VIVA LA DIFERENCIA: A NON-SOLUTION TO THE DIFFERENCE DILEMMA

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A fierce debate has raged through the feminist community.[1] Recently the conflict has spread to minority or outsider legal scholarship.[2] The debate is

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1. For articles favoring treating men and women identically, see Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1975); Wendy W. Williams, *Notes From a First Generation*, 1989 U. CHI. LEGAL F. 99; Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985)[hereinafter *Equality's Riddle*]; Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982)[hereinafter *Equality Crisis*].

The classic work defining the difference between men and women's moral reasoning is CAROL GILLIGAN, IN A DIFFERENT VOICE (1982). For articles advocating that the law acknowledge the differences between men and women and treat them accordingly, see Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class*, 1991 DUKE L.J. 324 [hereinafter *Equal Protection Analysis*] (arguing law must take account of the needs of female adolescents); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) [hereinafter *Anti-Subordination*] (arguing anti-subordination rather than anti-differentiation should be the focus of equal protection law); Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25 (1990) (arguing for differences between men and women, but not among women); Linda Krieger & Patricia Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action, and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513 (1983). *Cf.* Herma Hill Kay, *Models of Equality*, 1985 U. ILL. L. REV. 39 (analyzing flaws in the equality or assimilationist model); Note, *Toward a Redefinition of Sexual Equality*, 95 HARV. L. REV. 487 (1981) (arguing for a broader vision of equality than one requiring assimilation to the male standard).

For an article splitting the difference between these approaches based on whether the context is pregnancy/childbirth or not, see Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985). *Cf.* Leslie Friedman Goldstein, *Can This Marriage be Saved: Feminist Public Policy and Feminist Jurisprudence*, *in* FEMINIST JURISPRUDENCE: THE DIFFERENCE DEBATE 11, 30 (Leslie Friedman Goldstein ed., 1992) (arguing for acknowledging difference to end sexual violence and economic discrimination, but for a sameness approach to valuing gender roles); Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1981) (arguing law must recognize the sex-unique aspects of procreation).

These categorizations are gross, at best. All of the authors offer some twist on the basic thesis. Some of the twists are quite remarkable. This catalog is only an attempt to provide a rudimentary sense of the debate.

2. Randall Kennedy's article on race and legal scholarship touched off the largest firestorm. *See* Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989). For responses to Professor Kennedy, see Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV L. REV. 1864 (1990); Richard Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872 (1990);

quite simple: is equality having the same rules apply to everyone, or having the rules apply the same to everyone. Scholars usually name the debate in dichotomous terms: anti-differentiation/anti-subordination,[3] equal treatment/special treatment,[4] sameness/difference.[5] These dichotomies set up what Martha Minow aptly has termed the "dilemma of difference."[6] As she describes it, the dilemma of difference is that "we may recreate difference either by noticing or by ignoring it."[7]

This Article will restate the dilemma using Christine Littleton's symmetry/asymmetry dichotomy.[8] At minimum, there are two ways of treating people unequally. One is to treat people equally, when they are not. For example, it is unfair symmetry to schedule little league teams to play professional teams. Another way is to treat people differently, when they are not. Thus it is unfair asymmetry to create different leagues for African-American and Euro-American players. The solution to unfair symmetry is to establish categories based on differences and to treat people asymmetrically depending on their grouping. In other words, create rules separating the groups and then establish different rules for the different groups so that the opportunities and obstacles are the same for members of both groups. The solution to unfair asymmetry is to abolish all separations and to treat everyone symmetrically. In short, one set of rules applies to everyone.

Now the dilemma. Solving unfair symmetry requires imposing asymmetrical solutions. Solving unfair asymmetry requires imposing symmetrical solutions. Furthermore, we have to choose one solution or the other because we cannot screen for both without making all solutions to one type of inequality an instance of the other type.[9] If there is one set of rules, they inevitably will not present equal opportunities and obstacles for everyone because not everyone comes to the rules from the same position. If there are different sets of rules tailored so that everyone approaches the rules from the same position, they inevitably will not be the same rules.

Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990); Leslie G. Espinoza, *Masks and Other Disguises: Exposing Legal Academia*, 103 HARV. L. REV. 1878 (1990); Alex M. Johnson, Jr., *Racial Critiques of Legal Academia: A Reply in Favor of Context*, 43 STAN. L. REV. 137 (1990). For an attempt to negotiate a truce, see Scott Brewer, *Introduction: Choosing Sides in the Racial Critiques Debate*, 103 HARV. L. REV. 1844 (1990). For a rejection of that truce, see Richard Delgado, *Brewer's Plea: Critical Thoughts on Common Cause*, 44 VAND. L. REV. 1 (1991). There is good reason to believe the debate is nothing new to those communities. *See* Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 (discussing debate between integrationist and black nationalists). It is just that the debate has finally made it into legal scholarship.

3. Colker, *Anti-Subordination*, *supra* note 1, at 1005.

4. Williams, *Equality's Riddle*, *supra* note 1, at 325-28.

5. CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32 (1987).

6. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND THE AMERICAN LAW 20 (1990) [hereinafter DIFFERENCE]; *see also* Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 12 (1987) (early version of her book).

7. DIFFERENCE, *supra* note 6. *See also* David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 100-13 (arguing that paying attention to and ignoring race produce the exact same type of results).

8. Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1291-1301 (1987).

9. *See* Williams, *Equality Crisis*, *supra* note 1, at 196 ("If we can't have it both ways, we need to think carefully about which way we want to have it.").

The most obvious examples of the difference dilemma in the United States Supreme Court is *California Federal Savings & Loan Assn. v. Guerra.*[10] The case involved two statutes designed to address gender inequality. The first statute is the Pregnancy Discrimination Act ("PDA")[11] in which Congress explicitly stated that discrimination against pregnancy was within Title VII's prohibition of discrimination on the basis of sex and that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected ...."[12] The federal statute embodies a symmetrical model of equality. The statute requires employers to apply the same rules to female and male employees, even if the female employee is pregnant.

The other statute is California's law making it "an unlawful employment practice ... for any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions ... [t]o take a leave on account of pregnancy for a reasonable period of time, not to exceed four months."[13] The California statute embodies an asymmetrical model of equality. The statute requires employers to protect the jobs of women involved in childbearing because childbearing is a relevant difference between men and women. This protection assures that employers' rules on taking leave of absences apply the same to everyone.

The inevitable happened. California Federal Savings & Loan Association ("Cal Fed") had a rule that all employees who take unpaid leave of absences for various reasons, including pregnancy and disability, risk termination if a similar position is not available when they wish to return to work. Cal Fed claimed the two statutes placed it in an unsolvable dilemma. If Cal Fed complied with the California law and always rehired women returning from pregnancy leave, but not men returning from disability leave, they were in violation of the PDA. If Cal Fed complied with the federal law and treated pregnancy just like any other disability leave, they were in violation of the state law.

The Court fractured along the symmetry/asymmetry fault line. All sides, however, agree that when Congress passed the PDA, it did not contemplate workplace rules singling out pregnancy for beneficial treatment.[14] In the absence of any direct evidence of legislative intent, Justice Marshall, writing for Justices Brennan, Blackmun, and O'Connor, argued that the PDA does not preempt the California statute because both laws serve the same purpose of promoting equality. As the Court stated, "California's pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs."[15] Implicit in this argument is the assumption that only mothers, and not fathers, need to take a leave of absence surrounding the birth of a child. Thus the majority implicitly adopts the asymmetrical model of equality that Justice Stevens explicitly adopts in his concurring opinion. Justice Stevens

10. 479 U.S. 272 (1987).
11. 42 U.S.C. §2000e(k) (1988).
12. *Id.* This statute overruled General Electric Co. v. Gilbert, 429 U.S. 125 (1976). *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 670 (1983).
13. CAL. GOV'T CODE §12945(b)(2) (West 1994).
14. 479 U.S. at 285-87 (majority opinion), 300 (White, J., dissenting).
15. *Id.* at 289.

argued that because *United Steelworkers v. Weber*[16] allows affirmative action by adopting an asymmetrical approach to the Title VII prohibition on racial discrimination, the same asymmetrical approach also should apply to gender discrimination.[17]

The dissent takes the other side of the dilemma. Justice White, joined by Chief Justice Rehnquist and Justice Powell, argues that the plain language and legislative history require that employers treat pregnant women the same as other workers who are or are not able to work.[18] They read Title VII in light of a symmetrical model of equality in which the same rules apply to all people.

The difference dilemma thus permeates not only the statutory scheme but also the Court's attempt to address the situation. There are, of course, nearly innumerable attempts to solve this dilemma.[19] Unfortunately for these scholars, focusing on the difference dilemma creates a situation in which it is impossible to either solve the dilemma or ignore it. No matter how good the solution, the difference dilemma thrives as long as scholars and judges define it as The Problem, just as *Lochner v. New York*[20] is still alive because the Court is very concerned with not repeating the mistakes it made during the time beginning with that case and ending in 1937.[21] Consciously ignoring the dilemma is just as ineffective.[22] Once scholars articulate and understand the dilemma, no other

16. 443 U.S. 193 (1979).
17. 479 U.S. at 292-295 (Stevens, J. concurring).
18. 479 U.S. at 297-302 (White, J., dissenting).
19. *See, e.g.*, MACKINNON, *supra* note 5, at 32-45 (suggesting solution is to look for disparate power relations); Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 21-28 (1985) (episodic switches between symmetry and asymmetry depending on whether reproduction at issue or not); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1008-11 (1984) (suggesting an effects test, without consideration whether the effect of continuing domination came from unfair symmetry or asymmetry, and strict scrutiny for any law with such effects); Christine Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043 (1987) (adopting essentially asymmetrical model of equality but solving the difference dilemma by arguing for equality as acceptance of the differences); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987) (same); Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991) [hereinafter *Reflections*] (arguing for an equality or symmetrical analysis, but solving the difference dilemma by reformulating equality in light of lived-out experience); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986) (focusing on solving inequality or oppression); Stephanie M. Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265 (1984) (arguing for participatory perspective in which explicit gender classification or classification with disparate impacts is inherently suspicious unless it is not harmful to and furthers women's participation in society); Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296, 306-23 [hereinafter *Dissolving*] (solving the difference dilemma through the post-modern realization that symmetry and asymmetry require one another to function); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989) (arguing for a symmetrical approach, but solving difference dilemma by reformulating symmetry as a tool to break social constructions of difference); *see also* Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1163-82 (1986) (ultimately rejecting equality analysis as a way to empower outsiders).
20. 198 U.S. 45 (1905).
21. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2812 (1992) (Opinion of O'Connor, Kennedy, and Souter, JJ.); *id.* at 2862-65 (Rehnquist, C.J., dissenting); *see also* Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1193-1219 (1985).
22. For example, try consciously ignoring your left foot. You probably will be able to do nothing except think about your left foot or the fact that you are ignoring it. *Cf.* Strauss, *supra* note 8, at 111-13 (arguing that prohibiting persons from using racial criteria makes them focus

scholar can ignore it without being an ignorant or incompetent legal scholar.

It is not that the difference dilemma is a hopeless predicament. In *California Federal*, Justice Marshall's opinion, joined in this part by Justice Scalia, actually discovers a unique way to approach the difference dilemma. Extrapolating on that discovery, this Article suggests in Section II that the difference dilemma is not just The Problem, but is also a useful tool in equality analysis. The existence of the difference dilemma not only indicates the existence of subordination, but it also provides the dynamic tension necessary to provide direction out of the subordination. In short, attempting to solve the difference dilemma is futile and possibly dangerous; attempting to use the difference dilemma is hopeful and no more dangerous than not attempting to do so.

In Section I, however, this Article takes a different tack and examines how justices on the United States Supreme Court handle the difference dilemma. The surprising claim of Section I is that the justices ignore the problems created by the difference dilemma, but not the dilemma itself. It is hardly surprising that the justices ignore the theoretical indeterminacy created by the dilemma. Indeterminacy is unlikely to be a popular theory in an institution whose function is making final determinations in legal disputes. The justices ignore the problems created by the dilemma in a second way, however, that is considerably more startling: all of the justices adopt both symmetrical and asymmetrical models of equality. Moreover, they switch back and forth between symmetry and asymmetry depending on context, usually between claims of race and gender discrimination. This claim requires a bit of substantiation and Section I will examine most, but not all, of the recent members of the Court.[23] The more recent appointees to the Court have not yet written enough opinions to highlight their switches between asymmetry and symmetry. If any of these newer justices believe they can maintain either a purely symmetrical or a purely asymmetrical approach, a glance at their predecessors might teach greater humility.

I. THE CHANGING FACE OF EQUALITY ON THE SUPREME COURT

Although this section details the switches the justices make between symmetry and asymmetry, this is merely a description, not a criticism or an indictment. Although some might consider their switches between symmetry and asymmetry as unprincipled or in need of justification, the Article does not blame the justices for falling into the difference dilemma. It is inevitable.

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on race, not ignore it).

23. This Article will not discuss the newer justices (Justices Scalia, Kennedy, Souter, Thomas, Ginsburg, and Bryer). This Article also will not discuss Chief Justice Burger because of his tendency to merely sign on opinions authored by other justices, which leaves considerable room for error in discovering his actual position. Of all the cases reviewed, he authored opinions only in Fullilove v. Klutznick, 448 U.S. 448, 453-95 (1980) (writing for himself and two other justices); Steelworkers v. Weber, 443 U.S. 193, 216-19 (1979) (short dissent leaning on Justice Rehnquist's fuller dissent); Califano v. Webster, 430 U.S. 313, 321 (1977) (one paragraph concurrence indicating inability to distinguish this case from Califano v. Goldfarb, 430 U.S. 199 (1977)); Craig v. Boren, 429 U.S. 190, 215-17 (1976) (Burger, C.J., dissenting) (two page discussion of standing issues leaning on Justice Rehnquist's fuller dissent); Reed v. Reed, 404 U.S. 71 (1971)(six page opinion of the court).

Ironically, the easiest illustrations of the switch between symmetry and asymmetry are the most ideological justices: (Chief) Justice Rehnquist on the right, Justices Brennan and Marshall on the left. This article will start with (Chief) Justice Rehnquist.

Craig v. Boren[24] involved an Equal Protection challenge to an Oklahoma law prohibiting the sale of reduced alcohol beer to females under the age of 18 and males under the age of 21. The Court held that the statute violated the Equal Protection Clause.[25] Justice Rehnquist opened his dissent with the objection that statutes treating men less favorably than women are not subject to anything more than rational basis scrutiny because, as he writes later in his opinion, "[t]here is no suggestion in the Court's opinion that males in this age group are in any way peculiarly disadvantaged, subject to systematic discriminatory treatment, or otherwise in need of special solicitude from the courts."[26] In taking this position, Justice Rehnquist adopts an asymmetrical approach: gender-specific laws are constitutionally unobjectionable as long as they are minimally rational and do not harm a historically subordinated *class*.

