position.[38]

If *Bakke* left any doubt as to where the core commitment of the present Court lay with regard to voluntary race-conscious opportunity programs, *United Steelworkers of America v. Weber*[39] surely demonstrated that it was in favor of such increased opportunity. The issue in *Weber* was the validity of a fifty-fifty black-white quota for admission to skilled training programs under the employment nondiscrimination provisions of Title VII of the 1964 Civil Rights Act. I think I can say without fear of contradiction that the statute did not dictate the outcome in *Weber*. Indeed, here again, the text lent itself easily to the opposite result.[40] Yet the program in *Weber* was sustained.

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38. Karst & Horowitz, *The Bakke Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7, 27-29 (1979).

39. 99 S. Ct. 2721 (1979).

40. Section 703(d), 42 U.S.C. § 2000e-2(d) provides:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Section 703(j) of Title VII, 42 U.S.C. § 2000e-2(j) provides:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage or persons of such race, color, religion, sex, or na-

The significance of that result for assessing the basic commitment of the present Court lies not only in the fact that the majority had to go to some lengths to achieve it. That significance is greatly enhanced if one again considers the broader context of the decision. At the time of the decision it was reasonably clear that whatever the Court decided would stand as the law of the land. Congress would be unable to overrule either outcome, because the contending forces on both sides would each have enough strength to block attempted action by the other. Under these circumstances, the Court acts in an area of its greatest freedom. If, as I think clear, the Court was aware of this circumstance, then the outcome in *Weber* was particularly demonstrative of the present Court's commitment toward racial equality.

III

The frontier in the area of sexual equality at the end of the 1960s was essentially to get the Court to see the problem. Constitutionally, gender-based classifications were viewed as no different from the ordinary run of legislative classifications. Outstanding authority on the merits was a 1961 decision of the Warren Court that upheld the exclusion of women from juries unless they explicitly asked to serve, in a case in which a woman was accused of murdering her husband.[41] The Court reasoned that a state might rationally conclude that "woman is still regarded as the center of home and family life" and has "her own special responsibilities,"[42] and this sufficiently supported the statutory provision applicable to all women—homemakers or not. To be sure, this was two years before *The Feminine Mystique*[43] was published and even longer before the force of the renewed women's movement had significantly developed. But even toward the very end of the Warren period, the Court steadfastly refused applications to review a number of cases in which state and lower federal courts had upheld official discrimination against women.[44]

It was the present Court that first accorded special constitutional protection against discrimination on grounds of sex. Though it has stopped short of declaring gender a "suspect" classification, it has declared that legislation on

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tional origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

For the text of § 703(a)(1) and (2), see notes 49, *infra*, and 22, *supra*.

41. Hoyt v. Florida, 368 U.S. 57 (1961).

42. *Id.* at 62.

43. B. FRIEDAN, THE FEMININE MYSTIQUE (1963).

44. *See* Pendergraft v. Mississippi, 213 So. 2d 560 (1968), *appeal dismissed* and *cert. denied*, 394 U.S. 715 (1969); Miskunas v. Union Carbide Corp., 399 F.2d 847 (7th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969); Garrison v. Alabama, 44 Ala. App. 463, 213 So. 2d 369 (1968), *cert. denied*, 393 U.S. 1051 (1969); Kansas v. Paxton, 201 Kan. 353, 440 P.2d 650, *cert. denied*, 393 U.S. 849 (1968); Wells v. Civil Service Comm'n of Philadelphia, 423 Pa. 602, 225 A.2d 554, *cert. denied*, 386 U.S. 1035 (1967). *See also* Guerra v. Mississippi, 209 So. 2d 627, *appeal dismissed for want of properly presented federal question*, 393 U.S. 18, Gruenwald v. Gardner, 390 F.2d 591 (2d Cir. 1968), *cert. denied*, 393 U.S. 982 (1968).

sex-based lines is subject to careful scrutiny.[45] It has condemned legislation seen as the product of the "baggage of sexual stereotypes,"[46] including the stereotype of traditional family roles which its predecessor Court had explicitly relied upon just ten years before the present Court opened its attack on sexual inequality.[47]

