

The Dilemma of Difference in Democratic Society

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I. THE CASE OF GENDER

It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women.

—JUSTICE OLIVER WENDELL HOLMES, JR. (1923)

EQUALITY

It is the pole star in the constellation of values that compose America's national identity. No word in American speech enjoys more talismanic status. No term has had more power to shape the contours of the law, fire the engines of government, or stir the passions of the people. Whether as constitutional doctrine, political premise, or cultural ethos, the concept of equality is the starting point of all American history, the *fons et origo* from which all else flows.

Thomas Jefferson enshrined the equality principle in the first substantive sentence of the Declaration of Independence. The “self-evident” truth that “all men are created equal,” he announced on July 4, 1776, was the foundational assumption that legitimated American nationhood and undergirded democracy itself. A little more than half a century later, in the first sentence of *Democracy in America*, Alexis de Tocqueville declared: “Among the novel objects that attracted my attention during my stay in the United States, nothing struck me more forcibly than the general equality of condition among the people.” All of his magisterial analysis followed from that simple observation. Four score and seven years after the Declaration of Independence, Abraham Lincoln reprised Jefferson's exact phrase in the first sentence of the most renowned of all presidential addresses. At Gettysburg, Pennsylvania, on November 19, 1863, he described the Civil War as a test of the very viability of a “nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.” What was more, he famously asserted, the American Civil War amounted to nothing less than a test of whether *any* nation “so conceived and so dedicated, can long endure.” Perhaps most consequentially, in the Reconstruction Era following the Civil War, Jefferson's self-evident principle, which Lincoln held to be

essential to *all* democracies, was formally inscribed into the text of the Constitution of the United States. No state, proclaimed the Constitution's Fourteenth Amendment in 1868, could "deny to any person within its jurisdiction the equal protection of the laws."¹

But while equality may have long been sanctified as a principle, and eventually codified in the nation's fundamental law, it has been obliged from the outset to contend with the clamorous reality of difference. Indeed, repeated struggles over the definition, application, and effects of the equality idea in the teeming plural society that is America give this story its compelling narrative interest and its lasting historical significance. Jefferson himself illustrates the case—and not simply because of the well-known anomaly that the great patron of equality was also a slave owner and thus complicit in the most egregious inequality in all of American history. No less instructively, as his self-designed tombstone at Monticello reminds us, Jefferson wished to be remembered not only as the author of the Declaration of Independence—equality's touchstone—but also as the architect of the Virginia Statute for Religious Freedom, whose very logic was the recognition of *diversity* among religious faiths. (Jefferson also hoped that posterity would remember his role as the founder of the University of Virginia; he conspicuously did not mention his service in the presidency.) And of course the problem of diversity—or "faction"—was the subject of the most celebrated commentary on the Constitution, Federalist No. 10, penned in 1787 by Jefferson's brother revolutionary, James Madison.

The nation's venerable motto, "E pluribus unum," similarly captures some of the tensions in the relationship between diversity and homogeneity, between variety and singularity, between individual liberty and national coherence—or between difference and equality.

Americans have labored for more than two centuries to reconcile their commitment to equality with the stubborn fact that they differ from one another in countless ways, including region, religion, race, ethnicity, gender, wealth, income, class, age, physical and intellectual

¹ "The Declaration of Independence," in *The Papers of Thomas Jefferson*, ed. Julian P. Boyd (Princeton: Princeton University Press, 1950), vol. 1, p. 429; Alexis de Tocqueville, *Democracy in America*, Everyman's Library edition (New York: Alfred A. Knopf, 1994), vol. 1, p. 3; Abraham Lincoln, "Address at Gettysburg, Pennsylvania," in *Abraham Lincoln: Speeches and Writings, 1859–1865*, ed. Don E. Fehrenbacher, Library of America edition (New York: Literary Classics of the United States, 1989), p. 536; *United States Constitution*, Art. XIV, in *Documents of American History*, ed. Henry Steele Commager and Milton Cantor, 10th ed. (Englewood Cliffs, N.J.: Prentice Hall, 1988), pp. 147–48.

endowment, ambition, and even political philosophy. The Constitution itself, for all that it honors the equality principle in the Fourteenth Amendment, has been rightly described (by Supreme Court Justice Oliver Wendell Holmes, Jr.) as “made for people of fundamentally differing views.”²

This is what I mean by the “dilemma of difference in democratic society”: how can a polity that is in principle egalitarian but in fact astonishingly variegated find equilibrium between those two apparently irreconcilable realities? As these lectures will emphasize, for minorities of all descriptions the question has tactical as well as philosophical urgency: In the turbulent scramble of American life, are individuals or groups, however their minority status—or differentness—may be defined, more advantaged by embracing the equality principle or by asserting their own distinctiveness? And here are some related questions: Is it possible that a nominal uniformity in legal rules or social norms can actually generate inequality? Conversely, can the recognition of difference paradoxically serve as the guarantor of effective equality? As we shall see, different people have at different times given different answers to those questions.

The dilemma of difference, in the American case, and some of its attendant ironies and paradoxes, came into especially sharp focus in the Reconstruction Era in the late 1860s. If indeed the whole of American history can be understood as the story of equality, then the saga of the Fourteenth Amendment is the pivotal chapter in that tale. The amendment was the second of the three great additions to the Constitution occasioned by the emancipation of black slaves during the Civil War. Its first paragraph guaranteed all persons equal protection of the laws. Yet in almost the same breath, its second paragraph acknowledged a fundamental difference among those persons when for the first time it formally distinguished between the sexes by introducing the word “male” into the Constitution with reference to the right to vote. The same paragraph went on explicitly to envision the grossest of all political inequalities when it prescribed penalties for, *but did not expressly forbid*, denial of the franchise to adult male citizens. Two years later, in 1870, that inconsistency was partly resolved when the Fifteenth Amendment specifically prohibited withholding the right to vote “on account of race, color, or previous condition of servitude.”

² *Lochner v. New York*, 198 U.S. 45 (1905), 76.

Yet to the dismay and disgust of women's suffrage advocates, the Constitution's continued silence in 1870 about "sex"—we would today say gender—perpetuated the political inequality of females, who remained unable to vote. Race and sex alike, said one woman suffragist, were but "accidents of the body." Now, she said, was the moment "to bury the black man and the woman in the citizen." But Congress and the country refused to go that far, enfranchising black men, but no women, black or white. Susan B. Anthony, the noted suffrage leader, was livid. "There is not the woman born," she said, "who desires to eat the bread of dependence, no matter whether it be from the hand of husband, father, or brother; for any one who does so eat her bread places herself in the power of the person from whom she takes it.... Mr. [Frederick] Douglass [the former slave and prominent abolitionist] talks about the wrongs of the negro; but with all the outrages he to-day suffers, he would not exchange his sex and take the place of Elizabeth Cady Stanton [Anthony's comrade-in-arms in the suffrage struggle]." This was neither the first nor the last time that African-Americans and women would find themselves at odds with respect to the equality principle.³

As the nineteenth century drew to a close, the gap widened between the nominal and actual social circumstances of blacks as well as women. African-Americans were now politically equal in theory but cruelly oppressed in practice, as the consolidation of the "Jim Crow" system of statutory segregation in the southern states made a mockery of the Fourteenth Amendment's "equal protection" pledges. By the 1890s, blacks in the eleven states of the Old Confederacy were everywhere relegated to separate and inferior public facilities, notoriously including schools, and were almost nowhere allowed to exercise their constitutionally stipulated right to vote, not to mention serve on juries or hold public office. Those circumstances would not materially change until the great civil rights campaigns of the mid-twentieth century. Women meanwhile had no constitutional claim to full political equality, but the circumstances of their everyday lives were increasingly assimilating to men's. Women in most states were still legally debarred from the polling booth—but they were to be found in swelling numbers along-

³ Eric Foner, *The Story of American Freedom* (New York: W. W. Norton, 1998), p. 108; Elizabeth Cady Stanton et al., *History of Woman Suffrage* (Rochester, N.Y.: Susan B. Anthony, 1861–76), vol. 2, p. 383.

side their brothers on the workshop floor. By the nineteenth century's end, one out of five women worked for wages. By the time of World War I, almost one out of four did.

Thus the twentieth century would visit the dilemma of difference with particular urgency on women and African-Americans alike, though not in like manner. The struggle to accommodate the principle of equality with differences of gender and race in the United States in the last century and a half is the subject of these lectures. It is a peculiarly American story, framed by uniquely American laws, institutions, and historical circumstances and invested with typically American aspirations, prejudices, and hypocrisies. It is a story with peculiar resonance for inhabitants of American society, which itself inhabits a distinctive social and historical niche, where diversity and equality alike have long been both facts of life and defining values. But it is also a story with broader human resonance, a special case of the timeless contest between principle and practice, between the ideal and the real. Perhaps it can also serve as an instructive parable for a world wracked between the universalizing and homogenizing forces of "globalization" and enduring loyalties to particular cultures, identities, and ways of life.

Momentous history is often rooted in the most humdrum details of daily routine. So it was with Joe Haselbock. Like the Molière character in *Le Bourgeois Gentilhomme* who was amazed to discover that he had been speaking prose all his life, so might Haselbock have been charmed by the revelation that he was living in history—was in fact making it. Haselbock's brief but consequential appearance on history's stage came on September 4, 1905, in the normally placid little Pacific Northwestern city of Portland, Oregon, far from the great arenas of majesty and contestation where we are accustomed to thinking that "history" unfolds. We find him in no heroic pose, dramatically lit and blocked by the director's art, but simply standing behind the counter of a store-front business establishment called the Grand Laundry. He had held his station with customary diligence and competence throughout the day, greeting customers and superintending the workers who toiled in the shop behind him at their washtubs and mangles and ironing boards.

Just before closing time on that mild late-summer evening, a customer came through the door with a load of laundry and inquired if it could possibly be available for pick-up the following morning. Eager to

please, Haselbock gave assurance that it would be done. He then directed an employee by the name of Gotcher to stay after hours and wash and iron the late-delivered laundry.

Early the next day, the customer picked up the finished load. Haselbock presumably congratulated himself on a job well done. His employer, Mr. Curt Muller, could take pride that his establishment's hard-earned reputation for quality service and customer satisfaction had been confirmed.

The only disgruntled party in this otherwise beatific commercial scene was that after-hours employee, Gotcher, who must have been tired, hungry, and eager to go home at the end of a ten-hour shift wrestling with heaps of soiled shirts and sheets and diapers.

Gotcher was a woman, and thereon hangs this tale. Her womanhood was more than an incidental biological attribute, a mere "accident of the body." It also defined her cultural identity, her social role, and, not least, her legal status and political capacity. That she was employed at all defined her as an unusual woman at a time when only 20 percent of all American women worked for wages. And because she had a husband, she was more unusual still in an era when only about 5 percent of married women held paying jobs. But on both counts she was a harbinger of things to come. By the beginning of the next century, more than two out of every three adult women in the United States were gainfully employed, including almost three of every four mothers, whether married or single, with children in the household under the age of six years.