Switching to the race context and transposing "Euro-Americans" or "whites" for "males" in the sentence quoted above, Justice Rehnquist should apply reduced scrutiny to affirmative action programs that disadvantage only those of the socially dominant race.[27] But he does not. Although Justice Rehnquist never has written an opinion in a case involving an Equal Protection challenge to an affirmative action program, he has voted against every affirmative action plan that has come before the Court, often joining opinions holding them to the strictest scrutiny.[28] Moreover, Justice Rehnquist has written opinions in cases where there was a Title VII challenge to such programs and he always interprets the statute to "outlaw[] *all* racial discrimination, recognizing that no discrimination based on race is benign, that no action disadvantaging a person because of his color is affirmative."[29] In this context,

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24. 429 U.S. 190 (1976).

25. *Id.* at 197-204.

26. *Id.* at 219 (Rehnquist, J., dissenting); *see also* Califano v. Goldfarb, 430 U.S. 199, 242 (1977) (Rehnquist, J., dissenting) (discrimination in favor of aged widows "is scarcely an invidious discrimination.").

27. Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 51 (1991) (noticing this switch and arguing that Euro-Americans arguing for strict scrutiny is an attempt to reproduce their societal advantage).

28. Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 603-10 (1990) (O'Connor, J., dissenting, joined by Rehnquist, C.J, Scalia, and Kennedy, J.J.); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-98, (1989) (O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, J.J.); United States v. Paradise, 480 U.S. 149, 196 (1987) (O'Connor, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273-74 (1986) (Powell, J., joined by Burger, C.J., and Rehnquist and O'Connor, J.J.); Fullilove v. Klutznick, 448 U.S. 448, 522-27 (1980) (Stewart, J., dissenting, joined by Rehnquist, J.); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 408-21 (1978) (Stevens, J., dissenting in part, joined by Burger, C.J., and Stewart and Rehnquist, J.J.) (not reaching equal protection ground because affirmative action plan violated Title VI).

29. United Steelworkers v. Weber, 443 U.S. 193, 224 (1979) (Rehnquist, J., dissenting). *See also*, Local Number 93, International Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 535-45 (1986) (Rehnquist, J., dissenting); Local 28, Sheet Metal Workers' International Association v. E.E.O.C., 478 U.S. 421, 500 (1986) (Rehnquist, J., dissenting). *Cf.* Firefighters v. Stotts, 467 U.S. 561 (1984) (White, J., joined by Burger, C.J., and Powell, Rehnquist, and O'Connor, J.J.) (prohibiting district court from modifying consent decree to give advantage to those who cannot prove they were actual victims of discrimination violates Title VII).

Justice Rehnquist switches to a symmetrical approach: race-specific programs employ a prohibited *classification* and are therefore presumptively unconstitutional because the same rules do not apply to everyone.

There are other examples of the same phenomenon. For instance, Justice Rehnquist joined Justice Stewart's much maligned opinion in *Geduldig v. Aiello*.[30] In that case, California had established a disability insurance fund that provided benefits to those unable to work because of disability. The state defined disability to exclude any injury or illness that arose in connection to pregnancy. Justice Stewart, writing for the Court, held that excluding benefits for disability caused by pregnancy is not a classification based on gender because "[t]he program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."[31] *Geduldig* is usually attacked for selecting the male standard of disability and applying it symmetrically to both men and women.[32] There may be more to *Geduldig* than initially meets the eye, however, as the Court could defend its approach based on an asymmetrical model. The Court could argue that if women and men really are different, there is no gender classification if both some men and some women can take advantage of a program, even if there are disproportionate impacts.

By the same logic, an affirmative action program would not contain a racial classification if some members of all races can take advantage of the program. Therefore, a government could prefer minority-owned business enterprises without creating a racial classification if it defined such business as having fifty-one percent minority ownership.[33] An Euro-American could take advantage of such programs by becoming the forty-nine percent partner in such a business. The obvious differential impact of the program should be irrelevant. The facts in *City of Richmond v. J.A. Croson Co.*[34] indicated that Richmond, Virginia had exactly that definition of a minority business enterprises.[35] Richmond then required that at least thirty percent of the dollars spent on city-financed construction projects go to subcontractors that qualified as these minority business enterprises. In the Equal Protection challenge to this program, Chief Justice Rehnquist joined Justice O'Connor's opinion that does not ever pause over the question of whether the program is a racial preference. They just assume it is.[36] That assumption results from having switched back to a

30. 417 U.S. 484 (1974) (Opinion by Stewart, J., joined by, *inter alia*, Rehnquist, J.). For catalogues of articles criticizing *Geduldig* see, Law, *supra* note 19, at 983 nn.107 - 08.

31. *Geduldig*, 417 U.S. at 497 n.20. In the recent Operation Rescue case, Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 760 (1993), Justice Scalia, in a majority opinion that included, *inter alia*, Chief Justice Rehnquist, reaffirmed this holding.

32. Williams, *Equality Crisis*, *supra* note 2, at 192; Williams, *Equality's Riddle*, *supra* note 2, at 360.

33. *Cf.* Metro Broadcasting, Inc., v. F.C.C., 497 U.S. 547, 557 (1990) (minority ownership must exceed 50 percent or be controlling); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 478 (1989) (at least 51 percent).

34. 488 U.S. 469 (1989).

35. *Id.* at 477-81.

36. *Id.* at 493-96 (O'Connor, J., joined by, *inter alia*, Rehnquist, C.J.) (attack on "benign" racial preferences, assuming the program in question contained a racial preference); *id.* at 520, (Scalia, J., concurring) (same); *see also Metro Broadcasting*, 497 U.S. at 603 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, J.J., dissenting) (same); *id.* at 631-37 (Kennedy, J., joined by Scalia, J., dissenting) (same).

Justice Scalia even writes that programs that have a disproportionate racial impact are constitutional if they do not contain a racial classification, never questioning whether the

symmetrical model—the program disadvantages people of specific ethnicity, chiefly Euro-Americans,[37] and therefore is an unconstitutional racial classification.

One last example of this switch focuses on the question of the possible justifications for an affirmative action program. In the *Sheet Metal Workers* case,[38] there was overwhelming evidence of Local 28's violations of Title VII's prohibition on racial exclusion, and it was just as clear that it would be very difficult to locate all those individuals excluded by Local 28. Nevertheless, Justice Rehnquist would not have allowed the district court to order remedies that would benefit anyone other than the specific individuals unfairly denied admission to Local 28. He argued that the statute allows a court to order racial preferences only for "minority individuals who have been the actual victims of a particular employer's racial discrimination."[39] In the Equal Protection context, Chief Justice Rehnquist has signed onto Justice O'Connor's opinions in *Metro Broadcasting, Inc. v. F.C.C.* and *Croson* that, in dicta, would allow affirmative action to remedy past racial discrimination, even if the beneficiaries are not the actual victims, if the government unit implementing the affirmative action program is the actual perpetrator of past discrimination.[40] Thus in both the Title VII and Equal Protection context, (Chief) Justice Rehnquist adopts a very symmetrical model—everybody must be treated the same absent very concrete proof[41] of past racial discrimination.

Justice Douglas urged perhaps a more extreme version of the same perspective. In 1971, the University of Washington Law School admitted minority students under a separate admissions procedure. The law school would not have admitted these students under the non-minority admissions track.[42] In *DeFunis v. Odegaard*,[43] a Euro-American applicant who the University denied admission challenged this dual admission procedure. Justice Douglas argued that "[t]here is no constitutional right for any race to be preferred."[44] He would

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Richmond program might fit within the category. *See Croson*, 488 U.S. at 524, (Scalia, J., concurring).

37. Indeed it may be difficult to name a non-European racial group in the United States other than African-Americans, Hispanic-Americans, American Eskimo, Native Americans, Aleuts or Asian-Americans. Justice Kennedy asserts in *Metro Broadcasting* that there are "many racial and ethnic *minorities* that have not made the Commission's list." *Metro Broadcasting*, 497 U.S. at 633 (Kennedy, J., joined by Scalia, J., dissenting). He does not provide any examples. My best guess would be people of Middle-Eastern ancestry. *See* Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987) (holding that an Arab could seek damages for racial discrimination under 42 U.S.C. § 1981).

38. Local 28, Sheet Metal Workers' International Association v. EEOC, 478 U.S. 421 (1986).

39. *Id.* at 500 (Rehnquist, J., dissenting). *See also* Local Number 93, International Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 535 (1986) (Rehnquist, J., dissenting).

40. *See, Metro Broadcasting*, 497 U.S. at 611-12 (O'Connor, J., dissenting, joined by, *inter alia*, Rehnquist, C.J.); *Croson*, 488 U.S. at 479-505 (O'Connor, J., writing for a majority, joined by, *inter alia*, Rehnquist, C.J.). *Cf., Croson*, 488 U.S. at 525-26 (Scalia, J., concurring) (may only benefit actual victims of racial discrimination). Chief Justice Rehnquist notably did not join Justice Scalia's separate opinion in *Croson*.

41. *See Croson*, 488 U.S. at 496-505 (O'Connor, J., joined by, *inter alia*, Rehnquist, C.J.); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277-78 (1986) (Powell, J., joined by, *inter alia*, Rehnquist, J.).

42. *See* DeFunis v. Odegaard, 416 U.S. 312, 325 (1974) (Douglas, J., dissenting).

43. 416 U.S. 312 (1974).

44. *Id.* at 336 (Douglas, J., dissenting).

have required decisions made on the "individual merits in a racially neutral manner"[45] even in the face of a compelling state interest. The only reason for a racial classification "is to make more certain that racial factors do not militate *against an applicant or on his behalf.*"[46] This reasoning is again the symmetrical model of equality, requiring the same rules apply to all applicants to the law school.

Everything changes, however, in the gender context. Justice Douglas authored, and Justice Rehnquist joined, the majority opinion in *Kahn v. Shevin*[47] rejecting an Equal Protection challenge to Florida's annual $500 property tax exemption for widows (females) but not widowers (males). Their rational: "the financial difficulties confronting the lone woman ... exceed those facing the man."[48] There are no requirements that the women be actual victims of discrimination, or even economically deprived; broad, amorphous social discrimination is enough.[49] This shift reveals that these justices have moved back to an asymmetrical approach—women, particularly women who have lost their man, are different and the legislature may act on that difference.[50]

One wrinkle is that the switch to asymmetry does not apply to women working outside the home or otherwise part of the business world. When Santa Clara County promoted Diane Joyce from road maintenance worker to road dispatcher pursuant to an affirmative action plan, Chief Justice Rehnquist would have struck down the plan as a violation of the Equal Protection clause. He agreed with Justice Scalia's dissenting opinion that "the objective of remedying societal discrimination cannot prevent remedial affirmative action from violating the Equal Protection Clause."[51] Apparently, men and women working

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45. *Id.* at 337.

46. *Id.* at 336; *see also id.* at 336 n.18 (distinguishing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), because no one was excluded from school and no one had a right to segregated education).

47. 416 U.S. 351 (1974).

48. *Id.* at 353; *cf.* Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 280-82 (comparing images of, and public support and sympathy for, "worthy" widows and "unworthy" unmarried mothers).

49. *Compare Defunis*, 416 U.S. at 353 ("Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs.") *and* Califano v. Goldfarb, 430 U.S. 199, 242 (1977) (Rehnquist, J., dissenting) (gender classification "explainable as a measure to ameliorate the characteristically depressed condition of aged widows.") *with* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 497 (1989) (O'Connor, J., joined by, *inter alia*, Rehnquist, C.J.) (generalized assertion of past societal discrimination inadequate because it provides no logical stopping point) *and* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274-76 (1986) (Powell, J., joined by, *inter alia*, Rehnquist, J.) (same).

50. *Cf.* THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS 424-56, 465-71 (1992) (discussing rhetoric of motherhood that led to the passage of mother's pensions and how that same rhetoric inevitably channeled the public funds to "deserving" widows rather than "unworthy" unmarried mothers).

51. Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 664 (1987) (Scalia, J., joined by Rehnquist, C.J., dissenting). *See* Nashville Gas Co. v. Satty, 434 U.S. 136, 138-143 (1977) (Rehnquist, J.) (illegal discriminatory effect of requiring women returning from maternity leave to forfeit seniority accumulated prior to taking maternity leave); *see also*, Kirchberg v. Feenstra, 450 U.S. 455, 463 (1981) (Stewart, J., joined by Rehnquist, J., concurring) (Louisiana "head and master" provision unconstitutional because "men and women were similarly situated for all relevant purposes with respect to management and disposition of community property."); Califano v. Westcott, 443 U.S. 76 (1979) (unanimous on substantive question) (unconstitutional to provide AFDC money if the primary economic provider who becomes unemployed is the father, but not the mother).

in the same jobs are the same, and the same rules must apply. Symmetry has returned.

The point of this exercise is not that these cases cannot be distinguished from each other. Chief Justice Rehnquist could distinguish them by using the race/gender distinction, if by nothing else. The point is that he uses both symmetrical and asymmetrical approaches to equality without explaining why he chooses one approach instead of the other. For instance, he could use a symmetrical model in all gender cases and an asymmetrical model in race cases. Of course if he did that, he always would vote with Justices Brennan and Marshall.[52]

Justices Brennan and Marshall make the same shift between symmetry and asymmetry, just backwards. For example, consider their analysis of suspect classifications and the level of scrutiny. In the Court's first decision on the merits of an affirmative action plan,[53] the medical school at the University of California at Davis set aside sixteen seats for minority students and instituted a separate admissions procedure for minority applicants eligible for those seats. Again a Euro-American, Allan Bakke, challenged the separate procedure on Equal Protection grounds. Justices Brennan and Marshall would have held that Euro-Americans are not a suspect class because they do not "have any of the 'traditional indicia of suspectness: the class is not saddled with ... disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'"[54] Because Euro-Americans are not a suspect class, Justices Brennan and Marshall have consistently applied only intermediate scrutiny to racial affirmative action plans, which only requires means "substantially related" to "important governmental objectives,"[55] rather than strict scrutiny, which requires means "narrowly tailored" to a "compelling governmental interest."[56] They have adopted an asymmetrical approach — the races are not the same because of historical and current divisions of power along racial lines, and the government may treat them differently if it helps narrow that gap.