Once the area was opened up, the frontier advanced rapidly. Because the ground had been broken by the race civil rights movement, and because women had not been as culturally and socio-economically isolated as racial minorities, movement advanced in longer strides. The reach of the drive, and the extent of the Court's commitment, are both indicated by the decision in *City of Los Angeles, Department of Water and Power v. Manhart*.[48] In that case, the Court held that Title VII bars a pension plan that requires women to make larger contributions than men, despite the unchallenged facts that (1) women live longer than men and (2) the plan provided for equal retirement payments for all for as long as they lived. There was no contention that the larger contributions required of women were not matched by the larger value of the annuity that women received. So that in economic terms, on the best available information, women were not treated unequally. Indeed, since the employer contributed an amount equal to 110 percent of the employee contributions, the fact that women made higher contributions meant that the employer actually expended more dollars on account of a woman as compared to a man earning identical base salaries—a differential which was magnified by the additional 10 percent on top. Yet the Court held that the requirement that women make larger contributions violated the Title VII command not to "discriminate . . . because of . . . sex. . . ."[49]

The Court's opinion leaves a great deal to be desired, not least a convincing explanation of the result. The most tenable basis, in my view, rests on the fact that the plan resulted in women receiving smaller take-home paychecks than men for the same jobs, a fact that the opinion does state in those terms.[50] Though this may appear to stress form over substance, the form in this instance is not trivial. The smaller paycheck for the same job is

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45. Though four justices voted in Frontiero v. Richardson, 411 U.S. 677 (1973), to make gender a suspect classification, a majority of the Court has never adopted that position. The standard for gender-based discrimination is an intermediate one: the classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976).

46. Orr v. Orr, 440 U.S. 268, 283 (1979).

47. *See* Reed v. Reed, 404 U.S. 71 (1971).

48. 435 U.S. 702 (1978).

49. Section 703(a)(1), 42 U.S.C. 2000e-2(a)(1). The full text of the provision is:

> 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 . . .

50. 435 U.S. at 705, 708.

undoubtedly one of the sorest and sorriest parts of the historic discrimination to which women have been subjected. Though under an arrangement such as that in *Manhart* the woman's compensation may, in ultimate reality, equal or exceed the man's, the weekly or monthly receipt of a smaller amount seems a constant replay of the old pattern. It may make a woman feel that her work —and she as a person—are still valued at a lower figure. It may engender resentment; in the perverse way in which discrimination may be internalized, it may even make her feel smaller.

I am not saying that I consider this a sufficient justification for the result. That is a large issue that I leave for another time and place. But if what I have described is, as I have said, the most tenable basis for the result, that in itself is highly significant for assessing the present Court's position with regard to sexual equality. For here, again, the statute surely did not, by either its terms or its history, compel the Court's result.[51] That outcome must, rather, reflect an empathic awareness of the problems of sex discrimination. I do not mean to suggest that the Court has embraced the full conception of gender equality advanced by the women's movement; certainly it has rejected some claims of sex discrimination, including some in situations not too distant from *Manhart*.[52] But the *Manhart* result surely suggests a strong responsiveness to efforts to eradicate not only real sexual inequality but symbolic stereotypes as well.

IV

Today's subject invites a comparison of the present Court with its predecessor. I do not see it as my role to chalk up and count "victories" and "de-

51. Even assuming that the plan in *Manhart* would have fallen afoul of the basic general provision of the statute, see note 49, *supra*, the so-called Bennett Amendment, § 703(h), 42 U.S.C. § 2000e-2(h) (1976), exempts practices "authorized" by the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976), from Title VII's general ban on workplace sex discrimination. The Equal Pay Act bars wage differentials "on the basis of sex" *except* where pursuant to seniority, merit, productivity, or "a differential based on any other factor other than sex . . . ." *Id.* It was surely a tenable construction that the pension contribution differential was authorized by the Equal Pay Act, and exempt from Title VII, because it was based on longevity—a "factor other than sex."