The court documents that have preserved Gotcher's story refer to her only as "Mrs. E. Gotcher." That formal appellation evoked the already vestigial common-law tradition of the *femme couverte*, whose civil existence was subsumed in the person of her husband, just as her surname disappeared in his. Mrs. Gotcher was a citizen, but citizenship is parsable, and many of its privileges were denied to her. She could not vote in the state of Oregon in 1905; nor could she hold public office. She would be unable to do either for seven more years. (Had she lived in Pennsylvania, Florida, or any of eighteen other states, she would have been unable to do so for fifteen more years, until the passage of the Nineteenth Amendment in 1920.) In short, Mrs. Gotcher was unequal by many measures. But inequality—or difference—also had its claims, as Messrs. Haselbock and Muller would shortly find out.

When he required Mrs. Gotcher to work overtime, Haselbock violated an Oregon statute passed in 1903. It stipulated that "no female

[shall] be employed in any mechanical establishment, or factory, or laundry in this state more than ten hours during any one day.”⁴ Gotcher, perhaps egged on by her husband, Elmer, who—we might imagine—was stewing at home on the evening of September 4, irritably waiting for his good wife, Emma, to prepare his supper, filed a formal complaint with the Oregon authorities, supported by testimony from several of her women co-workers. The state of Oregon thereupon brought misdemeanor charges against Muller, as the proprietor of the laundry and hence the person ultimately responsible for what happened there. The Oregon Circuit Court for Multnomah County found Muller guilty and fined him \$10. The Oregon State Supreme Court affirmed the conviction the following year, in 1906.

There the matter might have ended (and this lecture would have prematurely adjourned) had Mr. Muller been a more submissive soul—or had the Reconstruction Congress not seen fit to amend the Constitution some forty years earlier. But Muller had his dander up. He seems to have been a familiar American type, not inclined to tug his forelock in the presence of authority, nor to let legislators or magistrates—men who had never met a payroll—tell him how to run his business. He determined, therefore, to mobilize the formidable and uniquely American machinery of judicial review. With the support of other like-minded Portland laundry owners, he petitioned the United States Supreme Court to pass judgment on the constitutionality of the Oregon statute. He took his stand on a literal reading of the Fourteenth Amendment. As his attorneys put it, citing the Amendment’s equal protection clause, the Oregon law under which Muller had been convicted was “unconstitutional.... Because the statute does not apply equally to all persons similarly situated, and is class legislation.”⁵

That simple statement starkly challenged the Oregon statute. By singling out women for special consideration by the state, the law implicitly denied such consideration to men and thereby flatly contradicted the Fourteenth Amendment’s guarantees of equal protection to

⁴ State of Oregon, *The General Laws and Joint Resolutions and Memorials Enacted and Adopted by the Twenty-second Regular Session of the Legislative Assembly, 1903* (Salem, Ore.: J. R. Whitney, State Printer, 1903), p. 148. For much of the discussion that follows I am indebted to Nancy Wolloch, *Muller v. Oregon: A Brief History with Documents* (Boston: Bedford/St. Martin’s, 1996).

⁵ Philip B. Kurland and Gerhard Casper, eds., *Landmark Briefs and Arguments of the Supreme Court of the United States* (Arlington, Va.: University Publications of America, 1975), vol. 16, p. 8.

all persons within the state's jurisdiction. Muller's suit thus sounded a klaxon among those reformers, most of them women, who for more than a generation had been seeking to carve out legislative safeguards for maximum hours, minimum wages, and less dangerous working conditions for the widening stream of women flowing into the work force. A successful assault on the Oregon statute would not only cancel their short-lived success in the state of Oregon. It would also put at risk similar provisions in several other states and thereby toll the knell for efforts to bring the growing legion of working women under the sheltering embrace of the law.

That unwelcome prospect galvanized one reformer in particular: Florence Kelley, the head of the National Consumers' League. The league was the principal organization doing battle to improve the lot of women workers. Kelley had become its secretary on its inception in 1899 and would remain so until her death in 1932. She had been raised in a Philadelphia Quaker environment and was a confidante and translator of Friedrich Engels, as well as a sometime member of the German Social Democratic Party and the American Socialist Labor Party. She earned a law degree from Northwestern University and served a formative apprenticeship at Jane Addams's Chicago settlement project, Hull House. There she had pioneered demographic and occupational censuses of Chicago's gritty immigrant wards. Those data had helped her to induce the Illinois legislature to pass one of the country's first laws limiting women's (and children's) working hours—an important precedent for the Oregon statute now under challenge. At Hull House she honed her lifelong reform strategy: “investigate, educate, legislate, enforce”—the last term of which had, thanks to Curt Muller's challenge, become her currently compelling mission.

Ironically enough, Kelley was also the daughter of William Darrah “Pig Iron” Kelley, a prominent abolitionist and longtime Radical Republican congressman from Pennsylvania. Like his fellow Radicals, he strongly opposed slavery, favored full and meaningful black emancipation, and advocated the wholesale reordering of the South's political, social, and economic structure. He had conspicuously supported the same Fourteenth Amendment on which Muller's appeal now relied. That “measure passed to guarantee the Negro freedom from oppression,” his daughter now noted ruefully, was in danger of becoming “an insuperable obstacle to the protection of women....” The constitutional stan-

dard of equality, Kelley feared, threatened to annul legislation targeted exclusively on women.⁶

Kelley anxiously hurried to Oregon to consult with local labor leaders and women's advocates. She helped them to enlist some heavyweight legal talent to defend the Oregon law: Louis D. Brandeis, the renowned "people's attorney," the scourge of big business and the darling of the progressives of his day, celebrated for his successful trust-busting suits and for his outspoken pro-labor views. After an official invitation by the Oregon attorney general, Brandeis agreed to take on the case.

By reason of temperament, intellect, experience, and ideology, Brandeis was an inspired choice to defend the Oregon law. Already famed as a champion of progressive causes, he was also building a reputation as a major innovator in legal reasoning. Brandeis might be called a radical exponent of the common-law process. He believed that the law was neither distilled from lofty abstractions (in the manner of civil law) nor simply composed of a historical accretion of judicial decisions (as in common law), though he much admired the evolutionary character and inductive method of the common-law tradition. Rather, said Brandeis, both statutory and case law grew organically out of the ever-changing needs of society. In this he agreed with his famous contemporary Oliver Wendell Holmes, Jr., who had proclaimed on the first page of *his* classic analysis of Anglo-American jurisprudence, *The Common Law* (1881), that "the life of the law has not been logic: it has been experience." (By this point I'm surely in danger of giving the impression that I never read beyond the opening page of any document!)⁷ These Tanner Lectures might well be understood as nothing more than an elaboration on that statement by Holmes, with reference to the issues of gender and racial equality in the United States in the last century and a half.

Like Holmes, Brandeis thus formulated his own answer to the ancient riddle of the relation of fixed principles to protean reality. And like Holmes—indeed, like the luminous constellation of Holmes and his contemporaries Charles Peirce, John Dewey, and William James, who crafted the distinctively American philosophical doctrines of

⁶ "Kelly, Florence," in *American National Biography* (New York: Oxford University Press, 1999) vol. 12, pp. 483–86; Josephine Goldmark, *Impatient Crusader: Florence Kelley's Life Story* (Urbana: University of Illinois Press, 1953), p. 144.

⁷ O. W. Holmes, Jr., *The Common Law* (Boston: Little, Brown, and Company, 1881), p. 1. On Holmes's circle, see Louis Menand, *The Metaphysical Club* (New York: Farrar, Straus and Giroux, 2001).

Pragmatism—he gave greater weight to the messy and dynamic huger-mugger of lived experience than to the supposedly eternal precepts of jurisprudential doctrine. For both Holmes and Brandeis this meant that insofar as possible judges should defer to the evolving will of the people as expressed through their legislators and should invoke constitutional restraints only in compelling, unambiguous circumstances. Brandeis now looked to those guiding precepts as he set out to draft his *Muller* brief.

Brandeis had his work cut out for him. *Muller*'s attorneys may have been no match for Brandeis in brainpower, ingenuity, or notoriety, but the Constitution had dealt them the trump card of the Fourteenth Amendment. They played it skillfully, doggedly repairing to the ostensibly inescapable logic of the amendment's equality principle. They argued that men and women had equal rights before the law, including especially the right to contract freely for the sale of their labor. (They acknowledged only in passing the nontrivial exception that "the one may not be able to exercise the elective franchise, or hold office.") How then could a woman be forbidden "from doing what would be perfectly lawful and proper for her brother or husband to contract to do in the same service [?]" They further argued that while a large corpus of precedent upheld the legitimacy of using the state's police power to protect workers in dangerous occupations, in the instant case "the health of men is no less entitled to protection than that of women." Unless the Court were willing "to proceed upon the theory that women are wards of the state," they declared, the statute could not be allowed to stand. In an especially provocative formulation, they pointedly drew the racial analogy: "[I]f the statute had forbidden employment for more than ten hours, of all persons of white color...no one would contend that the classification was reasonable or one that could be sustained."⁸

Faced with those apparently irrefutable arguments, Brandeis devised a highly innovative strategy, one that aimed not to challenge the equal-protection doctrine directly, but to justify an exception to it. He submitted for the Court's consideration a brief that contained only two pages of citations to precedent but laid out over one hundred pages of social, economic, and physiological data. He drew from sources as diverse as Beatrice Webb's *The Case for the Factory Acts*, reports of various British factory commissions, and similar documents from Canada, Ger-

⁸ Kurland and Casper, *Landmark Briefs*, vol. 16, pp. 16, 17, 24, 30.

many, Belgium, and France as well as Massachusetts, Connecticut, New York, and Wisconsin. Brandeis forged that evidence into a simple yet solid chain of syllogistic reasoning. Its major premise was that “in structure and function women are differentiated from men”; they were “fundamentally weaker than men in all that makes for endurance: in muscular strength, in nervous energy, in the powers of persistent attention and application.” They were therefore more susceptible than men to the dangers of “overwork...which...is more disastrous to the health of women than men, and entails upon them more lasting injury.” It followed that these “facts of common knowledge” and “the world’s experience” provided reasonable grounds for bending the equality principle to accommodate feminine difference. In short: Women were by nature unequal; their different nature put them at special risk in the workplace; rules of equality could therefore not reasonably be applied to them. To invalidate the Oregon law, Brandeis implied, would be to affirm a hollow, purely formal notion of equality whose practical effect would be to inflict disparate harm on a distinctive and therefore peculiarly vulnerable category of workers.⁹

Brandeis’s argument, with its scant reference to legal precedent and heavy emphasis on sociological data, was an instant legal sensation. The term “Brandeis Brief” soon entered the American legal lexicon as a generic descriptor. It came in time to define the technique of a broad school of legal reasoning known as “sociological jurisprudence,” about which more will be heard later. But for all the inventiveness in Brandeis’s method, the core of his argument was not new at all. Brandeis himself later joked that his brief could have been entitled “What Any Fool Knows.”¹⁰ It rested on a set of propositions as old as the Book of Genesis. It therefore artfully persuaded the nine Supreme Court Justices about what they already knew.