By analogy, if gender classifications disadvantage males, Justices Brennan and Marshall should apply a less strict standard of review, but they don't. In the early gender discrimination cases the plaintiffs were often male,[57] but Justices Brennan and Marshall advocated the same standard of review as if the plaintiffs

52. For the purpose of this discussion, I will treat Justices Brennan and Marshall interchangeably, largely because they never disagreed with one another on these issues. Within the subset of cases discussed in this Article, the only opinion they did not both join is Justice Marshall's separate opinion in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 387 (1978) (Marshall, J., partially concurring in the judgment of the Court). Of course, they were both part of the joint opinion in that case. *Id.* at 324 (Opinion of Brennan, White, Marshall, and Blackmun, J.J.).

53. The Court dismissed as moot the first case bringing up the issue, *Defunis v. Odegaard*, 416 U.S. 312 (1974).

54. *Bakke*, 438 U.S. at 357 (Opinion of Brennan, White, Marshall, and Blackmun, J.J.) (quoting San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973)); *see also* Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 563-66 (1990); Fullilove v. Klutznick, 448 U.S. 448, 518 (1980) (Marshall, J., concurring).

55. See sources cited *supra* note 54.

56. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273-74 (1986).

57. For a justification of this strategy, see David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 LAW & INEQ. 33, 53-92 (1984).

were female.[58] They always were careful to note, however, that there was no claim of remedying past discrimination.[59] Then Alabama claimed the purpose of its law making alimony available only to female former spouses is to help remedy past discrimination[60] In an opinion written by Justice Brennan, the Court reviews the statute under intermediate scrutiny,[61] the same standard by then established to review gender classifications disadvantaging women.[62] In other words, Justices Brennan and Marshall switch from protecting suspect classes to protecting against suspect classifications. In that switch, these justices also have switched to a symmetrical approach—equality requires that the same rules, including the Court's level of scrutiny, apply to both men and women.

Part of the problem in even discussing statutes that discriminate against men is that Justices Brennan and Marshall often find discrimination against females, even if the plaintiff is male. Denial of benefits to a male spouse, through the heterosexual marriage relationship, becomes discrimination against the female spouse because she is less able to provide for her family.[63] For instance, in *Califano v. Goldfarb*,[64] Justice Brennan authored a plurality opinion striking down provisions of the Social Security Act automatically providing widows with survivors benefits on the death of their husbands, but requiring widowers to prove economic dependency on their deceased wives.[65] By looking at the relationships between individuals with different genders, Justices Brennan and Marshall realize they must apply a symmetrical model of equality or risk perpetuating the stigmatizing stereotypes that, at least in part, fuel gender discrimination.[66]

Similarly, the personal relationships among colleagues or co-workers could turn a program disadvantaging Euro-Americans into discrimination against African-Americans or other minorities because of the racial stigmatization that can arise out of an affirmative action program. Justices Brennan and Marshall do acknowledge that affirmative action programs can be stigmatizing, and as a result they apply intermediate rather than reduced, or "rational basis," scrutiny.[67] Nevertheless, these Justices do not seriously

58. *E.g.*, Craig v. Boren, 429 U.S. 190, 197-99 (1976); Frontiero v. Richardson, 411 U.S. 677, 682-688 (1973).

59. *Craig*, 429 U.S. at 198 n.6; *Frontiero*, 411 U.S. at 689 n.22.

60. Orr v. Orr, 440 U.S. 268, 280 (1979).

61. *Id.*; *see also,* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982) (Opinion by O'Connor, J., joined by, *inter alia*, Brennan and Marshall, J.J.); Rostker v. Goldberg, 453 U.S. 57, 87-88 (1981) (Marshall, J., dissenting); Califano v. Goldfarb, 430 U.S. 199, 209 n.8 (1977); *cf.* Kahn v. Shevin, 416 U.S. 351, 358-60 (1974) (Brennan J., dissenting) (same, except using strict scrutiny rather than intermediate scrutiny).

62. *Craig*, 429 U.S. 190, 197-99 (1976); *see also* Califano v. Webster, 430 U.S. 313, 316-17 (1977) (per curiam).

63. *Goldfarb*, 430 U.S. at 207-09; Weinburger v. Wiesenfeld, 420 U.S. 636, 645 (1975); *see also* Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 147-49 (1980) (White, J., joined by, *inter alia*, Brennan and Marshall, J.J.); Califano v. Westcott, 443 U.S. 76, 84 (1979) (Blackmun, J., joined by, *inter alia*, Brennan and Marshall, J.J.); *cf. Frontiero*, 411 U.S. at 688 (Plurality opinion by Brennan, J.) (female member of the armed services denied housing and medical benefits for her husband).

64. 430 U.S. 199 (1977).

65. *Id.* at 201-17 (Brennan, J., joined by, *inter alia*, Marshall, J.).

66. *See id.*;*Weinburger*, 420 U.S. at 643; *see also Westcott*, 443 U.S. at 88-89 (1979) (Blackmun, J., joined by, *inter alia*, Brennan and Marshall, J.J.).

67. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 360 (1978) (Opinion of Brennan, White, Marshall, and Blackmun, J.J.).

question the precepts of the affirmative action programs that have come before the Court.[68] Sometimes they simply do not discuss the question of perpetuating racial stigma or stereotypes.[69] When they do discuss the issue, they seem to assume that as long as the minority participants meet the same minimal qualifications,[70] are integrated into the mainstream process,[71] and the stereotypes are true in the aggregate,[72] there is no problem. It is ironic that these justices, known for looking at race issues in historical context,[73] are unwilling to look at the affirmative action programs in the current social context. The reason is no mystery, however. Because of the history of race relations in the United States, at least Euro-Americans and African-Americans (and maybe other minorities) are different, and using a symmetrical model would risk ruining the solution by building into it the current effects of historical discrimination.[74] Thus they shift back to an asymmetrical model.

The final example of their switch is the interpretation of Title VII. Justices Brennan and Marshall twice interpreted the language at the heart of Title VII: "It shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms,

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68. *See* STEPHEN CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 47-62 (1991) (decrying "best black" syndrome in which African-Americans are never objectively good, they are just the "best black"); Jerome M. Culp, Jr., *Diversity, Multiculturalism, and Affirmative Action: Duke, the NAS, and Apartheid*, 41 DEPAUL L. REV. 1141, 1145-52 (1992) (noting that affirmative action can either increase or decrease racial stereotypes). *Compare Bakke*, 438 U.S. at 369-76 (Opinion of Brennan, White, Marshall, and Blackmun, J.J.) (arguing that U.C. Davis could implement affirmative action programs to counter disproportionate impacts of standardized tests as long as it avoids all stigma by "bringing the races together" and not establishing a separate preserve for African-American students) *with* Derrick A. Bell, Jr., *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3, 7-9, 17-18 (1979) (decrying *noblesse oblige* attitude that makes affirmative action allowable, but not required, criticizing choice of creating exception to admissions standards rather than reforming them, and noting that simple inclusion does not effectively combat stigma). *See also* Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357, 1363-64 (1992) (reviewing DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS (1991)) (noting affirmative action is seen as gratuitous lowering of standards, even if the standards are not met by those who administer the standards).

69. It is always difficult to give a negative cite, but the following cites are to places in cases where such a discussion is conspicuously absent: City of Richmond v. J.A. Croson Co., 488 U.S. 469, 547-548 (1989) (Marshall, J., dissenting); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 306-10 (1986) (Marshall, J., dissenting). The absence is especially conspicuous in *Croson* because the majority specifically raises the danger of stigmatic harm as one reason to always apply strict scrutiny to all racial classifications. *Croson*, 488 U.S. at 492.

70. Fullilove v. Klutznick, 448 U.S. 448, 521 (1980) (Marshall, J., concurring); *Bakke*, 438 U.S. at 375-76.

71. *Bakke*, 438 U.S. at 374.

72. Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 579-84 (1990).

73. *E.g., Metro Broadcasting*, 497 U.S. at 552-58 (history of minority participation in broadcast industry); *Croson*, 488 U.S. at 529, 544-45 (history of racial discrimination in Richmond, Virginia); United States v. Paradise, 480 U.S. 149, 153-68 (1987) (history of discrimination and dilatory tactics by Alabama Department of Public Safety); Local 28 Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 426-40 (1986) (history of discrimination and dilatory tactics by Local 28 of an international union); *Wygant*, 476 U.S. at 297-99 (history of discrimination and negotiations on solution by Jackson School Board); *Bakke*, 438 U.S. at 387-94 (Marshall, J., concurring) (history of discrimination against African-Americans in the United States); *see* Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1765-72 (describing Justice Marshall's method of interpretation in *Croson* as "ecological" because it incorporates background and context).

74. *Croson*, 488 U.S. at 536-39, 551-53.

conditions or privileges of employment because of such individual's race, color, religion, sex, or national origin."[75] In an early case interpreting this language, General Electric provided its employees with disability benefits for workers who could not work due to non-occupational sickness or accident. Workers who could not work because of pregnancy did not qualify for these benefits.[76] Justices Brennan and Marshall, dissenting from the Court's opinion holding that this practice did not violate Title VII, acknowledged the choice between symmetrical and asymmetrical models[77] and argued that pregnancy is not "an additional risk, unique to women."[78] They argued that it is more consistent with Congressional intent to view pregnancy as one of a host of reasons employees may not be able to work, and that failure to cover absences due to pregnancy is not treating males and females with gender-specific disabilities the same.[79] Obviously they employed a symmetrical approach.

In another early case, Kaiser Aluminum decided to integrate its craftwork jobs by promoting African-Americans to half of the openings in craft-training programs.[80] Justices Brennan and Marshall argued that although the plain language of the statute might prohibit such affirmative action programs, the language had to be read in light of the statutory purpose. As told by Justice Brennan, in the legislative history there was absolutely no discussion of *voluntary* affirmative action programs; only discussions of removing discrimination against African-Americans and the problem of mandatory affirmative action programs, or quotas.[81] Justice Brennan then reasons that:

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[82]

Again these Justices switch to the asymmetrical model in the race

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75. 42 U.S.C. § 2000e-2(a) (1988).
76. General Electric Co. v. Gilbert, 429 U.S. 125, 127-29 (1976).
77. *Id.* at 147-48 (Brennan, J., dissenting).
78. *Id.* at 139 (Rehnquist, J., writing for the Court) (emphasis omitted).
79. *Id.* at 155-160 (Brennan, J., dissenting). A fair amount of confusion results from taking the majority too literally in this case and Geduldig v. Aiello, 417 U.S. 484 (1974). The majority seems to use a symmetry analysis, saying that excluding pregnancy benefits treats men and women the same because both men and women are covered for all other reasons for missing work. General Electric Co. v. Gilbert, 429 U.S. at 138; Geduldig v. Aiello, 417 U.S. at 496-97. The cases are indefensible under a symmetry analysis, however, because the programs provide benefits for male-specific but not female-specific inabilities to work. General Electric Co. v. Gilbert, 429 U.S. at 152, 152 n.5 (Brennan, J., dissenting); *Geduldig*, 417 U.S. at 501 (Brennan, J., dissenting). The majority opinions are understandable, however, from an asymmetrical approach. The Court could believe that excluding pregnancy treats everyone the same because the ability to bear children is an extra, and optional feature of women, *General Electric Co.*, 429 U.S. at 136, 139; *see also Geduldig*, 417 U.S. at 493-95 (treating pregnancy as an addition to the disability system). The programs in question treated men and women the "same" only if such optional differences are first excluded from the calculus. Thus the Court's approach is actually asymmetrical, although it does use the difference to create a separate set of rules protecting that difference. *See also* note 32, *supra*, and accompanying text.
80. United Steelworkers v. Weber, 443 U.S. 193, 197-200 (1979).
81. *Id.* at 202-07.
82. *Id.* at 204.

context—there are differences between the races, and Congress did not intend to prohibit employers from acknowledging racial differences and using racial classification to include racial minorities in job training programs or other benefits. The switch is obvious. The way to include women is symmetrical rules; the way to include African-Americans is asymmetrical rules.

Once again the justices use both symmetrical and asymmetrical models of equality and switch between them without explanation, and perhaps without even conscious awareness. The most ideological justices make the switch in the most predictable manner, but there are exceptions even in their approaches.[83]

Justice Powell, often seen as the "swing" vote on the Court, made the switch too. He was just less predictable. For him the context shifts were often within, not just between, race and gender discrimination contexts. For instance he was the only justice to sign onto the majority opinions in both *Kahn v. Shevin*[84] and *Califano v. Goldfarb*.[85] As discussed earlier, *Kahn* takes an asymmetrical approach and upholds Florida's $500 property tax exemption for widows but not widowers;[86] *Goldfarb* uses a symmetrical approach and rejects a social security benefits scheme that requires widowers but not widows to prove they were economically dependent on their deceased spouse.[87] He also signed onto the majority decisions in both *Firefighters Local Union No. 1784 v. Stotts*[88] and *Local Number 93, International Association of Firefighters v. Cleveland*.[89] Both cases involved claims of discrimination settled by consent decrees approving affirmative action programs that were later challenged by unions intervening to protect the seniority system.[90] *Stotts* took a very symmetrical model of Title VII, arguing a court could award only actual victims of discrimination the benefits of affirmative action;[91] *Cleveland* took the opposite approach and position.[92]

Justice Powell's seminal split-approach opinion, however, is his lone but controlling opinion in *Bakke*.[93] Allan Bakke challenged the decision by the

83. The most obvious example is Johnson v. Transportation Agency, 480 U.S. 616 (1987). On the facts, the opinions look bizarre. Justice Brennan wrote the opinion of the Court using an asymmetrical approach — it is constitutional to treat women differently for their benefit. Justice Scalia, joined by Justice Rehnquist, dissented, arguing the agency was statutorily required to treat men and women symmetrically. These positions are exactly the reverse of their usual positions. *See* text accompanying notes 24-50 and 53-83.

The riddle is fairly easy, though. Because Diane Joyce, the woman benefited by the affirmative action, was in the very male profession of road construction, everyone saw her as analogous to a minority male seeking promotion in the field. Justice Scalia nearly wore out phrases like "race or sex" in his opinion. See *Id.* at 658, 664, 665, 667 (twice), 670, 675 (three times). Justice Brennan's opinion carefully noted that it applied to racial minorities as well as women. *Id.* at 635 n.13. Indeed, not one of the four justices writing opinions (Justices Stevens and O'Connor wrote separate concurring opinions) even cite a prior gender discrimination case.

84. 416 U.S. 351 (1974) (Douglas, J., joined by, *inter alia*, Powell J.).

85. 430 U.S. 199 (1977) (Brennan, J., joined by, *inter alia*, Powell J.)

86. 416 U.S. at 352-56.

87. 430 U.S. at 204-09.

88. 467 U.S. 561 (1984).

89. 478 U.S. 501 (1986).

90. *Cleveland*, 478 U.S. at 504-12; *Stotts*, 467 U.S. at 565-67.