The legislative history would have supported this conclusion. As noted in the *Manhart* opinion, remarks made by Senator Humphrey in reference to the 1964 passage of Title VII with its accompanying Bennett Amendment "apparently assumed that the 1964 Act would have little, if any, impact on existing pension plans." 435 U.S. at 714. The opinion set this history aside, asserting that Senator Humphrey's "statement cannot . . . fairly be made the sole guide to interpreting the Equal Pay Act, which had been adopted a year earlier . . ." *Id.* This dismissal is hardly compelling. The issue in *Manhart* was the extent of liability resulting from the enactment of Title VII in 1964. The fact that the 1964 Bennett Amendment incorporated the 1963 Equal Pay Act into Title VII by reference provides scant basis for discounting contemporaneous remarks about the effect of that incorporation. And though "sole" reliance on a single Senator's comments might indeed be inappropriate if conflicting remarks presented contradictory interpretations, the Court's opinion presented no such competing legislative viewpoint.

52. *See* General Electric Co. v. Gilbert, 429 U.S. 125 (1976); Geduldig v. Aiello, 417 U.S. 484 (1974). *Gilbert*'s holding, that exclusion of pregnancy from an employer's disability plan did not violate Title VII, was subsequently reversed by an amendment to that statute. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (to be codified at 42 U.S.C. § 2000e-2(k)).

feats" for a hypothesized set of equality goals. Responsible scholarly assessment of a Court's performance must take into account the nature of the issues confronted as well as the social and political terrain on which the Court is operating.

From this aspect, the core equality issues decided by the current Court are surely more complex and ambiguous from a moral perspective than those addressed previously. *Brown v. Board of Education*[53] was a trying decision for the Court, but this was due to the extent of the race problem it confronted rather than uncertain equities of the claims it adjudicated. While perhaps politically explosive, the moral quality of the decision was clear. Moreover, assuming that implementation could be peacefully achieved, the only sense in which "injury" was reasonably foreseeable as a result of the Court's holding was in terms of the racist perspective that the decision aimed to combat. The dilemma in *Brown* concerned the Court's authority rather than the definition of justice. This was true for most of the earlier Court's period. Although some of the moral and factual complexities involved in moving out of the past toward real equality did begin to appear in the later 1960s, the Warren Court left most of these for its successors.[54]

Bakke and *Weber* involved programs aimed at eradicating the legacy of invidious discrimination and, indeed, ultimately of racial awareness itself. But the program involved injury to the aspirations, if not expectations, of members of the majority who could not be considered personally responsible for the evils of the past. *Manhart*, at least in its potential implications, posed the problem of prohibiting a use of sex-based criteria with the object of ending inappropriate gender awareness at the cost of not providing men with equal pay—in the precise sense of economic value—for equal work. The issues inherent in judging legislation on the basis of disproportionate racial or gender impact pit the objectives of equality against other fundamental societal needs and goals and, further, present problems of the Court's legitimacy and capacity to make those choices for society.

Beyond the greater moral complexity of the issues, there also lies a change in the social and political context in which the Court works. That this is relevant in fact to the Court's work probably needs no demonstration; if one is called for, the experience in the area of sex equality surely makes the point vividly. This is not the place to discuss the legitimacy of such influence; I would, for now, simply assert that political sensitivity in the Court is not only

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53. 347 U.S. 483 (1954).

54. In the implementation of school desegregation, the Warren Court addressed "freedom of choice" plans in Green v. County School Bd., 391 U.S. 430 (1968), but problems of busing were first addressed squarely in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). Race-conscious special admissions programs went into effect in the late 1960s, but the Court first confronted the issue (or declined to confront it) in DeFunis v. Odegaard, 416 U.S. 312 (1974). As to sex discrimination, see text at 60 and notes 41-44, *supra*.

inevitable but necessary and proper. In any event, to attempt to assess the present Court (or any other) without consideration of the broader political context within which it must work is to cut one's self loose from moorings of responsibility.