After remarking on the unusual character of Brandeis’s presentation, Justice David J. Brewer wrote for a unanimous bench that the Oregon law was constitutionally legitimate precisely because of “the inherent difference between the two sexes, and in the different functions in life which they perform.”

⁹ *Ibid.*, vol. 16.

¹⁰ Dean Acheson, *Morning and Noon* (Boston: Houghton Mifflin, 1965), p. 53. Some historians have suggested that the “facts” Brandeis so exhaustively presented were in the end irrelevant to the basis of Brewer’s decision, which rested almost entirely on familiar assumptions of women’s special character.

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious.... [S]he is not an equal competitor with her brother.... [S]he is not upon an equality.... This difference justifies a difference in legislation...to compensate for some of the burdens which rest upon her.... [S]he is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained.

Almost as an afterthought, Brewer added: "We have not referred in this discussion to the denial of the elective franchise in the State of Oregon, for while that may disclose a lack of political equality in all things with her brother, that is not of itself decisive."¹¹

So Curt Muller was obliged at last to cough up his \$10 fine. Feminists of a later era would gag on both the terms of Brandeis's argument and the specifics of Brewer's language. But in 1908 exultant female activists virtually without exception joined Florence Kelley in clamorously applauding the *Muller* decision as a landmark victory for women. Emboldened by the *Muller* verdict, Kelley and her associates in the following decade cajoled the legislatures of nineteen additional states to enact women's maximum-hours laws, bringing the total to thirty-seven by 1917. Further heartened by those results, Kelley's National Consumers' League in 1918 took an additional dramatic step. It pressured the United States Congress to pass a law setting minimum wages for women in the federal District of Columbia.

Then in 1920 feminists scored yet another signal victory when the requisite number of states ratified the Nineteenth Amendment, guaranteeing women the right to vote. The amendment crowned a century of struggle and atoned at last for the suffragists' bitter disappointment at having failed to secure the franchise in the formative crucible of the Reconstruction Era.

But the amendment's passage also threatened to exemplify the ancient maxim about being careful what one wishes for. Brewer had taken passing notice of Oregon's "denial of the elective franchise" to women in the *Muller* case but considered the absence of political equality with men not decisive. Its *presence*, however, soon proved to be another matter.

The federal minimum-wage statute of 1918 seemed to build natu-

¹¹ *Muller v. Oregon*, 243 U.S. 412 (1908), 421-23.

rally on the post-*Muller* proliferation of women's maximum-hours laws, and the passage of the Nineteenth Amendment just two years later appeared to herald another landmark advance for women. But in fact the amendment and the statute—indeed the amendment and all those state laws that rested on assumptions about women's special nature—were on a collision course.

The collision came in the old judicial chamber in the basement of the Capitol building in Washington, D.C., on April 19, 1923, when the Supreme Court announced its decision in the case of *Adkins v. Children's Hospital*. The hospital, a District of Columbia employer, had challenged the constitutionality of the 1918 law and therefore the authority of the District of Columbia Minimum Wage Board, headed by Jesse Adkins. A companion case, *Adkins v. Lyons*, arose from the complaint of Willie Lyons, a 22-year-old female elevator operator. The minimum-wage law had caused her employer, the Congress Hall Hotel Company, to replace her with a male who was willing to work for a lower wage.

In addition to being a federal, not a state, measure, the law that the *Adkins* cases tested differed in two significant ways from the Oregon statute that Brandeis had so cleverly defended in 1908. It dealt not merely with what the Court called "incidents of employment" like the regulation of hours, but with "the heart of the contract; that is, the amount of wages to be paid and received." No less importantly, the federal law of 1918 must necessarily be assessed in the new constitutional environment created by the passage in 1920 of the Nineteenth Amendment.¹²

The National Consumers' League's attorney, Brandeis's protégé and future Supreme Court Justice Felix Frankfurter, weighed in with a mega—"Brandeis Brief" of 1,138 pages in support of the statute and of Adkins's board. Brandeis himself now sat on the Supreme Court. (As the first Jew ever appointed to the high bench—by Woodrow Wilson in 1916—he represented yet another reminder of the pervasive, indeed wildly accelerating, pluralism of American society in the early twentieth century, when nearly a million immigrants a year, most of them Jewish or Catholic or Orthodox, were pouring into the traditionally Protestant country.) Brandeis might have been expected to give Frankfurter a friendly reception and to support the invocation of the *Muller* precedent on which Frankfurter's argument crucially depended. But

¹² *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), 552–70.

probably because of his involvement with the earlier case, as well as his daughter Elizabeth's employment at the Minimum Wage Board, Brandeis recused himself from the *Adkins* cases. Frankfurter would have to proceed without the help of his friend at Court.

The courts had traditionally resisted any encroachment on freedom of contract, one of the most sacrosanct tenets in the Anglo-American legal tradition. As recently as 1905, in the infamous case of *Lochner v. New York*, the Court had strenuously reaffirmed its commitment to the freedom of contract doctrine when it struck down a New York law regulating the working hours of bakers. Still, Justice Brewer's decision in the *Muller* case provided a rationale for at least some abridgment of that freedom with respect to women. The principle of *stare decisis* obliged the Court to take notice of that precedent. "In the *Muller* Case," Justice George Sutherland duly observed in his majority decision, "the validity of an Oregon statute, forbidding the employment of any female in certain industries more than ten hours during any one day, was upheld. The decision proceeded upon the theory that the difference between the sexes may justify a different rule respecting hours of labor in the case of women than in the case of men."¹³

So far so good. But then the recused Brandeis must have blanched when he realized that Sutherland was deftly dispensing with the *Muller* precedent by employing Brandeis's own technique of reaching legal conclusions on the basis of actual social conditions—*stare decisis* be damned. "[T]he ancient inequality of the sexes," said Sutherland, "has continued 'with diminishing intensity' [here he deliberately lifted language directly from Brewer's earlier opinion]":

In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point. In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present

¹³ *Ibid.*

day trend of legislation, as well as that of common thought and usage [here Brandeis must have been acutely discomforted] by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships.

That reasoning extinguished the federal minimum-wage law. It also occasioned a deliciously tart dissent from Justice Holmes. "It will need more than the Nineteenth Amendment," he wryly observed, "to convince me that there are no differences between men and women." He then spelled out the judicially meaningful implication: "or that legislation cannot take those differences into account."¹⁴

But for better or worse, the Nineteenth Amendment had proved powerfully dispositive in compelling those differences *not* to be taken into account. Many reformers, including Felix Frankfurter and Florence Kelley, now feared that the entire laboriously built structure of protective legislation for women had thereby been put in jeopardy. "Most ominous part of the opinion," Frankfurter telegraphed to Kelley, "is suggestion that *Muller* doctrine has been supplanted by nineteenth amendment"—that the judicial recognition of difference, in short, had been compelled to yield to the dominant principle of equality.¹⁵

Frankfurter's anxiety was somewhat overblown. Sutherland had applied his argument narrowly to wage regulation. He conceded that "physical differences" might still be recognized in regulations affecting hours and working conditions. So at least for the moment such laws remained intact, though somewhat precariously.

But Frankfurter was right to worry about the broader "supplanting" effect of the Nineteenth Amendment over the longer term. The *Muller* and *Adkins* cases rested on utterly different, even incompatible, assumptions about women's nature and civil status. A shift in those assumptions had in the space of just fifteen years radically recast constitutional law and transformed the entire social and economic landscape for women. The seismic upheaval occasioned by Sutherland's abandonment of Brewer's premises threw into vivid relief the chronic perplexities of

¹⁴ Ibid. For further detail on the Lyons case, see also *Lyons v. Same* [Adkins, et al., Minimum Wage Board] 52 App. D.C. 109 (1922).

¹⁵ Joan G. Zimmerman, "The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and *Adkins v. Children's Hospital*, 1905–1923," *Journal of American History* 78, no. 1 (June 1991): 222–23.

the dilemma of difference respecting gender. It also sharply intensified disagreement among women themselves as to whether Brewer's premise of difference in *Muller* or Sutherland's premise of equality in *Adkins* was a superior foundation—in theory as well as in public policy—for the definition of women's essential character and for efforts to enhance their social standing.

As it happened, Justice Sutherland had acted neither capriciously nor cynically when he made women's newly acquired voting rights central to his reasoning in the *Adkins* cases. Sutherland later gained notoriety, along with Justices Pierce Butler, Willis Van Devanter, and James C. McReynolds, as one of the egregiously conservative "Four Horsemen" who opposed much of the reform program of the New Deal and occasioned Franklin D. Roosevelt's notorious "Court-packing" plan in 1937. But Sutherland, whatever his views on other subjects, was on gender issues something other than a doctrinaire male chauvinist. As a Utah senator in 1915, he had introduced a women's suffrage amendment in Congress. "Any argument which I may use to justify my own right to vote, justifies the right of my wife, sister, mother, and daughter to exercise the same right," he said. While still a senator he had also advised Alice Paul, head of the militant National Woman's Party, on the drafting of a constitutional amendment to guarantee gender equality. To the consternation of an outraged Florence Kelley, Paul had in turn helped the brothers Wade and Challen Ellis, attorneys for Children's Hospital and Willie Lyons, to devise the legal strategies that had proved persuasive to Sutherland and a majority of his colleagues in the *Adkins* cases.¹⁶

Alice Paul was a severe, preternaturally self-disciplined woman, a generation younger than Florence Kelley, but nurtured in a comparable Quaker milieu and comparably affected by her involvement with immigrant women wage-earners—in Paul's case in the seething tenement houses of New York's Lower East Side. But unlike Kelley, who spent her lifetime emphasizing women's unique nature and fighting for laws to give them special protection in the workplace, Paul was a paladin—indeed, a voluptuary—of the equality principle. Paul spent *her* lifetime proclaiming the idea of gender parity—and insisting that it be formally inscribed in the Constitution.