91. 467 U.S. at 578-83.

92. 478 U.S. at 515-28. In Local 28 of the Sheetmetal Workers Int'l Assoc. v. EEOC, 478 U.S. 421 (1986), Justice Powell in concurrence writes that *Stotts*'s language went beyond the exact question presented in the case. *Id.* at 484. He does not indicate why the "suggest[ed] ... answer" in *Stotts* did apply in the later cases. *Id.*

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

medical school of the University of California at Davis to set aside sixteen seats for disadvantaged minority students under both the Equal Protection Clause and Title VI, which is the counterpart to Title VII that applies to educational institutions. Justice Powell's approach to the Title VI challenge is asymmetrical and virtually identical to the later reading of Title VII by the Court in *Weber*:[94] Congress intended to prohibit racial classifications only if they injure, rather than benefit, racial minorities.[95] Conversely, his approach to the Equal Protection Clause challenge is symmetrical: all racial classifications, regardless who they hurt or benefit, are subject to strict scrutiny.[96]

To further confuse the issue, Justice Powell's *Bakke* opinion also illustrates how he sometimes switched approaches at the race/gender line. In *Bakke*, he holds that racial diversity is a compelling interest for colleges and universities, but they must not set aside a specific number of seats in the class for minorities.[97] Here Justice Powell clearly embraces the symmetrical approach to diversity: everyone has the opportunity to bring some type of diversity to a school, if not racial, then geographical, socio-economic class, or talent diversity.[98]

Now consider single-sex universities and colleges. In Joe Hogan's Equal Protection challenge to Mississippi University for Women's policy of not admitting male students to its nursing program, Justice Powell argued that it was inappropriate to apply the same standard to gender classifications that expand women's choices as to those that foreclose choices.[99] Moreover, diversity now justifies setting aside not a paltry number of seats within an institution, but entire institutions for different categories of persons.[100] This approach is asymmetry at its best.

Other justices, generally viewed as less ideological than Justices Brennan, Marshall, or (Chief) Justice Rehnquist, are surprisingly more consistent in choosing either a symmetrical or an asymmetrical approach. Eventually, however, they too make the shift.

Justice White, for example, quite consistently takes a symmetrical approach. He argues the same rules should apply to men and women in almost every context: military service,[101] employment benefits,[102] and relationships to children born outside of a traditional marriage.[103] He applies the same standard

94. United Steelworkers v. Weber, 478 U.S. 193, 202-07 (1979)

95. *Bakke*, 438 U.S. at 284-87; *cf. Weber*, 443 U.S. 193, 200-11 (1979). Justice Powell took no part in the decision of *Weber*. *Id.* at 209.

96. *Bakke*, 438 U.S. at 289-99.

97. *Id.* at 311-19.

98. *Id.* at 315-19, 321-24.

99. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 739-41 (1982) (Powell, J., dissenting).

100. *Id.* at 742-45.

101. Rostker v. Goldberg, 453 U.S. 57, 83-85 (1981) (White, J., dissenting); *see also* Schlesinger v. Ballard, 419 U.S. 498, 521 (1975) (White, J., dissenting).

102. California Fed. Sav. & Loan Assn. v. Guerra, 479 U.S. 272, 297 (1987) (White, J., dissenting); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980); *see also* Califano v. Westcott, 443 U.S. 76 (1979) (Blackmun, J., joined by, *inter alia*, White, J.); Weinburger v. Wiesenfeld, 420 U.S. 636 (1975) (Brennan, J., joined by, *inter alia*, White, J.); Frontiero v. Richardson, 411 U.S. 677 (1973) (Brennan, J., joined by, *inter alia*, White, J.).

103. Parham v. Huges, 441 U.S. 347, 361 (1979) (White, J., dissenting); *see also* Caban v. Mohammed, 441 U.S. 380 (1979) (Powell, J., joined by, *inter alia*, White, J.).

whether the gender classification disadvantages women or men,[104] and is very suspicious of all affirmative action programs purportedly designed to benefit women.[105] He takes symmetry so far that he hints that he might uphold the same height and weight requirements for men and women.[106] In the race context, Justice White's position is somewhat less certain, but he generally is suspicious of any racial classification,[107] including affirmative action plans, whether imposed by courts,[108] accepted by courts as consent decrees,[109] or voluntarily adopted by local governments.[110] Again, a very symmetrical understanding of equality.

The point at which Justice White makes the switch to asymmetry is pregnancy. Although he may see males and females as similarly situated with regard to sex,[111] pregnancy is different, and it may be treated differently.[112] For example, in his separate and largely dissenting opinion in the recent *Johnson Controls* case,[113] he argues that the ability to bear children may be a bona fide occupational (dis)qualification[114] if hiring women who could bear children either directly raises the employer's costs, or indirectly raises those costs by risking injury to fetuses, who might grow up to be tort plaintiffs.[115] His jumps into asymmetry in the race context are slightly less predictable, but at least affirmative action programs by the federal government seem acceptable.[116]

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104. *Wengler*, 446 U.S. at 150-52; *see also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-26 (1982) (O'Connor, J., joined by, *inter alia*, White, J.).

105. Kahn v. Shevin, 416 U.S. 351, 360 (1974) (White, J., dissenting); *see also* Orr v. Orr, 440 U.S. 268, 281-83 (1979) (Brennan, J., joined by, *inter alia*, White, J.); Califano v. Goldfarb, 430 U.S. 199, 207-09 (1977) (same).

106. Dothard v. Rawlinson, 433 U.S. 321, 348 (1977) (White, J., dissenting).

107. *E.g.*, United States v. Fordice 112 S. Ct. 2727 (1992) (White, J., writing majority opinion).

108. Local 28 of the Sheet Metal Workers Int'l Assoc. v. EEOC, 478 U.S. 421, 499 (1986) (White, J., dissenting) (would allow "nonvictims" to benefit from remedy but District Court went too far in ordering what practically amounted to "a strict racial quota."); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (injunction to support prior consent decree); *see also* United States v. Paradise, 480 U.S. 149, 196 (1987) (White, J., dissenting).

109. Local No. 93, Int'l Assoc. of Firefighters v. Cleveland, 478 U.S. 501, 531 (1986) (White, J., dissenting).

110. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (White, J., concurring in the judgment); *see also* City of Richmond v. J.A. Croson, 488 U.S. 469 (1989) (O'Connor, J., joined by, *inter alia*, White, J.). *But see* Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547 (1990) (Brennan, J., joined by, *inter alia*, White, J.); Fullilove v. Klutznick, 448 U.S. 448 (1980) (Burger, C.J., joined by White and Powell, JJ.).

111. *See* Michael M. v. Superior Court, 450 U.S. 464, 488 (1981) (Brennan, J., dissenting, joined by White and Marshall, J.J.).

112. *See* General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (Rehnquist, J., joined by, *inter alia*, White, J.); Geduldig v. Aiello, 417 U.S. 484 (1974) (Stewart, J., joined by, *inter alia*, White, J.); *see also* Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (Rehnquist, J., joined by, *inter alia*, White, J.).

113. UAW v. Johnson Controls, Inc., 499 U.S. 187, 211 (1991) (White, J., concurring in part and concurring in the judgment).

114. The bona fide occupation qualification (BFOQ) exception is codified at 42 U.S.C. § 2000e-(2)(e) (1988).

115 *Johnson Controls*, 499 U.S. at 211-20.

116. *See* Metro Broadcasting Inc., v. F.C.C., 497 U.S. 547 (1990) (Brennan, joined by, *inter alia*, White, J.); Fullilove v. Klutznick, 448 U.S. 448, 453-92 (1980) (Burger, C.J., joined by White and Powell, J.J.). The only other votes in favor of asymmetrical programs occurred in United Steelworkers v. Weber, 443 U.S. 193 (1979) (Brennan, J., joined by, *inter alia*, White, J.) and Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 324-79 (1978) (Joint

At first glance, Justice O'Connor also appears to insist on symmetry first, last, and always. Regardless of who benefits from the classification or whether it is purportedly a "benign" classification, her opinions stridently apply the same level of scrutiny if there is a suspect or quasi-suspect classifications.[117] The only constitutional justification for an asymmetrical approach[118] is if there is a sufficient basis to believe racial discrimination has occurred,[119] and the remedies are very narrowly tailored to the past discrimination.[120] There are cracks in her symmetrical approach, however.

Consider her treatment of higher education in Mississippi. When the question was whether Mississippi had racially desegregated its colleges and universities, she wrote separately in *United States v. Fordice* to emphasize that Mississippi must prove it had removed every remnant of separate education for Euro-Americans and African-Americans.[121] This position contains the symmetry expected of Justice O'Connor. When the question is whether Mississippi had to desegregate its all-female university, Justice O'Connor writing for the majority in *Mississippi University for Women v. Hogan*, rejected Mississippi's contention that forbidding males to take nursing classes for credit instead of just auditing them was compensation for past discrimination against women.[122] In reading the opinion, however, it is striking how narrowly she states the issue: are women in need of affirmative action in the field of nursing?[123] She later limits the scope of her opinion to only MUW's nursing school.[124] It is also striking how comparatively solicitous she is of affirmative action for women: no stringent requirement to prove specific past discrimination,[125] and no requirement to root out all vestiges of past discrimination.[126] In this case, Justice O'Connor is beginning to approach asymmetry. In a more recent case challenging Operation Rescue as a conspiracy to deprive women of their civil rights, she argues in dissent that: "The victims of [Operation Rescue] are linked by their ability to become pregnant and by their ability to terminate their pregnancies, characteristics unique to the class of

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opinion of Brennan, White, Marshall, and Blackmun, J.J.). By the time he left the Court, his support of *Weber* was shaky at best. *See* Johnson v. Transportation Agency, 480 U.S. 616, 657 (1987) (White, J., dissenting).

117. *Metro Broadcasting*, 497 U.S. at 602 (O'Connor, J., dissenting); City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 493-98 (1989); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-27 (1982).

118. *Metro Broadcasting*, 497 U.S. at 612-17 (O'Connor, J., dissenting).

119. *See Croson*, 488 U.S. at 495-506; Johnson v. Transportation Agency, 480 U.S. 616, 649-53 (1987) (O'Connor, J., concurring); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 289-92 (1986) (O'Connor, concurring).

120. United States v. Paradise, 480 U.S. 152, 196-201 (1987) (O'Connor, J., dissenting); Local 28 of the Sheet Metal Workers' Int'l Assoc. v. EEOC, 478 U.S. 421, 489-99 (1986) (O'Connor, J., concurring in part and dissenting in part); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 587-88 (1984) (O'Connor, J., concurring).

121. United States v. Fordice, 112 S. Ct. 2727, 2743-44 (1992) (O'Connor, J., concurring).

122. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 727-31 (1982).

123. *Id.* at 719 ("This case presents the narrow issue of whether a state statute that excludes males from enrolling in an state-supported professional nursing school violates the Equal Protection Clause of the Fourteenth Amendment.").

124. *Id.* at 723 n.7.

125. *Id.* at 728.

126. *See id.* at 727 n.13. Apparently the very existence of MUW is a remnant of past racial and gender discrimination.

women."[127] Justice O'Connor has arrived at asymmetry: women are different, and federal civil rights laws should be read to protect that difference.

In some respects, Justice Blackmun is just the opposite of Justices O'Connor and White: he seemed to find difference at every turn and therefore adopted asymmetrical rules. In the race context, he joined Justices Brennan and Marshall in voting in favor of every affirmative action program that has come before the Court.[128] In the gender context, he found real differences between men and women in military service,[129] child bearing,[130] education,[131] and sexual vulnerability.[132] For Justice Blackmun, these differences justify asymmetrical rules. He also usually supports affirmative action justifications for treating women differently.[133] Of course he also takes symmetrical approaches, notably in non-affirmative action race cases[134] and in gender discrimination cases in the employment[135] and child rearing contexts.[136]

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127. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 802 (1993).

128. Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547 (1990) (Brennan, J., joined by, *inter alia*, Blackmun, J.); City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 528 (1989) (Marshall, J., dissenting, joined by Brennan and Blackmun, J.J.); United States v. Paradise, 480 U.S. 149 (1987) (Brennan, joined by, *inter alia*, Blackmun, J.); Local Number 93, Int'l Assoc. of Firefighters, v. City of Cleveland, 478 U.S. 501 (1986) (Brennan, joined by, *inter alia*, Blackmun, J.); Local 28 of the Sheet Metal Workers' Int'l Assoc. v. EEOC, 478 U.S. 421 (1986) (Brennan, joined by, *inter alia*, Blackmun, J.); Wygant v. Jackson Bd. of Education, 476 U.S. 267, 295 (1986) (Marshall, J., dissenting, joined by Brennan and Blackmun, J.J.); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 593 (1984) (Blackmun, J., dissenting, joined by Brennan and Marshall, J.J.); Fullilove v. Klutznick, 448 U.S. 448, 517 (1980) (Marshall, J., concurring, joined by Brennan and Blackmun, J.J.); United Steelworkers v. Weber, 443 U.S. 193 (1979) (Brennan, J., joined by, *inter alia*, Blackmun, J.); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 324 (1978) (Opinion of Brennan, White, Marshall, and Blackmun, J.J.).

129. Rostker v. Goldberg, 453 U.S. 57 (1981) (Rehnquist, J., joined by, *inter alia*, Blackmun, J.); Schlesinger v. Ballard, 419 U.S. 498 (1975) (Stewart, J., joined by, *inter alia*, Blackmun, J.); *cf.* Personal Administrator v. Feeney, 442 U.S. 256 (1979) (Stewart, J., joined by, *inter alia*, Blackmun, J.) (hiring preference for veterans not unconstitutional discrimination against women).

130. Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (Rehnquist, J., joined by, *inter alia*, Blackmun, J.); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (same); Geduldig v. Aiello, 417 U.S. 484 (1974) (Stewart, J., joined by, *inter alia*, Blackmun, J.).

131. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 733 (1982) (Blackmun, J., dissenting).

132. Michael M. v. Superior Court, 450 U.S. 464, 481 (1981) (Blackmun, J., concurring); Dothard v. Rawlinson, 433 U.S. 321, 337 (1977) (Rehnquist, J., concurring, joined by Burger, C.J., and Blackmun, J.).

133. Johnson v. Transp. Agency, 480 U.S. 616 (1987) (Brennan, J., joined by, *inter alia*, Blackmun, J.); Califano v. Webster, 430 U.S. 313, 321 (1977) (Burger, C.J., concurring, joined by, *inter alia*, Blackmun, J.); Califano v. Goldfarb, 430 U.S. 199, 224 (1977) (Rehnquist, J., dissenting, joined by, *inter alia*, Blackmun, J.); Kahn v. Shevin, 416 U.S. 351 (1974) (Douglas, J., joined by, *inter alia*, Blackmun, J.). *But cf.* Orr v. Orr 440 U.S. 268, 284 (1979) (Blackmun, J., concurring) (voting against Alabama's remedial justification for female-only alimony, but explicitly expressing support for *Kahn* and the idea of remedying society-wide discrimination).