It is obvious enough that the political climate has not been constant. Immediately after World War II, there was a growth of major force in the drive for racial equality. This was supported by recent historical experience and by the concurrent emergence of Third World powers on to a world scene in which the United States held the leading role but only in a continuing competition with the Soviet Union. Congress was apparently unable to rise to the challenge, and it was the Supreme Court in *Brown* that "took the point" in leading the attack on racial discrimination. Congress still lagged, although with reapportionment and the increasing effectiveness of the civil rights movement, among other influences, it did proceed to move through a series of progressively stronger Voting Rights and Civil Rights Acts. This pattern both reflected and reinforced the development of a political climate in the mid-1960s that was more hospitable to the drive for racial equality. The more recent history is, of course, familiar. As I said earlier, the initial steps of progress disclosed underlying problems even more difficult and intractable. With the growing moral and factual complexities, and the increased problems in meeting them, the 1970s have also witnessed the growth of greater public ambivalence. It is not, in my view, that general belief in the rightness of the objective of racial equality has lessened. It is rather that increased awareness of what may be involved in the means of accomplishing such fundamental change, combined with the perception that the general economic pie is not expanding as it used to, have made public support for effective remedial actions much more problematic.

In my judgment, the present Court has shown itself to be clearly committed on the side of efforts to achieve racial and sexual equality. I do not mean to suggest that this Court does not reflect, if it does not in some respects share, the general public ambivalence. But the Court's actions show a pattern much more on the side of advancing equality than what I conceive to be the center of gravity of the national will.

I cannot say that this Court is as much in advance of the public as was the Court that decided *Brown v. Board of Education*, although we know now that that Court did not act without internal hesitations if not reservations. When we compare the issues taken and resolved by the Warren Court of the 1960s in its political context with those of the present Court in its, the answer is far from clear.

I do not, and cannot, apply a yardstick of "how the Warren Court would have decided." I think it impossible to know—or even intelligently guess—how the members of the earlier Court would each have voted in the 1970s, any more than I could judge how the members of the present Court would have

voted had they been sitting in the 1950s and 1960s. Projections of the former kind appear inevitable at times, but they almost always seem to carry the sad note of "might have been," often ignoring the quite different world in which the members of the earlier Court would have found themselves.[55]

What I believe can be said with confidence is that the present Court has taken up the fundamental equality commitments entered into by its predecessor and has carried forward the thrust of those commitments into new areas of both racial and sexual equality. My presentation here is not, of course, an exhaustive demonstration, but I have chosen instances that in my judgment test the fundaments of the Court's commitment by its actions on the frontiers. Although one could find cases that express a different motif,[56] I do not think that an equally strong case can be made for a proposition contrary to what I have asserted. I am not, of course, suggesting that anyone who disagrees with any specific decision should not object and remonstrate, even loudly. I share the view that such responses are not only proper but may be entirely functional; this is indeed a corollary of the view that the Court operates within a political matrix. What I am saying is that to focus exclusively on individual results seen as setbacks is to obscure the forest by concentrating on the fallen trees. In the core areas of equality, the present Court's continuity with its predecessor is the more significant note than that of discontinuity or change.

This continuity is not minimal or mechanical, following precedent only to the extent that it cannot be distinguished. It is, rather, one of thrust, of advances and even of expansion. That is hardly to be taken for granted. After all, the present Court has not only a different Chief Justice but a majority of members appointed by Presidents who had forcefully opposed the actions and tenor of the previous Court.[57] Under these circumstances, the active continuity seems worth remarking.

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55. If the statement in the text strikes the reader as fatuous, I would ask that reader if he or she remembers that Chief Justice Warren and Justice Black dissented in *Shapiro v. Thompson*, 394 U.S. 618 (the 1969 welfare residency case)—let alone guessed in advance that they would?

56. For example, Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978), read for its extreme possible implications, might be seen as undercutting much of *Griggs v. Duke Power* (*see* text at notes 18-20, *supra*). That is not in my judgment the correct reading of *Sweeney*. That decision merely vacated a court of appeals judgment handed down before Furnco Construction Co. v. Waters, 438 U.S. 567 (1978), for reconsideration in light of that later decision. As the dissent in *Sweeney* pointed out, the *Furnco* opinion can readily be read to maintain the thrust of *Griggs*, see 439 U.S. at 26, 28-29 (Stevens, J., dissenting), and the five-to-four vacating order in *Sweeney* does not in my judgment imply a majority of the Court ready to undo *Griggs*.

57. To be sure, the primary thrust of that opposition bore on the Warren Court's expansion of procedural requirements in the criminal process. But it is noteworthy that the present Court has not equated that concern with opposition to the drive for racial equality. During the political debate, there were many—on both sides—who considered these two areas melded. In my judgment, the Court is entirely right in its perception that they are not the same.