As a young woman Paul had traveled to England and apprenticed herself to Christabel Pankhurst and the British suffragists. She shared

¹⁶ "Sutherland, George," in *American National Biography*, vol. 21, p. 164.

their ordeals of imprisonment, hunger strikes, and forced feeding. Paul brought Pankhurst's tactics of mass demonstrations and disorderly conduct back to the United States. To promote women's suffrage, she sponsored a 5,000-woman march in Washington on the occasion of Woodrow Wilson's first inaugural in 1913. Four years later Paul organized the first picket line ever to take up station in front of the White House—for which she was once again arrested and force-fed after a hunger strike. On her release, she barnstormed the country in prison clothes, rallying support for the Nineteenth Amendment. Gratified but not contented with the suffrage amendment's passage in 1920, she caused an Equal Rights Amendment (ERA) to be introduced in Congress in 1923. Echoing the precepts that her allies were urging on the Court in the *Adkins* litigation, it stated simply: "Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction."¹⁷

The proposed Equal Rights Amendment rekindled a debate that had long smoldered among women and would continue, without stable resolution, until the twentieth century's end and beyond. One position in that debate had found notably forceful expression in 1898, when Charlotte Perkins Gilman—arguably her generation's deepest and most original thinker about gender issues—published her landmark work *Women and Economics: A Study of the Economic Relation between Men and Women as a Factor in Social Relations*. There she asserted that "our distinctions of sex are carried to such a degree as to be disadvantageous to our progress as individuals and as a race."¹⁸ Gilman, of course, was reacting against the fabled exaggeration of sexual distinctions in the Victorian era. But her emphasis on full and unqualified social, economic, and political parity for women was no passing fancy or simple reaction to the antecedent era's excesses. To later generations she bequeathed the rudiments of an enduringly powerfully feminist vocabulary, grammar, and syntax organized around the cardinal value of equality. With scrupulous consistency, Gilman herself eschewed the label of "feminist," a word

¹⁷ U.S. Congress, Senate, 68th Cong., 1st sess., *Congressional Record*, vol. 65, part 1, December 10, 1923 (Washington, D.C.: Government Printing Office, 1924), p. 150. The amendment was redrafted in 1943 to read: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex" (U.S. Congress, Senate, 78th Cong., 1st sess., "Report to Accompany S.J. Res. 25," Report No. 267, p. 1).

¹⁸ Charlotte Perkins Gilman, *Women and Economics: A Study of the Economic Relation between Men and Women as a Factor in Social Relations*, originally published 1898 (Berkeley: University of California Press, 1998), p. 33.

just beginning to enter into common usage during her lifetime. The very term, she said, was “masculinist.” She preferred to be known as a humanist, and she drew a sharp distinction between what she called “Human Feminists” and “Female Feminists.” The “Human Feminist” (her own variety)

holds that sex is a minor department of life; that the main lines of human development have nothing to do with sex, and that what women need most is the development of human characteristics. The other [the “Female Feminist” or what later scholars would call “difference” feminist] considers sex as paramount, as underlying or covering all phases of life, and that what woman needs is an even fuller exercise, development and recognition of her sex.¹⁹

Gilman’s contemporary, the sociologist Elsie Clews Parsons, shared her belief that only by the subordination of incidental gender differences to the shared humanity of both sexes could women achieve true autonomy and society realize optimal contributions from all its members. In a 1915 book whose very title foreshadowed a later generation’s fascination with the notion of “socially constructed” identities—*Social Freedom: A Study of the Conflicts between Social Classifications and Personality*—Parsons defined the goal of feminism as “freedom from domination of personality by sex.”²⁰ Ideas like those expressed by Gilman and Parsons suffused Alice Paul’s thinking and provided a formidable theoretical rationale for the Equal Rights Amendment.

But other women demurred. Margaret Sanger, for example, the pioneering advocate of birth control, colorfully asserted her belief in women’s special nature. In her own feminist manifesto of 1920, *Woman and the New Race*, she made repeated reference to “the absolute, elemental, inner urge of womanhood,” the “feminine spirit,” and the “intuitive forward urge within.” Expressing those distinctively female qualities was essential to women’s being, she argued. Even more extravagantly, giving voice to a sentiment later promulgated by the psychologist Carol Gilligan, Sanger believed that the full expression of those womanly traits would do nothing less than transform the character of human so-

¹⁹ “Gilman, Charlotte Perkins,” in *American National Biography*, vol. 9, p. 55; and Nancy Cott, *The Grounding of Modern Feminism* (New Haven: Yale University Press, 1987), p. 49.

²⁰ Elsie Clews Parsons, *Social Freedom: A Study of the Conflicts between Social Classifications and Personality* (New York: G. P. Putnam’s Sons, 1915), p. 29.

ciety itself, “by the infusion of the feminine element into all of its activities.”²¹

Florence Kelley and her allies may not have been as transported as Sanger by the vision of a newly feminized race, but they assuredly shared Sanger’s premise that women were immutably different, and in embracing that difference lay their salvation and their opportunity. On the rock of difference they would build their social and political strategy. Members of what might be called the “party of difference” assailed the thinking behind the ERA as a species of sexual Jacobinism, high-toned but ultimately malevolent theorizing that would wreak disastrous damage if applied literally to real life. To them the ERA campaign represented “a kind of hysterical feminism with a slogan for a program,” in the words of Mary Anderson, head of the federal Women’s Bureau.²² The National Women’s Trade Union League, the General Federation of Women’s Clubs, and the League of Women Voters all condemned the ERA, as did Eleanor Roosevelt and a host of other prominent women reformers, including, several decades later, most members of John F. Kennedy’s Presidential Commission on the Status of Women. Thanks in no small part to those divisive disagreements, the proposal to pass the Equal Rights Amendment was destined to have a long and troubled life. Although the bill was introduced in every successive congressional session after 1923, it took nearly half a century until Congress finally discharged it to the states for their consideration in 1972. To this day it has not secured the approval of the three-quarters of states (thirty-eight as the Union is presently constituted) necessary for ratification. It is effectively a dead letter.²³

Meanwhile, the famed Civil Rights Act of 1964 once again fused the fates of women and African-Americans, and irony was once again attendant on that union. With its companion legislation, the Voting Rights Act of 1965, the Civil Rights Act capped more than a generation of civil rights agitation and kept faith at last with the broken promises of racial

²¹ Margaret Sanger, *Woman and the New Race* (New York: Brentano’s, 1920), pp. 98–99, 231–32, et passim.

²² Mary Anderson, *Woman at Work* (Minneapolis: University of Minnesota Press, 1951), p. 168, as cited in William L. O’Neill, *Feminism in America: A History*, 2nd rev. ed. (New Brunswick, N.J.: Transaction Books, 1989) p. 281.

²³ In 1977, Indiana became the thirty-fifth—and last—of the states to approve the amendment.

equality made in the Reconstruction Era. And in this “Second Reconstruction,” as in the first, the interests of blacks and women intersected—though with results that differed dramatically from what had happened a century before.

As the Civil Rights Bill was making its halting way through Congress in 1964, Alice Paul suggested to Virginia representative Howard W. Smith that he add to its prohibitions against discrimination in employment on the bases of race, ethnicity, and religion an additional proviso forbidding discrimination on the basis of sex. In what may have been a cynical ploy to block the bill’s passage and frustrate its paramount goal of achieving racial equality, Smith agreed to do so. As one of Smith’s associates explained, “This single word ‘sex’ would divert some of the high pressure which is being used to force this Bill through...”²⁴ Whatever Paul’s intentions or Smith’s motives, the bill passed with the S-word included in its Title VII.

To the surprise of many, Title VII swiftly led to the wholesale dismantling of the structure of protective laws that *Muller* had long ago upheld. It amounted to a kind of *de facto* ERA. Within a dozen years, every state had removed such rules from its books or severely modified them. Though Alice Paul died in 1977, disappointed that her beloved ERA had not become a reality, it could be argued that Title VII represented Paul’s final victory over her old adversary, Florence Kelley. More broadly, it might be said that Title VII represented a resounding victory of the ideas of the “Humanist Feminists” like Charlotte Perkins Gilman and Elsie Clews Parsons over those of the “Female Feminists” like Margaret Sanger and Eleanor Roosevelt. More broadly still, it might be said that with respect to gender matters Title VII marked what may have been the inexorable triumph of the equality principle over the difference principle—and along with it, a victory for another venerable American value, equality’s inseparable companion, individualism.

The full logic of the compound character of that victory can be seen in another Supreme Court decision handed down in 1991. The Johnson Controls Company, a battery manufacturer, barred all women from jobs that involved exposure to lead, a known hazard to proper fetal development. The Court found Johnson in violation of Title VII. Justice Harry A. Blackmun’s reasoning is instructive:

²⁴ Butler Franklin quoted in Rosalind Rosenberg, *Divided Lives: American Women in the Twentieth Century* (New York: Hill and Wang, 1992), p. 187.

Concern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities.... It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make.²⁵

Tocqueville thought that equality was the supreme value in American society, but he also identified individualism as a peculiarly American phenomenon, to which he devoted some of the most arresting passages in *Democracy in America*. He found much to admire in both traits, but he also worried that over time the commitment of the Americans to equality and individualism would prove fatally corrosive to all the delicate ligature that held society together, that eventually their combined effect would be to dissolve all particular identities and loyalties and reduce society to an undifferentiated and potentially tyrannical—or tyrannizable—mass of isolated citizens. The passion of democratic peoples for equality, said Tocqueville, is “ardent, insatiable, incessant, invincible; they call for equality in freedom; and if they cannot obtain that, they still call for equality in slavery.” And with the spread of individualism, he warned, “the bond of human affection is extended, but it is relaxed, the woof of time is every instant broken and the track of generations effaced.... [I]t hides [the citizen's] descendants and separates his contemporaries from him; it throws him back forever upon himself alone and threatens in the end to confine him entirely within the solitude of his own heart.”²⁶

Even as it formally incorporated the equality principle, the Constitution gave telling expression to Americans' devotion to individualism. The Fourteenth Amendment assigned rights only to discrete “persons,” even while all knew that the Amendment had been occasioned by the precarious position of a defined social *group*, newly freed African-Americans. *Muller*, too, had posited the existence of an identifiable group, its shared interests sufficiently urgent that it could receive, as a group, official recognition in the law and preferential treatment in practice. For a brief season that view had significantly shaped the world of American women. But as Justice Blackmun's trenchant opinion in *Johnson Controls*

²⁵ *UAW vs. Johnson Controls*, 499 U.S. 197 (1991).

²⁶ Tocqueville, *Democracy in America*, vol. 2, pp. 97–99.

made clear, by the twentieth century's end women could no longer look to the law for affirmation of their special character, for recognition of their collective identity and interests, or for special protection in the workplace. They were, as never before, equal and unfettered individuals free to make their own contracts and their own way in the world. They were on their own. Whether they were also in danger of paying the wages of Tocqueville's individualism—of being thrown back forever upon themselves and confined within the solitude of their own hearts—was a question whose answer still lay in the lap of the future.