134. *See, Washington* v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 467-70 (1982) (Blackmun, J.) (holding that the Constitution allows placing obstacles to political power in the paths of all parties, but not placing special obstacles in the paths of racial minorities).

135. UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991) (Blackmun, J., writing for the Court); Califano v. Westcott, 443 U.S. 76 (1979) (Blackmun, J., writing for the Court); *see also* Johnson v. Transp. Agency, 480 U.S. 616 (1987) (Brennan, J., joined by, *inter alia*, Blackmun, J.); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980) (White, J., joined by, *inter alia*, Blackmun, J.); Weinburger v. Wiesenfeld, 420 U.S. 636 (1975) (Brennan, J., joined by, *inter alia*, Blackmun, J.); *cf.* Kirchberg v. Feenstra, 450 U.S. 455 (1981)

The more interesting switch, however, is along the race/gender line. In the racial affirmative action context, while adopting an asymmetrical approach, Justice Blackmun expressed regret that circumstances did not allow a symmetrical approach[137] and sympathy for those disadvantaged by the asymmetry.[138] Here asymmetry appears to him as a necessary evil; a means on the way to symmetrical ends. The same is not true in the gender context. If "[i]n order to get beyond racism, we must first take account of race,"[139] do we take account of sex only to get beyond gender? Apparently not for Justice Blackmun. He expressed no similar regrets over the use of asymmetry in the gender context. His only expressed concern about treating women differently than men is that the precedential effects of the opinions may spill over into the race[140] or abortion areas.[141] Thus Justice Blackmun not only switches between symmetry and asymmetry both within and between the gender and race contexts, but the very nature of the asymmetry changes between those two contexts.

Finally, there is Justice Stevens, whose approach to Equal Protection is unique and rather creative.[142] Justice Stevens first introduced his approach to Equal Protection in his concurring opinion in *Craig v. Boren*.[143] In that opinion he declared that he will not use different levels of scrutiny, but instead will apply a single standard to determine if real differences, as opposed to stereotypical thinking, justify and are logically consistent with the classification at issue.[144] Thus he purports to apply a uniform test in both the race and gender contexts. The cracks in this unitary approach are in the exceptions.

In the race context, Justice Stevens would allow race-specific rules as

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(Blackmun, J., joining a unanimous Court in striking down Louisiana's "head and master" law giving the husband the unilateral right to dispose of property jointly owned by the husband and wife).

136. Caban v. Mohammed, 441 U.S. 380 (1979) (Powell, J., joined by, *inter alia*, Blackmun, J.); Parham v. Hughes, 441 U.S. 347, 361 (1979) (White, J., dissenting, joined by, *inter alia*, Blackmun, J,).

137. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 402, 403 (1978) (Blackmun, J., additional opinion) ("I yield to no one in my earnest hope that the time will come when an 'affirmative action' program is unnecessary and is, in truth, only a relic of the past."); *see also*, United Steelworkers of America v. Weber, 443 U.S. 193, 209 (1979) (Blackmun, J., concurring) (acknowledging legislative history of Title VII may not support affirmative action programs, but arguing practical enforcement of nondiscrimination requires the Court to allow employers to adopt such programs).

138. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 561 (1989) (Blackmun, dissenting) ("one might sympathize with those who—though possibly innocent in themselves—benefit from the wrongs of past decades.").

139. *Bakke*, 438 U.S. at 407 (separate opinion of Blackmun, J.).

140. General Elec. Co. v. Gilbert, 429 U.S. 125, 146 (1976) (Blackmun, J., concurring in part).

141. Michael M. v. Superior Court, 450 U.S. 464, 481 (1981) (Blackmun, J., concurring in the judgment).

142. Charles Fried, *Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107, 126 (1990) ("An outside observer, however, comparing [Justice Stevens' affirmative action decisions] may be forgiven if he can discern no evident pattern from the trajectory of Justice Stevens' dispositions."). I hope this section illustrates that Justice Stevens has a more stable approach than Professor Fried believes, but some of Justice Steven's opinions are a bit extreme. See *infra* notes 151-54 and accompanying text.

143. 429 U.S. 190, 211 (1976) (Stevens, J., concurring).

144. City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 511 (1989) (Stevens, J., concurring); Michael M. v. Superior Court, 450 U.S. 464, 497 n.4 (1981) (Stevens, J., dissenting); Craig v. Boren, 429 U.S. at 212-14 (Stevens, J., concurring).

long as they include, rather than exclude, outsiders in the system.[145] He sees this as consistent because such race-conscious rules ultimately break down race-consciousness in society.[146] Likewise, he opposes the use of remedial justifications by political bodies, unless the program isolates specific victims and perpetrators to receive the benefits and burdens respectively.[147] Remedies for past discrimination are for the courts[148] because expanding racial remedies beyond the individual plaintiff/defendant model tends to create permanent social divisions.[149] Thus, Justice Stevens adopts a symmetrical approach to racial equality with the only exceptions being asymmetrical rules that will eventually further symmetry.

Given Justice Stevens' unitary approach, the analysis of race and gender should be identical, and thus the only exceptions to symmetry should be to narrow gender differences in society. Sometimes his opinions are in that vein;[150] sometimes they are not. One extreme example is his concurring opinion in *Personnel Administrator v. Feeney*.[151] The case involved Massachusetts's absolute preference for veterans in filling upper-level and mid-level civil service jobs. The beneficiaries of this preference were almost exclusively male and its effect was to keep women out these jobs.[152] Justice Stevens reasoned the preference was not discriminatory because the number of men in the state disadvantaged by the preference was very large and only about a million less than the number of women in the state disadvantaged by the preference.[153] His reasoning was within the symmetrical approach only if his sole focus was on those excluded by the preference. If he had chosen to look at those included by the hiring preference, the symmetrical approach would have required striking down the statute.[154] He also did not seem to realize that an asymmetrical

145. Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 601 (1990) (Stevens, J., concurring); *Croson*, 488 U.S. at 510 (1989) (Stevens, J., concurring in part and concurring in the judgment); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 313 (1986) (Stevens, J., dissenting).

146. *Wygant*, 476 U.S. at 316.

147. *Croson*, 488 U.S. at 512 n.1, 513-14 (Stevens, J., concurring); Fullilove v. Klutznick, 448 U.S. 448, 539-41 (1980) (Stevens, J., dissenting).

148. United States v. Paradise, 480 U.S. 149, 189 (1987) (Stevens, J., concurring in the judgment); *see also* Local Number 93, Internat'l Assoc. of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) (Brennan, J., joined by, *inter alia*, Stevens, J.); Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986) (same).

149. *Croson*, 488 U.S. at 513-14 (Stevens, J., concurring); *Fullilove*, 448 U.S. at 545 (Stevens, J., dissenting).

150. Johnson v. Transportation Agency, 480 U.S. 616, 642 (1987) (Stevens, J., concurring) (asymmetrical employment rules legal under Title VII if they are forward-looking, not remedial); California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 292 (1987) (Stevens, J., concurring) (asymmetrical pregnancy benefits must ultimately achieve equality of opportunity); Michael M. v. Superior Court, 450 U.S. 464, 496 (1981) (Stevens, J., dissenting) (symmetrical statutory rape law required unless some reason to believe male is usually the more guilty party); Califano v. Goldfarb, 430 U.S. 199, 221-24 (1977) (Stevens, J., concurring in the judgment) (remedial justification inadequate because not perfectly tailored to victims and perpetrators); General Elec. Co. v. Gilbert, 429 U.S. 125, 160 (1976) (Stevens, J., dissenting) (discrimination against pregnancy is discrimination on the basis of gender).

151. 442 U.S. 256, 281 (1979) (Stevens, J., concurring).

152. *Id.* at 260-64 (Stewart, J., writing for the Court), 283-85 (Marshall, J., dissenting).

153. *Id.* at 281.

154. In a sense, his opinion is the analytical opposite of Justice Stewart's opinion for the Court in Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974). Justice Stevens maintains a symmetrical approach by choosing to look only at those excluded by a program. Justice Stewart claims a symmetrical approach by choosing to look only at what is included in a program.

approach to those excluded would help remove gender lines from job categories.

Conversely, in *Caban v. Mohammed*[155] Justice Stevens adopts an asymmetrical approach without the limitation of ultimately eliminating the difference. In that case, the Court declared unconstitutional a New York law requiring and allowing only the mother of a child born out of wedlock to consent to an adoption. Justice Stevens dissented, arguing that a symmetrical rule requiring consent of both parents is less desirable than a rule requiring only one parent's authorization, if the concern is facilitating the adoption of illegitimate children. Moreover, he argues that given the biological difference in the relationship between the mothers and fathers of newborn illegitimate children, and the social difference between the mothers and fathers of older illegitimate children, the state can constitutionally choose to give the power of consent to the mother only.[156] Justice Stevens' opinion in *Caban* illustrates that in the gender context, asymmetrical rules need not necessarily lead to the narrowing of social difference. Thus even Justice Steven's unique approach to the Equal Protection Clause uses both symmetrical and asymmetrical rules, and switches between them within and between the race and gender contexts.

By now the point should be clear: every justice on the United States Supreme Court who has written a large enough number of opinions on equality issues has used both symmetrical and asymmetrical models of equality at one time or another. There is no reason to believe newer members of the Court will somehow magically escape the difference dilemma. Nevertheless, there is a way out.

II. USING THE DIFFERENCE DILEMMA

Noticing how the justices switch between symmetry and asymmetry is not a criticism. It is difficult to criticize the justices for getting caught in the difference dilemma, just as it is difficult to criticize the founding fathers for getting caught in the dilemma between individual freedom and social stability.[157] Both dilemmas constitute and animate significant portions of our social/political world. Although scholars have expended a fair amount of time and energy trying to find a way out of the difference dilemma[158] that may not be the best question. A more profitable question may be how to live within the dilemma.

Here is a suggestion: approach all situations from the position of the ideal, conscious, perhaps even genius, perpetrator of invidious discrimination. The word on the streets for such a genius perpetrator is "The Man." The important question is, if The Man wanted to discriminate against a particular group in modern American society, how would he do so? The suggestion to focus on The Man's perspective is rather ironic given the prevalent idea of reasoning from the bottom up[159] and avoiding the perpetrator perspective in

155. 441 U.S. 380, 401 (1979) (Stevens, J., dissenting).
156. *Id.* at 401-14.
157. *See* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE, 26-42 (1987).
158. *See supra* note 19.
159. *See* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323-26 (1989) (arguing for jurisprudence focused on

Equal Protection jurisprudence.[160] Although the irony is undeniable, this suggestion is actually complementary to those perspectives. Examining the methods The Man would use without endorsing his goals provides a balance to the victim's perspective without diluting the power of that perspective. The practical advantage of looking at the perpetrator's perspective is that judges and justices are much more likely to understand perpetrator ideology rather than victims' perspectives. Because of the way society selects judges and justices, very few of them are likely to come from backgrounds in which they have experienced severe subordination. This observation does not deny that there will not be moments of "inter-subjective zap,"[161] but there is no reason to believe those moments will happen frequently enough for a judicial system that requires punctual answers to legal questions.[162]

Those who advocate adopting symmetrical rules to enhance equality must believe that The Man's answer to how to create oppression would be "create separations and quarantine the victim group from the rest of society." Such apartheid policies, while necessary for subordination,[163] are not sufficient to accomplish that objective. Merely separating groups does not create subordination; it only creates separate nations. From the perpetrator's perspective, it is no surprise that the idea of a separate African-American state in the southern United States, sometimes floated by both radical African-American and Euro-American groups,[164] never has gained momentum. It is also no surprise that the tribal homelands in South Africa never gained full autonomy.[165] Likewise, it is no surprise that the "back-to-Africa" movements

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outsiders); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (arguing that looking to the victim solves many of the critiques of CLS and provides a framework of reparations for racial harms).

160. *See* Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (arguing that equal protection doctrine is thoroughly infused with the perpetrator perspective).

161. Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 4 (1984) (the term is Kennedy's).

162. *See* Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (Or Other -Isms)*, 1991 DUKE L.J. 397 (discussing dangers of using analogies to bridge intersubjective distance).

163. *See* C. MACKINNON, *supra* note 6, at 34 ("on the first day, difference was; on the second day, a division was created upon it; on the third day, irrational instances of dominance arose.").

164. *See* THEODORE DRAPER, THE REDISCOVERY OF BLACK NATIONALISM 57-58 (1970) (early Euro-Americans including Thomas Jefferson proposing separate African-American state); *Id.* at 132-47 (discussing calls for a separate African-American state by black nationalists); MALCOLM X, THE LAST SPEECHES 123 (1989) (discussing negotiations between Nation of Islam and white supremacist groups for a separate African-American state); *Muslim Suggests Secession of Blacks*, N.Y. TIMES, Apr. 22, 1984, at 1-16 (Louis Farrakhan, leader of the new Nation of Islam, suggesting that if the Rev. Jesse Jackson was ignored by the Democratic National Convention, he would negotiate with whoever the next President was for a separate territory for African-Americans); *cf.* Peller, *supra* note 2, at 791-94 (suggesting that geographical separation is not essential to the black nationalist idea that history has created African-Americans as a distinct social community).

165. *See* MARTIN MEREDITH, IN THE NAME OF APARTHEID: SOUTH AFRICA IN THE POSTWAR ERA 149-56 (1988) (short history of rise and fall of the homeland strategy). The farce of the homelands' independence became clear as South Africa took over any that refused to participate in the national election in the spring of 1994. *See* Bill Keller, *Rival Visions of Freedom Split South Africa's Zulus*, N.Y. TIMES, Apr. 4, 1994, at A1 (movement of army into Kwa-Zulu); Bill Keller, *De Klerk Orders Army to Protect Vote in Zulu Area*, N.Y. TIMES, Apr. 1, 1994, at A1 (ordering army to KwaZulu); Bill Keller, *A 2nd Homeland is Taken Over by*

floundered.[166] These mere separations would not necessarily leave one group disempowered.