Whatever its consequences for women, the principal aim of the Civil Rights Act was to assert the equality principle with respect to racial distinctions. Yet in the name of a new idea born in the 1960s, racial categorizing and claims to racial preferences have actually waxed over the last generation, even while the practice of gender differentiation has waned. That idea was affirmative action. It is an issue as probative of the complexities of the dilemma of difference in our time as was the issue of women's protective laws nearly a century ago. I will turn to the issue of racial difference in my next lecture.

II. THE CASE OF RACE

Our Constitution is color-blind, and neither knows nor tolerates classes among its citizens.

—JUSTICE JOHN MARSHALL HARLAN (1896)

It goes without saying that not all women are black, and not all blacks are women. But all women and all blacks in the United States nevertheless have something fundamental in common. They share a long historical entanglement with the dilemma of difference—that chronic struggle, in a polity that is by aspiration and nature at once egalitarian and diverse, between the competing claims of parity and particularity.

That dilemma is rooted in the very character of American society, with its paired promises of social equivalence and individual liberty, common citizenship and cultural pluralism. It has vexed countless people of all descriptions throughout the nation's history.

Successive waves of immigrants, to take a familiar example, have typically sought, sometimes heroically, to protect their distinctive cultural patrimonies and their group integrity, even while striving no less heroically to absorb the manners and mores of their adopted society, and to secure their unqualified membership in it. The apparently incompatible goals of cultural preservation and cultural assimilation have animated all immigrants' histories, a tension reflected in continuing debate about the vocabulary and metaphors appropriate to telling their tales and to passing judgment on the different choices that various groups, including the native-born majority, have made: melting pot or tossed salad, barrio or ghetto, "The Uprooted" or "The Transplanted," "The Rise of the Unmeltable Ethnics" or "The Disuniting of America."

But gender and race have surely been the most conspicuously distinguishing characteristics that have driven the most tortured and prolonged confrontations with the dilemma of difference. Indeed, the arcs of the respective histories of American women and American blacks have often intersected at precisely that point of contestation. The nineteenth-century American feminist movement, born at Seneca Falls, New York, in 1848, had its origins in the exclusion of women delegates—notably Lucretia Mott and Elizabeth Cady Stanton—from the World's Anti-Slavery Convention in London in 1840. Women narrowly missed inclusion in the Reconstruction Era amendments designed to confer at least nominal social and political equality on newly emancipated blacks. A century later, when Congress made good at long last on the promises of racial justice tendered in the aftermath of the Civil War, it somewhat adventitiously did include anti-sex-discrimination provisions in the Civil Rights Act of 1964.

Yet that convergence of the gender and racial stories in the 1960s, and its apparent vindication of the equality principle with respect to women and African-Americans alike, has not fully resolved the dilemma of difference for either group. Blacks as well as women still wrestle with the question that the social and political geometry of their position in American society inescapably poses: are they better served by asserting their shared membership in the family of humankind and their status as citizens equal before the law? Or by emphasizing instead their distinctive identities and therefore their claims to special consideration?

My previous lecture explored that question with respect to women. Today I will take up the case of America's oldest racial minority,

African-Americans. Laying these stories of gender difference and racial difference side-by-side may illuminate aspects of each that would otherwise remain obscure. It may also raise some fresh questions about the operational meanings of equality and inequality over the course of American history. And it may deepen our understanding of the difficulties in all modern societies of reconciling the not always compatible principles of civic inclusion and individual identity.

Racial differentiation is as old as America itself. It may be said in some ways to be a New World invention. The “Columbian exchange,” commencing in the 1490s with the European discovery of the Americas and soon convulsing Africa as well, amounted to nothing less than a demographic and cultural hurricane. It swept up diverse peoples and flung them into headlong encounters with unfamiliar others. It brought words like “mestizo,” “creole,” “mulatto,” “quadroon,” and “octoroon” to the tongues of peoples on four continents who had previously been little habituated to racial mixing. In the Americas generally, and in the society that would become the United States in particular, it deposited an exotic multiracial amalgam that had scant historical precedent.

Native Americans, of course, were part of that amalgam, and they have their own history of confronting the dilemma of difference. But for simplicity’s sake they will not figure in the present discussion.¹ It is the Africans who concern us here. They began to arrive in Virginia within little more than a decade of Jamestown’s founding in 1607. They were from the outset a special case in the emergent multicultural society that was taking shape in the American colonies. They were torn from their ancestral forests and savannahs against their will, thrown helter-skelter onto the slave-markets of Charleston, South Carolina, or Newport, Rhode Island, and dispersed at random into the hinterland without re-

¹ The earliest English settlers in North America quickly categorized the indigenous Americans they encountered around the shores of Chesapeake and Massachusetts Bays as separate peoples, to be subdued or shouldered westward. Yet history would eventually visit the dilemma of difference on them as well. British colonial authorities wavered between making war on the Indians and seeking ways peaceably to share the continent with them. Indians, in turn, debated whether to resist or to accommodate the European newcomers. Colonial settlers alternately massacred and missionized the native peoples of the eastern seaboard. Indians later had to cope with United States government policies that oscillated between the ethnic cleansing of Andrew Jackson’s Indian removal initiatives in the 1830s and the assimilationist goals of the Dawes Severalty Act in the 1880s, between the cultural-preservationist agenda of the “Indian New Deal” in the 1930s, an assimilationist strategy again in the “termination” proposals of the Eisenhower era, and a preservationist philosophy yet again in the Indian Self-Determination Law of 1974.

guard for clan or kin. Compared to immigrants who came more or less voluntarily, they had little control over their fates, faced exceptional challenges to preserving their ancestral heritages, or even their family ties, and harbored small hope of resisting the will of their white masters. Their American journey so sharply severed them from their cultural roots that it shoved them of necessity into uneasy but inescapable symbiosis with the white majority. Though branded from the outset with the stigma of difference, they became an integral, indispensable part of the social and economic fabric of the crude settler society that was coming into being in seventeenth-century British North America.

From that time to this, the presence of African-Americans has distinctively marked the course of American history. They compose the minority whose status for so long gave the lie to American pretensions about individual liberty and all men being created equal. As slaves, in Abraham Lincoln's words, they "constituted a peculiar and powerful interest. All knew that this interest was, somehow, the cause of the [Civil] war"—a judgment about the origins of America's greatest civil conflict that a century and a half of historical scholarship has conclusively ratified.² They are the Americans for whose freedom that war was fought. They have the additional distinction of being the only group in whose specific interest the Constitution has three times been amended. The African-American civil rights movement of the post-World War II era was unarguably among the great transformative events of American history. Its consequences reached well beyond the African-American community itself. Though at the dawn of the twenty-first century they are no longer the nation's largest minority (Latinos are), African-Americans have surely done more than any other minority to shape the entire nation's historical development, test its commitment to its own declared values, and define its very character.

Only a small fraction of the great African diaspora of the sixteenth through the nineteenth centuries ended up in the British North American colonies. And only in South Carolina, and there only transiently, did blacks constitute a majority of the population. But their presence in those raw settlements compelled innovations in both law and custom about how communities so constituted might endure. British legal

² Abraham Lincoln, "Second Inaugural Address," in *Abraham Lincoln: Speeches and Writings, 1859-1865*, Library of America edition (New York: Literary Classics of the United States, 1989), p. 686.

tradition, as devoid of rules concerning slavery as was British culture innocent of racial variety, offered little guidance. Ambiguity as to whether they were indentured servants or slaves surrounded the civil status of the first Africans brought to British America. But not for long. Necessity being the mother of invention, the English sugar-lords of Barbados, faced with a swelling work force of Africans, provided a fateful model for New World race relations in the draconian slave code that they promulgated in 1661. Its central premise was that the racial distinctiveness of Africans—and their implied racial inferiority—justified their enslavement. Within a year, the Virginia colonists began adapting the Barbados code to their own circumstances. By the end of the seventeenth century, laws throughout the British North American colonies defined slavery in racial terms and decreed lifetime servitude as the inescapable lot of Africans as well as their African-American descendants, in perpetuity. Thus was forged the fateful link between race and social status, a link that neither the Civil War nor the Reconstruction Era amendments to the Constitution, nor even the later Civil Rights movement, proved capable of completely breaking.

No sooner was race-based slavery codified in colonial America than voices were raised to condemn it. The earliest known formal American antislavery protest dates from 1688, when an assembly of Mennonites in Germantown, Pennsylvania, denounced “the traffic of mens-body.” They declared: “There is a saying, that we shall doe to all men licke as we will be done our selves: making no difference of what generation, descent, or Coleur they are.”³ That reference to the common humanity of all peoples and their equality in the eyes of God informed antislavery agitation for more than a century and a half thereafter. “I tremble for my country when I reflect that God is just; that his justice cannot sleep forever”; and that in the contest between white masters and black slaves, “the Almighty has no attribute which can take side with us,” Thomas Jefferson said of slavery in *Notes on the State of Virginia* in 1787. The idea was echoed in nineteenth-century abolitionist slogans like “Am I Not a Man and a Brother?” and “Am I Not a Woman and a Sister?” It continued to resonate vibrantly in the Civil Rights struggles of the twentieth century, notably in Martin Luther King, Jr.’s insistence that the pillars of American society were to be found “in the insights of our Judeo-

³ Peter G. Mode, ed., *Source Book and Bibliographical Guide for American Church History*: (Menasha, Wis.: Collegiate Press, 1921), pp. 552–53.

Christian heritage: all men are made in the image of God; all men are brothers; all men are created equal....”⁴

This was, of course, the message of the Golden Rule—traditional Christianity’s formulation of the equality principle. Between 1865 and 1870, the Thirteenth, Fourteenth, and Fifteenth Amendments rendered the same sentiment in the magisterial idiom of the Constitution: “neither slavery nor involuntary servitude...shall exist within the United States...”; “nor shall any State...deny to any person within its jurisdiction the equal protection of the laws...”; “the right of citizens of the United States to vote shall not be denied or abridged...on account of race, color, or previous condition of servitude.”⁵

To underscore the obvious: the equality principle furnished the simplest, the oldest, the most culturally pervasive, the most religiously sanctified, the most constitutionally specific, and the most legally actionable instrument in the centuries-old crusade against slavery and later against racial discrimination. It remains so today, though its ascendancy has never been unchallenged, and even now does not go wholly uncontested, as I’ll explain momentarily.

Yet in the post–Civil War era the newly articulated constitutional commitment to racial equality—not to mention the Golden Rule as applied to race relations—was brutally contested, indeed, repudiated outright. The federal government withdrew its last occupying troops from the conquered South in 1877. Almost immediately thereafter, the eleven states of the short-lived Confederacy—where nearly 90 percent of African-Americans continued to live until well into the twentieth century—hastened to fasten a regime of racial subordination on their black citizens nearly as onerous as slavery itself. Known as “Jim Crow”—a term that appeared as early as 1832 but came into common usage only after the Civil War—that regime systematically stripped black Americans of their voting rights, their educational and employment opportunities, their dignity, and often their lives. By the end of the nineteenth century, virtually all blacks in the Old South were disenfranchised, consigned to segregated schools, and permitted access to only the most menial jobs. Blacks dwelled in separate neighborhoods,

⁴ Thomas Jefferson, *Notes on the State of Virginia*, Library of America edition (New York: Literary Classics of the United States, 1984), p. 289; Martin Luther King, Jr., *Where Do We Go from Here: Chaos or Community* (New York: Harper and Row, 1967), p. 84.

⁵ *The Constitution of the United States*, Thirteenth, Fourteenth, and Fifteenth Amendments, respectively.

rode in separate railroad cars, drank from separate drinking fountains, ate in separate sections of restaurants, relieved themselves in separate public restrooms, worshiped in separate churches, and were buried in separate cemeteries. When the majesty of the law proved inadequate to enforce those arrangements, violence compelled compliance. In the decade of the 1890s alone, lynch mobs killed some 1,111 blacks with fire, hemp, bullet, cudgel, and blade—an average of more than two extralegal murders per week, year in and year out.

Later generations of blacks and whites alike, the historian C. Vann Woodward once noted, “may well wonder how their elders could have daily made their way back and forth through this anthropological museum of Southern folkways and pronounced its wonders perfectly normal.”⁶

But however bizarre it might appear to later observers, Jim Crow dictated the terms of life for generations of blacks and whites in the American South. It was a system supported by theories of racial uniqueness and racial hierarchy, theories that went unchallenged and indeed were often actively promoted by Americans in other regions—as well as by European writers like Houston Stewart Chamberlain, whose ideas about “racial purity” later became foundational principles of the ideology of Nazism. Jim Crow built an iron cage from which there seemed to be no possibility of escape. The abolitionist impulse that had helped propel the nation to war in 1861 was spent. The Republican Party, founded in the 1850s as the political vehicle for free-soil and free labor ideals, became increasingly the instrument of free-market corporate interests. The Democratic Party, consistent with its weak stomach for waging the Civil War itself, explicitly renounced any intention of reviving “the dead and hateful race and sectional animosities” of the past, as its 1904 platform declared.⁷ In the new popular-culture medium of film, movies like *Birth of a Nation* reinforced widespread conceptions of blacks as subhuman, even bestial. Even in the supposedly enlightened precincts of historical scholarship, a view took hold that justified Jim Crow. Writers like James Ford Rhodes and William A. Dunning portrayed the antebellum South with sympathy, blamed the Civil War not on American society’s moral failing but on inept statecraft, and judged

⁶ C. Vann Woodward, *Thinking Back: The Perils of Writing History* (Baton Rouge: Louisiana State University Press, 1986), p. 87.

⁷ Arthur M. Schlesinger, Jr., *History of American Presidential Elections, 1789–1968* (New York: Chelsea House, 1971), vol. 3, p. 2001.

Reconstruction to have been an unforgivably mischievous attempt to impose equality on a people who were not fit for it. In the name of binding up the nation's Civil War wounds, white Americans effectively abandoned their black fellow-citizens to their own meager devices.⁸

So law, politics, and culture, low as well as high, all conspired in the post-Reconstruction era to stamp black Americans as inherently different. In those circumstances, perhaps it was as historically inevitable as it was constitutionally contradictory, morally unsettling, and spiritually galling that African-Americans themselves took what refuge they could in the recognition of their difference—even if that meant acquiescing in the treacherous equation between difference and inferiority.

No one more assiduously pointed the way to that desperate refuge than Booker Taliaferro Washington. The child of an enslaved mother and an unnamed white father in Virginia, he was born into slavery on a date uncertain, customarily taken to have been in the spring of 1856. Of his natal circumstances he could say only that “he felt assured that his birth was a certainty.”⁹ An untutored nine-year-old on the day of Emancipation, Washington worked for a time in a West Virginia coal mine and cadged what schooling he could before enrolling in Virginia's Hampton Institute in 1872. Through his Hampton connections he received an invitation in 1881 to become the founding leader of a comparable school in Alabama, the Tuskegee Normal and Industrial Institute. From then until his death in 1915, Washington built Tuskegee into a premier site for black vocational training and a platform for his own eventual recognition as the “uncrowned king of black America.”¹⁰

Two events in 1895 clinched Washington's claim to that title. One was the death on February 20 of the renowned black abolitionist Frederick Douglass, which vacated the throne. The other was a ten-minute address that Washington delivered on September 18 at the opening ceremonies of the Atlanta Cotton States and International Exposition. Washington's remarks on that sultry southern day offered a succinct summary of his considered strategy for black America. They also helped

⁸ For an exhaustive exploration of this process, see David Blight, *Race and Reunion: The Civil War in American Memory* (Cambridge, Mass.: Harvard University Press, 2001).

⁹ Louis R. Harlan, *Booker T. Washington: The Making of a Black Leader, 1856–1901* (New York: Oxford University Press, 1972), p. 3.

¹⁰ The phrase is Richard Kluger's, in *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (New York: Vintage, 1977), p. 71.

to define a strain of black racial ideology that has managed to outlast the peculiar circumstances of its late-nineteenth-century origins.

Washington agonized over his Atlanta Cotton Exposition speech, just as he anguished more generally over the situation of his people in the post-Reconstruction South. Recognizing the historical circumstances in which African-Americans then found themselves, he addressed his remarks to three key constituencies: the white northern philanthropists who had helped build Tuskegee and like institutions; the southern whites who had invited him to Atlanta—"the best element of the white South," Washington deferentially called them—along with their more virulently racist fellow white southerners, sometimes colloquially described as "rednecks" and "crackers"; and, not least, said Washington, "my own race."

Washington's brief speech artfully blended elements of racial pride and ambition with humble—even humiliating—obsequy to the prejudices and prerogatives of the white majority he faced. He dutifully thanked the "northern philanthropists, who have made their gifts a constant stream of blessing and encouragement." To his own race he said:

Our greatest danger is that in the great leap from slavery to freedom we may overlook the fact that the masses of us are to live by the productions of our hands, and fail to keep in mind that we shall prosper in proportion as we learn to dignify and glorify common labour, and put brains and skill into the common occupations of life; shall prosper in proportion as we learn to draw the line between the superficial and the substantial, the ornamental gewgaws of life and the useful.... The opportunity to earn a dollar in a factory just now is worth infinitely more than the opportunity to spend a dollar in an opera-house.

To his white southern listeners he said:

The wisest among my race understand that the agitation of questions of social equality is the extremest folly.... [Y]ou can be sure in the future, as in the past, that you and your families will be surrounded by the most patient, faithful, law-abiding, and unresentful people that the world has seen. As we have proved our loyalty to you in the past, in nursing your children, watching by the sick-bed of your mothers and fathers...so in the future, in our humble way, we shall stand by you with a devotion that no foreigner can approach.

And then came the lastingly famous metaphor: "In all things that are purely social we can be as separate as the fingers, yet one as the hand in all things essential to mutual progress." The lapidary simplicity of that sentence belied the excruciating complexity of the problem to which it was addressed. Washington called it "the great and intricate problem which God has laid at the doors of the South." It was, of course, the problem of securing for all citizens the full promise of democracy in a society riven by racial distinctions.

Washington's answer to the particular dilemma of difference that his own people faced in that sorely afflicted moment in the history of American democracy became known as "the Atlanta Compromise." To the white South he offered to forsake full social and political rights for blacks in return for a modicum of economic opportunity and a measure of respite from interracial violence. There would be no further black challenges to segregation, no agitation to resist disfranchisement, and no protests against second-class citizenship. Blacks would content themselves to be left alone as hewers of wood and drawers of water, to remain indefinitely consigned to "the common occupations of life," but at least to be secure in those occupations, as well as in their homes and in their segregated schools and neighborhoods. "Cast down your bucket where you are," Washington advised his fellow blacks in another memorable trope, urging them to look to their own resources to build a separate community in whatever social interstices the white majority might leave unoccupied. Washington's advice to his race, quite simply, was to relinquish claims to equality while embracing black differentness and solidarity and making the most of them.¹¹

In the South of the 1890s, perhaps blacks could realistically do no other than make their peace with segregation, as Washington proposed. But however limited his choices, and however foreordained his counsel, Washington had few illusions about the degrading implications of the bargain he was offering to strike. On the way to Atlanta to give the Cotton Exposition address, he later wrote, "I felt a good deal as I suppose a man feels when he is on his way to the gallows."¹²

The audience Washington faced on September 18, 1895, was not

¹¹ Louis R. Harlan et al., eds., *The Booker T. Washington Papers* (Urbana: University of Illinois Press, 1974), vol. 3, pp. 583–87.

¹² Booker T. Washington, *Up from Slavery: An Autobiography* (New York: A. L. Burt, 1901), p. 213.

exactly a hanging crowd, but they gave him an uproarious reception that rivaled the berserk raptures of a lynch mob. Whites erupted in a “delirium of applause.” In the days and weeks that followed, more hosannas echoed from white pulpits and emanated from the white press throughout the North and South alike. Even some blacks wept openly as Washington’s words faded from the air—whether in affectionate affirmation or bitter resignation, the record does not say. The published address did at first draw warm praise from black commentators around the country. Prominent black journalist T. Thomas Fortune wrote Washington from New York that “it looks as if you are our Douglass... the best equipped of the lot of us to lead the procession.” From Wilberforce University, a black institution in Ohio, a bright and restless 27-year-old African-American instructor congratulated Washington on “your phenomenal success at Atlanta—it was a word fitly spoken.”¹³

That young instructor was a still obscure historical sociologist, William Edward Burghardt Du Bois. He would soon escape from obscurity and soon eat those flattering words.

Du Bois had been born in Great Barrington, Massachusetts, on February 23, 1868. He described his own genetic makeup as “a flood of Negro blood, a strain of French, a bit of Dutch, but, thank God! no ‘Anglo-Saxon’”¹⁴

The contrast between the confident certainties of Du Bois’s birth and ancestry and Booker T. Washington’s indeterminate nativity and unknown paternity suggested the gulf that separated the relatively ordered security of free black life in the North from the tremulous dread that suffused African-American existence in the South. That gulf may explain much of the ideological and temperamental differences between the two men. Du Bois had studied at Fisk University in Nashville, Tennessee, and at the Friedrich-Wilhelm III Universität in Berlin. He took his Ph.D. in history from Harvard in the same year that Washington delivered his celebrated address, 1895. He was the first African-American to earn a Harvard doctorate, about which he allegedly commented that “the honor, I assure you, was all Harvard’s.” Deference and humility were alien to his character. He came to loathe what he regarded as Washington’s timidity, his acquiescence in segregation, his contentment with

¹³ *Ibid.*, pp. 211, 212; Harlan, *Booker T. Washington*, pp. 219, 225.