Those who would equate equality with asymmetrical rules taking account of differences in a specific context must believe that The Man would always create inequality by establishing social norms that will systematically favor some talents, abilities, and backgrounds over others and applying those norms to everyone. Such pseudo universal standards help create subordination,[167] but they are not sufficient in and of themselves to create oppression. Merely treating everybody the same is oppressive to those whose talents are out of favor, but it does not easily lend itself to systematic subordination. As the norms approach a relatively more objective measure, the outcomes become harder and harder to control. Moreover, without internal group divisions it is difficult to remember who is supposed to lose in the system. Thus, it is no surprise that African-Americans and other outsiders have made huge gains in sports where ability is fairly easy to objectively measure and training expenses are relatively low.[168] It is also no surprise that LSAT scores and undergraduate grade point averages of female law school applicants result in the displacement of almost half the males who would have otherwise had seats in the entering class.[169]

Thus, neither symmetry nor asymmetry by themselves are sufficient to

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South Africa, N.Y. TIMES, Mar. 23, 1994, at A1 (South Africa takes over homeland of Ciskei after mutiny by policemen and soldiers); Bill Keller, *Homeland Leader in South Africa Flees His Capital*, N.Y. TIMES, Mar. 11, 1994, at A3 (government of apartheid homeland of Bophuthatswana collapses after attempting to block national elections in the homeland).

166. DERRICK BELL, RACE, RACISM AND AMERICAN LAW 56-60 (3d ed. 1992) (short history of failed emigration movements); ALPHONSO PINKNEY, RED, BLACK, AND GREEN: BLACK NATIONALISM IN THE UNITED STATES 16-56 (longer history of failed emigration movements); *see also* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM, 32-46 (1992) (chronicle of the Afrolantic Awakening); Peller, *supra* note 2, at 784-85 n.44 & 46 (short history of two failed emigration movements).

167. *See* IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 200-222 (1990) (arguing that merit is not a neutral measurement but a political decision that creates oppression); *see also*, Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 707-08, 748-52 (questioning social definition of merit and whether merit can be divorced from culture); Randall L. Kennedy, *Competing Conceptions of "Racial Discrimination": A Response to Cooper and Graglia*, 14 HARV. J.L. & PUB. POL'Y 93, 100-101 (1991) (arguing disparate-impact analysis in employment discrimination forces employers to shake off complacent acceptance of social definitions of merit, making authentic meritocracy possible); Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1333 (1986) (arguing that if merit is not universal but politically determined by social need, empowering African-Americans is consistent with merit).

168. *See* Mike Littwin, *Commentary: Should Players' Color Make a Difference?*, L.A. TIMES, Jan. 16, 1989, at 3-16 (noting predominance of African-Americans in some sports, and positions in some team sports, where speed and ability to jump predominate, and noting the difference is most likely the result of social oppression); David Sell, *Blacks and Hockey Maintain a Tenuous Relationship*, L.A. TIMES, April 1, 1990, at C6 (personal stories evidencing that training costs for hockey are too expensive for inner-city African-Americans); *see also* Harry Edwards, *Educating Black Athletes*, THE ATLANTIC, Aug. 1983, at 31 (African-American athletes limited to basketball, football, baseball, boxing, and track because of racial discrimination, selective role models, and attitudes within the African-American community).

169. *See* SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASSOC., A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES FALL 1990 LAW SCHOOLS AND BAR ADMISSION REQUIREMENT, 65-66 (women were 42.4% of full-time students in ABA approved law schools); *cf.* Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U. J. GENDER & L. 121, 127-38 (1993) (discussing bias against women and minorities in LSAT questions).

create oppression. This realization gives us another reason for looking to the perpetrator, because the problem for The Man is just the difference dilemma in reverse: one can create equality either by noticing difference or ignoring it. Put another way, both symmetrical and asymmetrical approaches can further equality. To create a system of oppression, The Man must understand that symmetry and asymmetry are not mutually exclusive; instead, they define one another.[170] To treat two people symmetrically requires acknowledging that there are *two* people—separate entities that could be differentiated. Likewise, treating two people asymmetrically requires acknowledging that there are two *people*—the same type of entity that could be grouped. Symmetry and asymmetry therefore always contain, yet mask, the other.

Once symmetry and asymmetry are understood as mutually dependent, the solution to the reverse difference dilemma is to create a system of interlocking apartheid and pseudo universal rules. The Man simultaneously would create a unitary system so that everyone would be judged by the same standards, and divisions in society so that the standards could be made to match as nearly as possible the definition of the favored group(s). With this design, apartheid does not lead to a separate nation, but to a subordinated group that does not have the choice of exit because the universal rules still apply to them. Moreover, increasingly objective measures do not threaten the gerrymandered norms because apartheid now creates an objective separation that means the outsiders are not as good by definition.[171]

This interlocking design not only solves the reverse difference dilemma and creates oppression, it also is nearly impossible to unravel. Attacking the apartheid aspects requires some notion of how people are all the same, thereby strengthening the pseudo universal standards. Objecting to the rigged universal standards requires an understanding of how people are different, thereby strengthening the apartheid aspects of the system. We have seen this problem before; it is the difference dilemma. The difference dilemma is not just the existence of symmetrical and asymmetrical solutions. It is the intertwining of the two solutions to create subordination. The first step to overcoming subordination is recognizing its existence. The appearance of the difference dilemma is a good indicator that subordination is present in a particular context.

The second step is to find another way to approach the difference dilemma. One unproductive approach is to keep attacking either symmetry or asymmetry. Such a futile struggle ultimately feeds the oppressive system. Another counter-productive approach is to bloody each other over whether to attack symmetry or asymmetry.[172] Instead of walking into the teeth of the dilemma, perhaps a better method is to approach the dilemma as if it were

170. *See Dissolving*, *supra* note 19, at 308-09 (dissolving sameness and difference rhetoric into one another).

171. Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2135, 2137 (1989) (noting that "white = good and black = bad" and lamenting that if African-Americans are talented, they are remembered as Euro-American); *see also*, BELL, *supra* note 157 at 104-05, 113-17, 120-21 (discussing fate of good African-American schools in desegregation and equation of Euro-American students with quality education); Peller, *supra* note 2, at 795-802 (discussing how black nationalist discourse revealed racial definitions of purportedly neutral "quality").

172. *See supra* note 1.

actually created by The Man. Because The Man creates pseudo universal norms and apartheid as solutions to each other on a very abstract level, anti-discrimination law needs to focus on specific instances of, rather than abstract meditations on, the dilemma.[173]

If the need is only for the justices to choose either symmetry or asymmetry in a particular context, however, the first section shows that they already and always make this choice. If instead of looking at the justices as individuals we examine the Court as a whole, its choices between symmetry and asymmetry would indicate a chaotic system[174] or a multiple-personality disorder.[175] Nevertheless, the only way to reconcile the outcomes of the cases would be a very fact specific analysis.

Taming the difference dilemma therefore obviously requires something more than just contextual decisions. The solution to the reverse difference dilemma was to understand how symmetry and asymmetry are always, simultaneously present in any situation and how to arrange them to create subordination. Therefore, anti-discrimination law also needs to focus on the symmetrical and asymmetrical aspects of subordination simultaneously present in any situation. This suggestion does not even require a major overhaul of precedent. One point of the first section of this Article is that every justice on the Court has, at one time or another, adopted both symmetrical and asymmetrical approaches to equality. As a matter of precedent, it is then a relatively small step to adopt both symmetrical and asymmetrical approaches *simultaneously* in all the various contexts.

The best example in the case law of how this approach works requires returning to the Court's decision in *California Federal Savings & Loan Assn. v. Guerra.*[176] One of the ironies of this case is that commentators sometimes fail to discuss what the Court actually did; instead they rehash the difference dilemma.[177] Recall that as told by California Federal, it was caught in the difference dilemma between the Pregnancy Discrimination Act's requirement of symmetrical treatment and California's asymmetrical treatment of maternity

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173. *See, e.g.*, Martha Minnow, *Partial Justice: Law and Minorities*, *in* THE FATE OF LAW 73-76 (Austin Sarat & Thomas R. Kearns, eds., 1991) (arguing for looking to context to solve the difference dilemma); Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 880-87 (1990) (arguing for positionality as a way of mediating the difference dilemma); *Reflections*, *supra* note 19, at 1324-28 (arguing for equality doctrine that takes into account context of oppression); *cf.* Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2116-20 (1989) (discussing risk that call to context will result in judges using discretion to injure outsiders and aid insiders); *see generally* Martha Minnow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990) (discussing call to examine situations "in context" and possible uses and problems with context).

174. *Cf.* Lawrence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989) (suggesting modern physics provides explanations and critiques of constitutional law).

175. *Compare* Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 564-65, (1990) (intermediate scrutiny for benign race conscious measures) *with* City of Richmond v. J.A. Croson Co. 488 U.S. 469, 493 (1989) (strictest scrutiny for all racial classifications).

176. 479 U.S. 272 (1987).

177. *See Dissolving*, *supra* note 19, at 310-11 & n.58 (relegating to bottom of footnote this solution); *see also* Mary J. Frug, *Sexual Equality and Sexual Difference in American Law*, 26 NEW ENG. L. REV. 665, 670 (1982) (discussing problems of *California Federal* for what she terms "equality theory"). *But see* Reflections, *supra* note 20, at 1322-23 (discussing the court's solution); DIFFERENCE, *supra* note 7, at 58-59 (same).

leave.[178] Step one: the difference dilemma has appeared so anti-discrimination law should realize this is a context of subordination.

After pages of discussing Congressional intent to preempt state law, Justice Marshall in one brief paragraph finds a different solution: there is no conflict here because it is possible to satisfy both federal and state law by providing everyone with the same right to reinstatement after a leave of absence.[179] Step two: focusing on symmetrical and asymmetrical concerns simultaneously, look at the specific context to see how they can work together.

A useful way to approach any particular context is to unmask the asymmetry hiding within symmetry, and vice versa. In this case, the symmetrical alternative of guaranteeing no one that they could return to their job after taking a leave of absence masks the baseline assumption that good employees do not take leave of absences. This baseline is asymmetrical because it favors male employment patterns. Likewise, the asymmetrical alternative of allowing only women to have a guaranteed job on returning from childbirth masks the side-constraint that the jobs they return to must be fungible positions. This side-constraint is symmetrical because women would be disadvantaged in competition for promotion to the upper ranks of a company where the absence of one worker would have a detrimental impact on the whole organization. By understanding how symmetry and asymmetry work co-exist in these alternatives, we can rearrange them in a way that lessens the difference dilemma.

For instance, Justice Marshall's solution in *California Federal* is symmetrical in that the employer now must treat all employees the same. At the same time, his solution is asymmetrical in that the baseline for how California Federal must treat its employees reflects the employment patterns of many women who enter and leave the paid workforce around childbearing. Nevertheless, there is less danger of imposing a glass ceiling because men and women now both are eligible to take leaves of absences surrounding childbirth.[180]

Another useful way of looking at the context is to ask who is creating the difference dilemma or using the it to their advantage. This approach is a corollary of acting as if The Man created the difference dilemma. In this case, Cal Fed was seeking to use the difference dilemma to avoid paying higher benefits. There is no indication or reason to believe that the women seeking reinstatement were using the difference dilemma as a lever to disadvantage male employees. Thus, the solution was to require Cal Fed to pay higher benefits and thus meet both statutes.

The moral of *California Federal* is that the difference dilemma is merely a dynamic tension that creative lawyers and judges can harness to create a solution that might be better than either a symmetrical or an asymmetrical solution alone. These solutions are probably not generalizable; they inhere in specific contexts. These solutions are probably temporary; they may not work more than once. So what. The dynamic tension will still be there to provide

178. *See supra* note 11-14 and accompanying text.
179. 479 U.S. at 290-91.
180. Subsequently, the federal government enacted the Family and Medical Leave Act of 1993, Pub. L. No. 103-3 (codified at 29 U.S.C.A. §§ 2601 - 2654 (supp. 1993)), which codified much of this result.

more solutions in different times and places.

The question then becomes whether courts can adopt this approach in other cases. Two cases decided by the United States Supreme Court in the 1992-93 term, *Bray v. Alexandria Women's Health Clinic*[181] and *Shaw v. Reno*,[182] indicate that this approach could prove most useful.

Bray is the Operation Rescue Case in which the Court held that there is no cause of action under §1985(3)[183] resulting from Operation Rescue's tactics, either demonstrations or orchestrated, violent, massive trespasses, depending on your politics. That section, the surviving version of §2 of the Civil Rights Act of 1871, creates a cause of action "[i]f two or more persons ... conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws."[184] By judicial interpretation, the Court requires the plaintiff to prove "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."[185] The question in *Bray* was whether or not Operation Rescue held any animus toward women, assuming gender discrimination qualified as "otherwise class-based" discrimination.[186]

A majority of six justices held there was no gender discrimination in this context. Justice Scalia, writing for a majority that included Chief Justice Rehnquist and Justice White, argued that opposition to abortion was without animus toward women because there were "respectable reasons for opposing it, other than hatred of or condescension toward (or indeed any view at all concerning) women."[187] Justice Scalia argued that although only women seek abortions, that fact merely proved a disparate impact. Such disparate impacts are irrelevant under *Geduldig* and *Feeney*.[188] The underlying perspective is the asymmetrical one would expect from Chief Justice Rehnquist in the gender context[189] and from Justice White in the child bearing context.[190] Women are different because of their child bearing capabilities, and treating women by

181. 113 S. Ct. 753 (1993).
182. 113 S. Ct. 2816 (1993).
183. 42 U.S.C. § 1985(3) (1988).
184. *Id.*
185. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).
186. 113 S. Ct. at 759-62. Both the majority and Justice Stevens' dissenting opinion see a second issue: whether or not a federal right has been violated here, namely the right to interstate travel or the right to an abortion. *Id.* at 792-95 (Stevens, J., dissenting). It is not at all clear that these questions are really separate, but this Article will not discuss that point. In addition, all opinions except Justice Kennedy's brief concurrence discuss the application of the second, or "hindrance," clause of § 1985(3), which creates a cause of action "if two or more persons ... conspire ... for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws." 42 U.S.C. § 1985(3); *see* 113 S. Ct. at 764-67, 770-79, 795-98, 804-05. This Article will not focus on this second clause because the debate among the justices focused on whether the animus requirement even applies to the second clause.
187. 113 S. Ct. at 760.
188. Geduldig v. Aiello, 417 U.S. 484 (1974); Personnel Administrator v. Feeney, 442 U.S. 256 (1979). The relationship between these cases is analyzed by Colker, *Equal Protection Analysis*, *supra* note 1. Her suggestion is to attack *Feeney* rather than *Geduldig*. *Id.* at 359. In light of the decision in *Bray*, attacking either independently of the other may be rather futile.
189. *See supra* notes 25-51 and accompanying text.
190. *See supra* notes 113-18 and accompanying text.

reason of their abilities is not treating women "by reason of their sex."[191]

As mentioned earlier,[192] Justice O'Connor's dissenting opinion in *Bray* is her clearest statement yet of an asymmetrical approach in the gender context. She agrees child bearing is a relevant difference, unique to women. She goes on to argue, however, that if protesters target that defining characteristic, then the choice of attacking women for their difference reflects sufficient animus for protection under the statute.[193]

The difference dilemma lives in this context, although here the dilemma appears to be not so much a contest between symmetry and asymmetry as simply the creation of inequality both by noticing and ignoring differences.[194] This change is largely because the Court decided *Bray* after the departures of Justices Brennan and Marshall and before the arrival of Justice Ginsburg.[195] In the absence of those justices there was no one to make the symmetrical argument:[196] Operation Rescue was discriminatory toward women because they attempt to protect the fetus by attacking only the female parent. Operation Rescue could have used their resources to track down the male parents and used similar massive civil disobedience tactics to terrorize men who choose to inseminate women in a context in which the pregnancy is not likely to be carried to term. Nevertheless, the existence of the difference dilemma should have told the Court there was oppression in this situation.

In looking for the difference dilemma, first examine the perpetrators' perspective, as Justice Scalia (almost) does when he adopts the abortion protesters' description of Operation Rescue as being unconcerned with women and only concerned with fetuses.[197] From the protesters' perspective, including Jayne Bray and other women, they are certainly not anti-women, only anti-abortion.[198] The protesters' perspective thus reveals the first half of the dilemma: equating abortion protest with an animus toward women reinforces the image of abortion as a "woman's" issue, instead of a society-wide issue about how to structure families, child-bearing, and child-rearing. Naming abortion a woman's issue marginalizes it.

Second, even a cursory examination of the controversy surrounding Operation Rescue discloses that gender issues, rather than race issues, predominate.[199] Both the majority and the dissenting opinions treat the issue as

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191. 113 S. Ct. at 759 (emphasis omitted).

192. *See supra* 127 and accompanying text.

193. 113 S. Ct. at 802.

194. Professor Minnow states the dilemma as the problem that we can create inequality both by noticing and by ignoring difference. *See supra* note 6-7 and accompanying text.

195. Justice Ginsburg appears to be solidly in the symmetricalists camp on gender issues. See Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1975); *see also* Cole, *supra* note 57 at 54-58, *passim*.

196. Justice Stevens' dissenting opinion disputed the majority's decision to take the perpetrator perspective in determining intent and its decision to maintain the rigid distinction between intent and effects. 113 S. Ct. at 785-92. Justice Stevens has long argued that a intent test and an effects test are not very distinct from each other. *See* Washington v. Davis, 426 U.S. 229, 252-54 (1976) (Stevens, J., concurring).

197. 113 S. Ct. at 759. *But see Reflections*, *supra* note 19, at 1315 (argument for protecting fetus necessarily places fetus in opposition to the pregnant woman).

198. *See* FAYE D. GINSBURG, CONTESTED LIVES: THE ABORTION DEBATE IN AN AMERICAN COMMUNITY 172-97 (1989).

199. That is not to say race plays no part. Specifically, the reactions of African-American women, who may have a cultural or personal memory of overt, public violence aimed at them,

whether the statute applies to gender, rather than if the statute applies to racial classifications the same way as it applies to gender classifications.[200] Justice O'Connor's dissent, however, begins to point out the problem with this unitary perspective when she argues that attacks on unique characteristics of the group are attacks on the group.[201] By comparison, many people, including Justice O'Connor, maintain that there are no unique characteristics of race,[202] leading them to consider race irrelevant.[203] Thus the victim's perspective reveals the other half of the dilemma: not protecting women's unique child-bearing capability risks oppression of women in the name of benign social policies controlling that capability.

Here is how the difference dilemma looks in this context. There is a solution to making human reproduction into something about which only women should care. The solution is to treat child bearing and abortion as separate from the female gender. The consequence of this solution is that the civil rights statutes do not protect women from violent anti-abortion activists. Likewise, there is a way to protect women from threats and injuries because of their role in human reproduction. This solution is to treat abortion and other human reproduction issues as a special concern of women because of their unique roles. The consequence of this solution is that it makes human reproduction into something about which only women should care. The circle is complete.

As much as the context illuminates the dilemma, it also points toward a way to narrow the difference dilemma. Earlier, Justice Scalia is quoted saying that anti-abortion protesters have respectable reasons for their views, reasons other than hatred of women.[204] In parentheses he then wrote that the members of Operation Rescue did not have any view at *all* concerning women. He was wrong. They must view women, at minimum, as having important social, moral, or political responsibilities to carry human embryos to term.[205] Thus the protesters do have a certain view of the role of women, even if it is not the

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may well be different than the reaction of Euro-American women, who may have a personal memory of covert or private violence. *Compare* CATHARINE MACKINNON, *Sex and Violence: A Perspective*, *in* FEMINISM UNMODIFIED 85-92 (1987) *with* Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 595-601 (1990).

200. 113 S. Ct. at 759, 785, 801-02; *cf.* Grillo & Wildman, *supra* note 162, (cautioning about dangers of conflating racial oppression with gender oppression).

201. 113 S. Ct. at 802.

202. Although some may view skin pigmentation or perhaps bone structure as unique to certain races, there are two problems with that claim. First, anthropologists abandoned race as a useful concept some time ago. *See* Saint Francis College v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987); A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1981 n.68 (1989); Joseph Avanzato, Note, *Section 1982 and Discrimination Against Jews; Shaare Tefila Congregation v. Cobb*, 37 AM. U. L. REV. 225, 226 n.7 (1987); Linda A. Lacewell & Paul A. Shelowitz, Note, *Beyond a Black and White Reading of Sections 1981 and 1982: Shifting the Focus from Racial Status to Racist Acts*, 41 U. MIAMI L. REV. 823, 834-35 (1987). Second, racial definitions in the United States dictate that one drop of African blood makes someone an African-American regardless of skin pigmentation or appearance. See Gotanda, *supra* note 27, at 24.

203. *See* John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 319-20 (1994).

204. *See supra* note 189 and accompanying text.

205. *See* GINSBURG, *supra* note 198, at 213-220 (arguing both right-to-life and pro-choice activists engage in the same redefinition of gender in a society where traditional gender roles have disintegrated).

anti-women perspective Justice Stevens thinks he unmasks.[206]

Looking at the context a bit closer also reveals that both men and women are on both sides of the debate. The majority accepted for the purpose of its decision what the clinic, N.O.W., and other respondents argued:[207] the men affected by Operation Rescue are peripheral to the purposes of the protests.[208] Justice O'Connor does not even mention the men affected by the protests. She cannot do so without undermining her argument that Operation Rescue targets women, and only women, because of their unique child-bearing capability. The assassination of Dr. David Gunn by an anti-abortion protester[209] two months after the Court announced its decision in *Bray*, and the subsequent assassinations of Dr. John Britton and Lt. Col. James Barrett,[210] is persuasive reason to reconsider this position.

Together these two points provide a way out. Instead of requiring an animus toward a group to trigger civil rights protection, the Court should have required an animus toward a view of a group's role in society. That position would even comport with the history of racism in this country. After all, most Euro-Americans did not object to the existence of African-Americans; they imported African-Americans for years. Euro-Americans merely objected to views that African-Americans should have a position in society other than the back of the bus or the servant's quarters. If the civil rights movement was a vision, partially shared between Euro-Americans and African-Americans,[211] of how race relations should be structured, then abortion clinics, pro-choice groups, and women deciding to have abortions have a similar partially shared vision of the role of women and child-bearing in society. Some may view female members of the right-to-life movement as victims of false consciousness,[212] but they too have their vision of empowering women in society.[213] Protecting women and men who have a vision of gender roles, and particularly the importance of women carrying a pregnancy to term, makes abortion less of a women's issue and more of an issue effecting both genders.

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206. Bray v. Alexandria Women's Health Clinic 113 S. Ct. 753, 786-89 (1993) (Stevens, J. dissenting).

207. Brief for Respondents at 28-29, Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993) (No. 90-985).

208. 113 S. Ct. at 760 n.2.

209. For news coverage of the assassination, *see* Paul Gray, *Thou Shalt Not Kill*, TIME, Mar. 22, 1993, at 44; Eloise Salholz, *The Death of Dr. Gunn*, NEWSWEEK, Mar. 22, 1993, at 34. For commentary on the assassination, *see Bloody Pensacola*, COMMONWEAL, Apr. 9, 1993, at 5; *Factions and Conflagrations*, NATIONAL REVIEW, Apr. 12, 1993, at. 15-16; Harrison Raine, *A Time For Abortion Foes to Draw the Line*, U.S. NEWS & WORLD REP., Mar. 22, 1993, at 8; *Killing is Unfortunate*, THE ECONOMIST, Mar. 20, 1993, at 27; *Open Season*, THE NATION, Mar. 29, 1993, at 1.

210. For news coverage of the second assassinations, *see* Ronald Smothers, *Death of a Doctor: The Overview—Abortion Doctor and Bodyguard Slain in Florida*, N.Y. TIMES, July 30, 1994, at 1.

211. Peller, *supra* note 2, at 826-44 (describing civil rights movement as built around rejection of white supremacy and black nationalism, but for different reasons in the mainstream Euro-American and African-American communities).

212. *See* Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1777-80 (arguing that false consciousness can be separated from consciousness-raising by looking for those who know their subordinated status and who organized to end their oppression).

213. *See* GINSBURG, *supra* note 198 at 111-19, 218-220 (arguing that moderate, grass-roots right-to-life forces view themselves as proffering a vision of how to empower women).

Focusing on gender roles rather than gender per se lessens the difference dilemma. This solution is partially symmetrical because it covers men and women on both sides of the abortion debate. Yet it does not threaten violence against women because the baseline is non-interference. Such a baseline is asymmetrical because it preserves the right to choose an abortion, even if this choice has become relatively more constrained in recent years.[214] Non-interference favors workers in abortion clinics, women seeking abortions, and pro-life activists that eschew violence. Nevertheless, this partially asymmetrical solution does not marginalize the abortion issue because of the partial symmetry it also contains.

The difference dilemma is not dead after this solution. It would reappear if the ground rules ever changed, such as a final overruling of *Roe v. Wade*.[215] The difference dilemma would have been alive, although somewhat diminished, even in *Bray* had the Court adopted the approach suggested above. By importing men into the analysis, the solution risks the symmetricalists' problem of using men as the standard. Additionally, the partially shared vision of women's role in society risks the asymmetricalists' problem of marginalizing the issue as one concerning women's roles.[216]

It cannot be any other way. The continued existence of the difference dilemma is the dynamic tension forcing American legal culture to continually reevaluate equality and enabling it to find creative solutions to particular problems.[217] Decisions of courts should be criticized or praised depending on how well they confront and try to narrow the difference dilemma in any particular circumstance.

Under that standard, the decision in *Shaw v. Reno*[218] is a disaster. It is understandable that the *Bray* Court fell into, and then got mired in, the difference dilemma. Exacerbating the dilemma, as the Court did in *Shaw*, is almost unforgivable.

The 1990 census resulted in North Carolina receiving an additional representative in Congress. Under § 5 of the Voting Rights Act,[219] the U.S. Attorney General objected to the state legislature's first redistricting attempt because it produced only one district with a majority of African-American voters. The second attempt produced two such districts, but the second district

214. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2822-26 (1992) (Opinion of O'Connor, Kennedy, and Souter, JJ.) (upholding requirements of 24-hour waiting period and provision of information designed to discourage women from having abortion); Harris v. McRae, 448 U.S. 297 (1980) (upholding Hyde Amendment restrictions on Medicaid funding of abortions).

215. 410 U.S. 113 (1973). *See Casey*, 112 S. Ct. at 2816-21 (1992) (Opinion of O'Connor, Kennedy, & Souter, JJ.) (purporting to overrule trimester test but maintain central holding of *Roe*).

216. This statement ignores that roles are always mutually negotiated. *See* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 241 (forthcoming 1991).

217. *See* BELL, FACES, *supra* note 168 at 195-200 (arguing that the dilemma of the permanence of racism—actions to confront racism are unlikely to create transcendental change and often merely reinforce racist system—frees us to find creative ways to serve those in need); *see also* Richard Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923 (1988) (book review) (discussing possibility of hope in face of the permanence of racism).

218. 113 S. Ct. 2816 (1993).

219. 42 U.S.C. § 1973(c) (1988).

was a long, skinny district basically encompassing the I-85 corridor and not much else. Plaintiffs sued claiming, among other things, that the redistricting violated their rights under the Equal Protection Clause.[220]

Justice O'Connor, writing for a majority that included Chief Justice Rehnquist, held that "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification" can be a violation of the Equal Protection Clause.[221] The majority, citing the history of racial gerrymandering in this country,[222] adopts a symmetrical approach to such practices: there can be a violation of the Equal Protection Clause regardless of whether the irregular district lines benefit Euro-Americans or African-Americans.[223] Justice White in dissent also adopts a symmetrical position, but instead of focusing on voting district lines he focuses on symmetrical treatment of Euro-American and African-American plaintiffs in voting rights cases. African-American plaintiffs have to prove the provisions in question dilute their power in the political process, so Justice White would have required the Euro-American plaintiffs in *Shaw* to offer the same proof.[224] The discussion in the first section of this Article would have predicted that these justices would adopt a symmetrical approach in the race context.[225]

Justices Stevens and Souter, in separate dissenting opinions, both take a more asymmetrical approach. Justice Stevens, focusing on the groups involved, argues irregular district lines created to benefit outsiders, including racial outsiders, are not unconstitutional, even if the use of such lines to benefit groups in power would be.[226] Justice Souter, switching the focus back to the district lines rather than the people involved, argues that redistricting is a unique governmental decision that inevitably involves taking race into account. Therefore, he would create separate rules for this special situation.[227]

The existence of the difference dilemma in this situation is no surprise. Those who view equality as symmetry would agree with the majority's insistence on symmetrical rules to avoid "an uncomfortable resemblance to political apartheid."[228] Those who view equality as asymmetry would note that the districts created by the plan in question resulted in the election of African-American congressmen from North Carolina, a rarity since Reconstruction.[229] They then would adopt either Justice Steven's explicitly asymmetrical approach validating this result because it benefits out-groups, or Justice White's

220. 113 S. Ct. at 2820-21.
221. *Id.* at 2824.
222. *Id.* at 2823.
223. *Id.* at 2829.
224. *Id.* at 2834-36, 2840-42 (White, J., dissenting).
225. See *supra* notes 101-10 &117-21 and accompanying text.
226. 113 S. Ct. at 2844 (Stevens, J., dissenting).
227. *Id.* at 2845-48 (Souter, J., dissenting).
228. *Id.* at 2827. *But see* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 524-26 (1993) (although the constitutional prohibition on irregular districts created to benefit outsiders is symmetrical, it relies on an asymmetrical baseline that gerrymandered districts containing a majority of African-Americans are racial, while gerrymandered districts containing a majority of Euro-Americans are not racial).
229. 113 S.Ct. at 2834 (White, J., dissenting), 2843 (Blackmun, J., dissenting).

symmetrical approach to Euro-American and African-American plaintiffs in voting rights cases, which freezes into place the essentially asymmetrical operation of § 5 of the Voting Rights Act. Their concern is that because African-Americans are a numerical minority in the United States, if the districts approximate the racial composition of the country, and if the race of the voters tend to correlate with the race of the candidate for whom they vote, African-American candidates will always lose.[230]

Here is how the difference dilemma looks in this context. There is a solution to racially homogenous legislatures. The solution is drawing districts where African-Americans are a majority of voters and therefore the election of African-American candidates is more likely. The problem is that such districting risks political apartheid and reinforces the racist idea that all African-Americans, or members of other racial groups, think alike, vote alike, and act alike.[231] There is a solution to such racial identification of districts. The solution is drawing district lines with a focus on compactness, contiguity, or integrity of political subdivisions.[232] The problem is that such districting makes it extremely likely that most governing bodies in this country will be entirely, or almost entirely, Euro-American.[233] Again the circle is complete.