¹⁴ W. E. B. Du Bois, *Darkwater: Voices from within the Veil* (New York: Schocken Books, 1969), p. 9.

merely vocational education for blacks, his strategy of seeking safety for African-Americans in society's cellar—not to mention Washington's servile habit of entertaining white audiences with dialect "darky" stories.

By 1903, when he published his widely acclaimed *The Souls of Black Folk*, Du Bois had become scathingly critical of the Wizard of Tuskegee. In a barbed comparison, Du Bois asserted that the Atlanta address had made Washington "the most distinguished Southerner since Jefferson Davis," president of the Confederacy. He offered faint—or *faux*—praise for Washington's "singleness of vision and thorough oneness with his age" and then added the caustic apostrophe: "It is as though Nature must needs make men narrow in order to give them force."¹⁵

Neither singularity nor narrowness formed any part of Du Bois's ambition for himself or for his people. The Negro, he wrote in *The Souls of Black Folk*, "ever feels his two-ness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body"—one of the most fulsome evocations of the dilemma of difference ever penned, and probably the most often quoted. But Du Bois's resolution of that dilemma was utterly different from Washington's. "The problem of the Twentieth Century," Du Bois declared, "is the problem of the color line." Washington, in effect, had proposed to keep scrupulously to his side of that line and to build the black community from the ground up in the separate sphere that it demarcated. Du Bois meant to march across the color line, or even to obliterate it altogether, and thereby lead black Americans into full and untrammelled participation in the life of the larger society.¹⁶

Until his death in freshly decolonized Ghana in 1963, by then an expatriated Communist venomously disillusioned with the United States and its failed promises about racial equality, Du Bois battled tirelessly against segregation and against the presumptions of black inferiority that underlay it. He anathematized Booker T. Washington's advocacy of racial separatism. He called for the immediate integration into mainstream American society of a vanguard of the "talented tenth" of blacks—"the Best of this race that they may guide the Mass...."¹⁷ In 1905 Du Bois helped to found the Niagara Movement as a frontal

¹⁵ W. E. B. Du Bois, *The Souls of Black Folk*, in *W. E. B. Du Bois: Writings*, Library of America ed. (New York: Literary Classics of the United States, 1986), p. 393.

¹⁶ Du Bois, *The Souls of Black Folk*, pp. 359, 364–65.

¹⁷ "The Talented Tenth," in *ibid.*, p. 842.

challenge to Washington's separatist and accommodationist counsel. "We will not be satisfied to take one jot or tittle less than our full manhood rights," the Niagara manifesto announced. "We claim for ourselves every single right that belongs to a freeborn American, political, legal, civil, and social; and until we get these rights we will never cease to protest and assail the ears of America."¹⁸ In 1910 Du Bois became the director of Publicity and Research for the Niagara Movement's successor, the National Association for the Advancement of Colored People (NAACP). For the next twenty-four years he edited its journal, the *Crisis*, which became the principal forum for denouncing racial inequality and insisting that the nation honor the principles of the American creed and Constitution.

After Washington's death in 1915, Du Bois emerged in turn as the most prominent black leader in America. The NAACP meanwhile became the African-American community's sword and shield in the long battle to escape Washington's passivity and dismantle segregation. Its chief counsel after 1939, and later the first African-American Supreme Court Justice, Thurgood Marshall, devised the legal strategy that pursued constitutional challenges to segregation. That dogged long march through the courts produced signal but limited gains like the 1950 decision in *Sweatt v. Painter* that integrated the University of Texas law school. Marshall's crowning victory came in the landmark Supreme Court ruling in the case of *Brown v. Board of Education* in 1954, declaring school segregation everywhere "inherently unequal." That decision, in turn, opened the road to the culminating triumph of the civil rights movement's integrationist agenda in the great Civil Rights acts of 1964 and 1965.

The point needs little elaboration that a kind of apostolic succession linked Du Bois, the theorist of equality, through Marshall, the antisegregation attorney, with Martin Luther King, Jr., the great historical agent of the Civil Rights movement.¹⁹ Du Bois, in short, played Alice

¹⁸ Kluger, *Simple Justice*, pp. 95–96.

¹⁹ To be fair, King was Booker T. Washington's legatee as well. Like Du Bois, King was born to freedom and largely educated in the North; like Washington, he was raised in the South. If the circumstances of birth and biography help us understand the careers of those two earlier leaders, they illuminate King's peculiar genius as well. It consisted in no small measure in his ability to transcend the frank elitism of Du Bois's preoccupation with the "talented tenth" by fusing Washington's focus on the plain folk who made up the black masses—still largely resident in King's day in the South, still mostly poor, economically

Paul to Booker T. Washington's Florence Kelley. Paul's Women's Party and her intellectual allies like Charlotte Perkins Gilman took their stand on the equality principle and championed the concept of a shared humanity that transcended the ephemeral distinctions of sex. And so did the NAACP and Du Bois, and later Thurgood Marshall and Dr. King, assert the primacy of equality, rather than difference, with respect to race. Just as Paul rejected Florence Kelley's and Margaret Sanger's enchantment with the privileges of feminine uniqueness in favor of an Equal Rights Amendment, so did Du Bois and Marshall and King try to block Washington's retreat into the refuge of racial separatism and demand instead equal rights and integration. The dilemma of difference, in short, generated both philosophical and tactical divisions among African-Americans remarkably parallel to those that it produced among American women.²⁰

It also yielded similar results in the domain of the law. A pair of Supreme Court cases—*Plessy v. Ferguson* in 1896 and *Brown v. Board of Education* in 1954—define an arc of constitutional development with respect to race that is effectively congruent with the trajectory of constitutional doctrine with respect to gender traced by *Muller v. Oregon* in 1908 and the Adkins cases in 1923. Yet it is among the several curiosities of

marginal, politically neutered, and sorely oppressed—with Du Bois's demand for integration. That crucial tactical combination had notoriously eluded his two predecessors.

²⁰ This simple dichotomy exaggerates the differences between Washington, who did covertly support the kinds of goals the NAACP pursued, and Du Bois, who at various times embraced the doctrine of racial essentialism. Indeed, it might be said that Du Bois embodied within his own person all the tensions embedded in the dilemma of difference, with its conflicting principles of assimilation and separatism. *The Souls of Black Folk* is at once a paean to black racial uniqueness and a plea for racial equivalence. Each of its chapters commences with paired head notes from black spirituals and European verse, evoking the cultural parity of blacks and whites. Claiming his full membership in the lineage of Western culture, Du Bois could write: "I sit with Shakespeare and he winces not. Across the color line I move arm in arm with Balzac and Dumas.... I summon Aristotle and Aurelius and what soul I will, and they come all graciously with no scorn nor condescension" (*The Souls of Black Folk*, p. 438). But he also asserted that "we are Negroes, members of a vast historic race that from the very dawn of creation has slept, but half-awakening in the dark forests of its African fatherland.... We are that people whose subtle sense of song has given America its only American music, its only American fairy tales, its only touch of pathos and humor amid its mad money-getting plutocracy.... We believe that the Negro people, as a race, have a contribution to make to civilization and humanity, which no other race can make.... We believe it is the duty of the Americans of Negro descent, as a body, to maintain their race identity until this mission of the Negro people is accomplished...." ("The Conservation of Races," in Du Bois, *Writings*, pp. 822, 825). Du Bois's biographer, David Levering Lewis, artfully summarizes the "genius" of *The Souls of Black Folk* as consisting in its message that "the destiny of the race could be conceived as leading neither to assimilation nor separatism but to proud, enduring hyphenation." (Lewis, *W. E. B. Du Bois: Biography of a Race, 1868–1919* [New York: Henry Holt, 1993], p. 281.)

this complex history that jurisprudential congruence did not translate into comparable social consequences.

As if responding to his invitation, just eight months to the day after Booker T. Washington's Atlanta address, the Supreme Court handed down a decision in the Plessy case that gave a kind of perverse constitutional imprimatur to the Wizard of Tuskegee's ideas. As early as 1883, the Court had begun the work of judicially repealing the Reconstruction Era amendments designed to securely settle the mantle of equality on the shoulders of African-Americans. In the Civil Rights cases of that year, the Justices had invoked a distinction between private and state action to carve out a space where individuals and businesses—including realtors and employers—could discriminate against blacks with impunity. Left intact, for the moment, were constitutional strictures against state, or governmental, abridgment of rights on the basis of race. Then on May 18, 1896, the Court delivered its opinion in the case of *Plessy v. Ferguson*. It ranks with the Dred Scott ruling of 1857, which declared that blacks could not be citizens of the United States and “had no rights which the white man was bound to respect,” as among the most obtusely reasoned, most mischievous, and most excoriated decisions in the history of the Court—though it faithfully reflected the dominant cultural premises and political realities of its time, including, not merely incidentally, those that Washington had acknowledged less than a year earlier.²¹

Consistent with the Jim Crow spirit of the era, the Louisiana legislature in 1890 had decreed that “all railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored, races....” The law unarguably constituted “state action” and thus invaded the zone that the Civil Rights cases had implicitly protected. A group of New Orleans Creoles and blacks known as the Citizens' Committee to Test the Constitutionality of the Separate Car Law therefore decided to challenge the statute on exactly those grounds.²²

In a tightly scripted tableau, on June 7, 1892, Homer Adolph

²¹ See *Scott v. Sandford* 19 How. (60 U.S.) 393 (1857). In *Williams v. Mississippi*, 170 U.S. 213 (1898), the Court also upheld discriminatory state action when it validated literacy tests and poll taxes as qualifications for voting—devices whose systematically prejudicial administration effectively disenfranchised some 95 percent of southern black adult males.

²² Kluger, *Simple Justice*, pp. 72–73.

Plessy, described as a “seven-eighths Caucasian,” light-complexioned African-American, purchased a ticket on the East Louisiana Railway for a thirty-mile trip from New Orleans to Covington, Louisiana. Plessy had been carefully type-cast for his role. Though he could easily pass for white, he pointedly identified himself as a “Negro.” On entering a whites-only coach, he was immediately asked to remove himself to a “colored” car. Plessy refused, was ritually arrested, and was hauled before Judge John H. Ferguson of the Criminal District Court for the Parish of New Orleans. Ferguson rejected Plessy’s argument that the Louisiana statute was unconstitutional, as did the Louisiana Supreme Court. Plessy and his counsel, Albion W. Tourgée, thereupon sought a review by the Supreme Court of the United States.