This much of the dilemma is almost inevitable. What the majority does, however, makes it worse. The Court's opinion forces states attempting to comply with the Voting Rights Act to walk the tightrope between "what the law permits, and what it requires."[234] States apparently may comply with the Voting Rights Act, but going beyond minimal compliance "would not be narrowly tailored to the goal of nonretrogression."[235] Alternatively, the state would have to prove that any other plan would amount to illegal vote dilution of the minority community.[236] The Court strongly intimates that it would not welcome remedial justifications outside of compliance with the Voting Rights Act, and would require any plan so justified to employ "sound districting principles,"[237] presumably the same requirements of compactness, contiguity,

230. *Id.* at 2843 (Blackmun, J., dissenting) (noting "irony" of majority's decision given that the plan facilitated first election of African-Americans to Congress from North Carolina in a century), 2849 n.9 (Souter, J., dissenting) (North Carolina's districting enhances representative democracy).

231. *See* Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1624 (1993) [hereinafter *Emperor's Clothes*] (arguing that districting by race risks ignoring gender, age, and class differences within races); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1103-09 (1991) [hereinafter *Tokenism*] (cautioning that African-American elected officials are not necessarily politically, culturally, or psychologically black); *see also* Kennedy, *supra* note 2, at 1778-86 (criticizing Professor Mari Matsuda for essentializing the experience of those who suffer racial oppression).

232. 113 S. Ct. at 2826.

233. *See* Guinier, *Tokenism*, *supra* note 231, at 1089, 1093-98 (describing the hope that electing African-American officials would create a political system responsive to African-American voters and how the means of electing African-Americans became confused with the end). The only exception would be municipal legislatures in some of the larger urban areas in the United States. These cities are then seen as a district belonging to one or more racial minorities. The problem with such racially identifiable cities is the same as with other racially identifiable voting districts. *Id.* at 1116-24 (African-American elected officials unable to function effectively because racially excluded from pluralistic democracy in the legislative councils).

234. 113 S. Ct. at 2830.

235. *Id.* at 2831.

236. *Id.* at 2831-32.

237. *Id.* at 2832 (quoting United Jewish Organization v. Carey, 430 U.S. 144, 168

and respect for political subdivisions that apply even without a remedial justification.

The Man hardly could have done better. Now each side has a text, the Voting Rights Act for African-Americans and the Equal Protection Clause for Euro-Americans, and the tension between them is drawn so tight that any gain by one is a loss by the other. This furthering of the difference dilemma, especially given that it is possible to read these texts in harmony rather than discord, is deeply disturbing.

There was another way, however, a way that narrows the dilemma. First, consider the factual context. The Court believed it was not necessary to use the I-85 corridor to create a second majority-minority district. The Justice Department, in rejecting the first redistricting plan containing only one majority-minority district, explicitly focused on the south-central to southeastern portion of the state where there was sufficient African-American and Native-American voting strength to create a second majority-minority district.[238] It accused the state legislature of dismissing plans to form such a district on a pretext.[239] Yet the second redistricting plan also rejected a majority-minority district in this area.

Second, consider who is creating the difference dilemma in this context and using it for their benefit. Here there are two possible perpetrators:[240] the Democrats who controlled the North Carolina state legislature, and the Republicans who brought the suit. The Democratic legislature seems to have been concerned not with racial justice, but with the usual concerns in redistricting: protecting incumbents and extending the influence of their party. Even the majority-minority district that did *not* stretch along the interstate was more irregular and less compact than necessary to create such a district.[241] The state legislature was therefore using race in two ways. In the south-central to southeastern area of the state, it was using African-American voters to shore-up Democratic majorities and to provide safer districts for Euro-American incumbents.[242] In the serpentine district following I-85, it was using African-

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(1977) (Opinion of White, J.)).

238. Shaw v. Barr, 808 F. Supp. 461, 463-64 (E.D.N.C. 1992), *rev'd sub. nom.* Shaw v. Reno, 113 S. Ct. 2816 (1993). *But see* Pildes & Niemi, *supra* note 228 at 522 n.126 (questioning if a compact majority-minority could have been created in southeastern North Carolina).

239. 808 F. Supp. at 464.

240. A third possible perpetrator is the Department of Justice, which may have been using the Voting Rights Act to pack minorities in one district, thereby making democratic incumbents more vulnerable in other districts. *See* Bernard Grofman, *Would Vince Lombardi Have Been Right If He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's The Only Thing"?*, 14 CARDOZO L. REV. 1237, 1249-53 (1993). The two majority-minority districts in North Carolina certainly made several races much closer for Democratic incumbents. ROLL CALL, Nov. 2, 1992 (redistricting caused problems for Democratic incumbents in 2nd and 9th districts). There is considerable doubt, however, about whether the Department of Justice was systematically using the Voting Rights Act to benefit the Republican party. *See* Grofman, *supra*, at 1254-56.

241. 808 F. Supp. at 463 n.2.

242. *See* Shaw v. Barr, 808 F. Supp. at 479 (Voorhees, C.J., dissenting in part), *rev'd sub nom.* Shaw v. Reno, 113 S. Ct. 2816 (1993); Grofman, *supra* note 240, at 1252; Pildes & Niemi, *supra* note 228, at 516-18. In addition to the two majority-minority districts, African-Americans comprise more than 20% of Districts 2, 3, 4, and 8, and comprise more than 15% of District 5. T. Alexander Aleinikoff & Samuel Issocharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 612 n.100 (1993). These

American voters as an in-road to predominantly Republican areas of the state.[243] Both strategies assume what statistics show: African-Americans tend to vote Democratic when they vote.[244]

The Republicans who brought the suit were no better. Their first complaint was that the redistricting was political gerrymandering. Because that ground for complaint appeared unlikely to result in a favorable judgment,[245] they shifted to the Equal Protection claim. Although the Republican party was not technically a plaintiff in *Shaw v. Reno*, it is hard to imagine this suit arising in the same way if the Republican Party had a candidate they thought could carry the new majority-minority district, or if African-Americans tended to vote for Republican candidates.

Fortunately, the factual context plus an examination of who is using the difference dilemma provides a way out. The majority is worried about "redistricting legislation that is so extremely irregular on its face"[246] that it "rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race."[247] By taking the context and the perpetrators' benefits into consideration, it becomes obvious that whether a district is "so extremely irregular" or not depends on the available alternatives and why the alternatives were not chosen. The problem is not that irregular district lines might reflect some use of race. The problem is that irregularity beyond what is necessary to create a majority-minority district strongly indicates the use of race by one political party to disadvantage another political party.

In a sense, the majority opinion cites the wrong history of racial gerrymandering. The Court cites the history of using districts to fence African-Americans out of the political process geographically after it has been impossible to exclude African-Americans through procedural means, such as poll taxes, white primaries, and literacy tests.[248] As the dissent points out,

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districts all reelected their Democratic incumbents, some of whom are quite powerful members of Congress. Daniel D. Polsby & Robert D. Popper, *Ugly: An Inquiry Into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652, 653 (1993).

243. For much of its length, District 12 runs through districts 6, 9, and 10. Those districts are three of the four districts held by Republican incumbents prior to the 1992 elections. Before reapportionment, District 6 contained Greensboro and District 9 contained Charlotte. District 12 largely removes those cities from those districts. It also largely removes Winston-Salem and Durham from districts with Democratic incumbents. Those Democratic incumbents were returned to Congress, albeit with lower margins of victory. Republican incumbents were also returned to Congress, with larger margins of victory. For comparative districting maps, *compare* 1 CONGRESSIONAL INDEX 103RD CONGRESS (CCH), at 25,936 *with* 1 CONGRESSIONAL INDEX 101ST CONGRESS (CCH), at 25,936. A good map of District 12, showing the cities it includes is in Pildes & Niemi, *supra* note 228, at 492. For a list of representatives by district and vote totals, *compare* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 273 (113th Ed., 1993) (Table No. 437) *with* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 258 (111th Ed., 1991) (Table No. 434).

244. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1993, 282 (113th Ed. 1993) (Table No. 452) (Of the black population, 40% are strong Democrats and another 23% are weak Democrats, while only 2% are strong Republicans and another 3% are weak Republicans).

245. *See* Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992), *aff'd mem.*, 113 S. Ct. 30 (1992) (dismissing complaint).

246. Shaw v. Reno, 113 S. Ct. 2816, 2824 (1993).

247. *Id.* at 2828.

248. *Id.* at 2823, 2825-26 (citing to Gomillion v. Lightfoot, 364 U.S. 339 (1960); Guinn v. United States, 238 U.S. 347 (1915)).

however, North Carolina did not fence anyone out of the political process.[249] The history the Court should have cited was the effort by the Republican Party during Reconstruction to use the enfranchisement of former slaves and the disenfranchisement of former Confederate supporters to create a Republican party in an area of the country where Republican influence was minimal.[250] The only thing that appears to have changed is which political party is now assuming the African-American vote is safely in its corner.

With this reformulation, the difference dilemma narrows. The Court should have allowed state legislatures to create majority-minority districts that empower geographic enclaves of minority voters to decide their own allegiances. The only requirement should be a prohibition on designing districts to favor one party.[251] Such districts avoid racist presuppositions about how members of the community will act and provides an opportunity for both parties in the new district. From this perspective, the Voting Rights Act and the Equal Protection clause work together, not in opposition. The Voting Rights Act forces the creation of majority-minority districts and the Equal Protection Clause acts to avoid political capture of those districts.

This solution is partially asymmetrical in that legislatures may empower traditionally excluded groups by including representatives from those groups in the legislative bodies. Yet there is less chance of marginalizing and stereotyping these representatives and districts because the symmetrical baseline of compact, coherent districts helps avoid capture and allows these representatives to participate more effectively in the pluralistic process.[252] Nevertheless, the partial symmetry of requiring that these districts not favor one political party by design does not risk excluding African-Americans and other traditionally excluded minorities, provided minority politicians can build a consensus within or across racial lines in their district.

Again, this solution is temporary and imperfect. In the next case there might not be an easy alternative majority-minority district. In the next case, the idea of "minority" might not be so easy if there are multiple ethnic minorities.[253] Even within this solution, the dilemma can still exist. The very idea of majority-minority districts can lead to perceptions of racial apartheid.[254] Requiring such districts to be as compact and contiguous as

249. 113 S. Ct. at 2837-38 (White, J., dissenting); *see also* Pildes & Niemi, *supra* note 230, at 494.

250. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 281-333 (1988); *see also* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 47 (1988).

251. *Cf.* Pildes & Niemi, *supra* note 228, at 578-82 (suggesting that courts will reject protection of incumbency as a compelling reason to adopt bizarrely shaped majority-minority districts).

252. See Guinier, *Tokenism*, *supra* note 231, at 1116-28 (arguing that mere presence of African-Americans in legislative bodies does not ensure they will either represent their constitutents or be able to effect the legislative outcomes).

253. Indeed this may have been a problem with the second district in North Carolina. Pildes & Niemi, *supra* note 228, at 522 n.126. *See generally* Peter Margulies, *The Mother with Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education*, 88 NW. U. L. REV. 695, 709-16 (1994) (discussing difficulty of assimilating intersections of race, ethnicity, disability, gender, religion, and class).

254. *See Emperor's Clothes*, *supra* note 231, at 1624-29 (arguing that the racial essentialism is not in majority-minority districts, but in winner-take-all districting itself rather than some form of proportional representation).

possible may bring to the surface divisive factions within each district so that the district always elect Euro-Americans and the governing councils remain predominately Euro-American. Even if districts are not necessarily designed to favor one political party, African-American or other representatives who are a racial minority in the governing body may be excluded from winning coalitions unless they adopt the political perspectives of the majority race.[255] The continued existence of the difference dilemma is not the problem. When the next case comes, the difference dilemma will again point out the existence of oppression and provide the creative energy to allow lawyers and judges to face its next manifestation.

III. CONCLUSION

For most scholars, the contemporary problem in equality law is the difference dilemma. Making the same rules apply to everyone (symmetry) protects against apartheid while risking that rules may systematically subordinate one group to another. Making the rules apply the same to everyone (asymmetry) protects against and invites exactly the opposite risks. Indeed, this dilemma is necessary for oppression to occur at all as neither apartheid nor subordination work very well without the other. Every member of the Supreme Court has become entangled in the dilemma, hopping from one horn to the other either between or within race and gender issues.

This inability to stick with either symmetry or asymmetry is not a weakness, however. It is not a weakness because the difference dilemma, or at least the dynamic tension it generates, is also the solution to the thorniest problems in contemporary equality law. If we can ride the dynamic tension between the horns of this dilemma, we can avoid getting stuck on either one. Accomplishing that feat requires looking at the facts and the perpetrator in the specific context. There are no generalizable rules about how to avoid the dilemma, which is fortunate. It is the instinct to grasp for such a generalizable rule that inevitably impales us on one horn of the dilemma.

The Court and the individual justices are halfway there. They realize the need for both symmetry and asymmetry and the importance of context. The next step is simply to focus on both symmetrical and asymmetrical equality simultaneously rather than separately. All that is required is the moral courage to admit there is oppression in our society, the faith that there is always a way to use the dynamic tension of the difference dilemma, and the humility to realize that we are mere mortals, and that what we created as permanent solutions are equally ephemeral.

255. *Tokenism, supra* note 231, at 1102-34.