Tourgée was no Louis Brandeis or Felix Frankfurter, but he was a passionate champion of black rights. Like Florence Kelley’s father, William Darrah “Pig Iron” Kelley, he was a principled abolitionist who had become a ferociously Radical Republican. And like Alice Paul, he was an effulgent voluptuary of the equality principle. As a Union soldier in the Civil War, he rejected the idea that the conflict was simply about restoration of the Union. Rather, he said, “I want & fight for the Union better than ‘it was.’”²³ True to his word, he moved to Greensboro, North Carolina, in 1865 and for the next decade and a half battled courageously, though ultimately in vain, against the Ku Klux Klan’s efforts to deny to blacks the full fruits of emancipation.

Tourgée’s brief in the Plessy case made two key assertions: that the Louisiana statute burdened blacks with a stigma of racial inferiority that violated the Thirteenth Amendment’s implied prohibition against all “badges of servitude”; and that the law’s constriction of individual choice on racial grounds violated the Fourteenth Amendment’s equal protection clause.²⁴ Justice Henry Billings Brown cavalierly waved away all of those facially irrefutable arguments. If any “badge of inferiority” were imputed to the statute, said Brown, “it is not by reason of anything

²³ Otto H. Olsen, *Carpetbagger’s Crusade: The Life of Albion Winegar Tourgée* (Baltimore: Johns Hopkins University Press, 1965), p. 24.

²⁴ Charles A. Lofgren, *The Plessy Case: A Legal-Historical Interpretation* (New York: Oxford University Press, 1987), pp. 44–49. Tourgée also uncannily adumbrated a later era’s preoccupation with the “social construction” of racial identity when he suggested that the Louisiana statute was further flawed because it left to railroad employees the inherently arbitrary decision whether a person was to be classified as black or white—an especially vexed matter in what Richard Kluger aptly calls the “racial *bouillabaisse*” of Louisiana (*Simple Justice*, p. 72).

found in the act, but solely because the colored race chooses to put that construction upon it.” (Of this part of Brown’s opinion, Yale law professor Charles R. Black, Jr., later wrote that here “the curves of callousness and stupidity intersect at their respective maxima.”) As for the equal protection clause, Brown chose, interestingly enough, to construe it in a manner that resembled the legal stratagem that Louis Brandeis would make famous a dozen years later (and that Chief Justice Earl Warren would curiously reprise in the *Brown v. Board of Education* case half a century on): not in light of the Fourteenth Amendment’s literal language, nor the documented intent of its framers, but rather “with reference to the established usages, customs, and traditions of the people. . . .” Brown rather gratuitously expanded on that point by citing “the establishment of separate schools for white and colored children” in many states and the judicial approval of such practices dating back to 1849. By that tortured reasoning process, Brown reaffirmed Judge Ferguson’s original ruling that there was no constitutional impediment to the “equal but separate” features of the Louisiana railroad act—nor, by implication, to the entire range of segregationist practices, not least of all in schools, then taking root in the South.²⁵

The lone dissenter in the Plessy case was Justice John Marshall Harlan. He was a former slaveholder who had opposed passage of the Thirteenth Amendment. But his views on racial matters had been markedly tempered when he witnessed the spectacle of wholesale violence visited upon blacks in his native Kentucky during the Reconstruction Era. Harlan was also a constitutional literalist. He unqualifiedly embraced a literal reading of the recently ratified Fourteenth Amendment. He objected that Brown had relied on legal precedents “rendered prior to the adoption of the last amendments of the Constitution, when colored people had very few rights which the dominant race felt obliged to respect. . . . Those decisions cannot be guides in an era introduced by the recent amendments of the supreme law.” Most emphatically, Harlan rejected the claim that “social usages, customs, and traditions” could take precedence over the manifest meaning of the law itself. In a dissent as universally honored as the majority’s decision has been roundly condemned, Harlan wrote:

²⁵ *Plessy v. Ferguson* (163 U.S. 537), 540, 544, 550, 551; Black quoted in Kluger, *Simple Justice*, pp. 80, 79.

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. . . . But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among its citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.²⁶

It would be too much to say that the Plessy decision was in fact a direct response to Booker T. Washington's offer in Atlanta to acquiesce in a strategy of racial separatism and submission. But it would not be too much to say that of the two strategies for promoting African-American well-being that emerged as the twentieth century was dawning, it was Washington's acceptance of racial distinctiveness, not Du Bois's assertion of racial equality, that was taken up by the white majority and firmly entrenched in law, not to mention in "usage, customs, and traditions." As the Jim Crow system of statutory segregation descended implacably over the South, reinforced as needed by the threat of mayhem and buttressed now by both the state and federal judiciaries, the terrible price of Washington's Atlanta Compromise became increasingly apparent. With respect to schools, the southern states proceeded to institutionalize the "separate" part of the Plessy doctrine while making a mockery of its "equal" provisions. Within a decade after the Court's pronouncement, virtually all children in the South attended segregated schools, and the eleven southern states were spending three times more per white pupil than they were per black student.²⁷

The predicament of African-Americans thus perversely mirrored the situation of American women in the long historical season that ran from the late nineteenth century to the mid-twentieth century. Both groups found their fortunes tightly linked to their respective racial or gender differentness—though with one supremely important qualifier. Blacks were bound to the difference principle by imperious necessity; women by calculated choice. The formally similar rulings but different social

²⁶ *Plessy v. Ferguson* (163 U.S. 537), 559, 563.

²⁷ Kluger, *Simple Justice*, p. 88.

implications of the Plessy and Muller cases illustrate the point. Women actively sought an affirmation of their distinctiveness in the Muller case; blacks had it unwillingly shoved down their throats in Plessy. Most American feminists stubbornly clung to the difference principle long after the Adkins decision grievously threatened its legal viability. Only when “second-wave” feminists succeeded in planting the anti-sex-discrimination clause in the Civil Rights Act of 1964, and when the National Organization for Women revived the campaign for the Equal Rights Amendment shortly thereafter, did the equality principle emerge—more than a little improbably, and not without lingering misgivings among some feminists—as the touchstone of women’s social and political strategy. In contrast, from its inception in 1910, the NAACP fought hammer and tongs to discredit Booker T. Washington’s philosophy, to overturn the Plessy decision, and to refute the premises of racial differentiation that informed it. Martin Luther King, Jr., eventually gave his life to that end.

The strategy of Du Bois and the NAACP was vindicated at last in the school-desegregation case of *Brown v. Board of Education* in 1954. In the following decade, that victory in court was further consolidated in Congress, with the passage of the Civil Rights legislation that Dr. King helped to make possible. If Plessy was to racial difference what Muller was to gender difference, so too in its endorsement of the equality principle Brown provided an analogue of sorts to Adkins in 1923—though again with the crucial difference that women fought against Adkins at the time while Brown capped a lengthy struggle by blacks to have their equal rights recognized and was universally cheered in the African-American community.

The Brown decision is popularly associated with its chief plaintiff, Linda Brown. At the time the case was filed, she was a seven-year-old third-grader whose petition to be admitted to a whites-only public school in Topeka, Kansas had been denied. In fact, the Brown case included almost identical requests from petitioners in South Carolina, Virginia, and Delaware. The collective case stands as a towering monument in the landscape of American racial justice. Yet it also heralded an unforeseeable and highly ironic reversal in the history of the equality principle. It was as well a controversial oddity in the annals of legal reasoning.

Writing for a unanimous court, Chief Justice Earl Warren did not technically overrule Plessy. He even backhandedly acknowledged at

least part of Plessy's logic by taking judicial cognizance of evidence that the various states involved had undertaken to provide physically and fiscally equal facilities for their separate black and white schools. On this point he concluded that "[o]ur decision, therefore, cannot turn on merely a comparison of these tangible factors." He suggested, rather, that Plessy had been rendered irrelevant by the passage of time and by the emergence of new knowledge and new sensibilities, or what Warren summarily called "intangible considerations." This was "sociological jurisprudence" with a vengeance, disposed as it was not only to privilege social and psychological evidence over jurisprudential doctrine, but also to look beyond the rim of the empirically verifiable world into the shadowy domain of inferential knowledge.

Even while invoking the Fourteenth Amendment's equal protection clause, Warren mooted the historical question of the intentions of the amendment's framers in 1868 with respect to education. The Court's effort to settle that question he dismissed as "inconclusive." The heart of Warren's decision instead rested heavily on social science research, especially the methodologically dubious findings of the African-American psychologists Kenneth Clark and Mamie Clark about the effects of segregation on black children's self-esteem.

On the basis of that somewhat questionable reasoning, Warren proposed to "consider public education in the light of its full development and its present place in American life..." He argued that "[t]o separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Accordingly, he said that "in the field of public education the doctrine of 'separate-but-equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs [are] deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."²⁸

The great cardinal constitutional principle of equality thus lay at the heart of the *Brown* decision. But as many critics have noted, Warren's ruling shared with Plessy—indeed, shared with Muller and to some extent even with *Adkins*—a marked impatience with formal jurisprudential doctrine and with constitutional literalism. He grounded his case, as Oliver Wendell Holmes, Jr., might have said, less in legal logic than

²⁸ *Brown v. Board of Education*, 347 U.S. 483 (1954).

in experience—or experience as interpreted by the social scientists on whom he relied. His opinion echoed the search for usable legal authority in what the Plessy decision had called “social usages, customs, and traditions,” or what Brandeis in *Muller* had called the “facts of common knowledge” and “the world’s experience,” or what Justice Sutherland in the *Adkins* case, turning Brandeis’s own language against him, had termed “common thought and usage.” It is only by understanding Warren’s choice to argue in that manner that one can render intelligible his otherwise strikingly curious failure, even as he dispensed with the Plessy precedent, to cite Harlan’s by then famous dissenting statement in Plessy about the color-blindness of the Constitution—an assertion based on the patent meaning of the law, not on contingent cultural circumstance, and surely not on the highly challengeable and potentially reversible conclusions of social science research.

The curiosities of the *Brown* decision do not end here; nor does the list of the ironic consequences spawned on that fecund judicial occasion. The crowning irony may be that within fifteen years of *Brown*, and within less than five years after the passage of the Voting Rights Act of 1965, just at the moment when African-Americans had achieved the constitutional and legislative ratification of the civic and social equality they had sought for a century, they re-embraced the difference principle as a rationale for a new policy: affirmative action.

Affirmative action is an idea with its roots in the venerable English legal concept of *equity*, or the administration of justice according to commonly understood standards of natural justice or conscience that might be violated by the mechanistic application of formal common-law rules. The poet William Butler Yeats captured the eternal anguish of the conflict between abstract principle and the messy needs of actual life in a lyrical passage:

*God guard me from those thoughts men think
In the mind alone.
He that sings a lasting song
Thinks in a marrow bone.*²⁹

The Constitution explicitly extends the federal judicial power “to all Cases, in Law and Equity.”³⁰ The actual phrase “affirmative action”

²⁹ Yeats quoted in J. Anthony Lukas, *Common Ground: A Turbulent Decade in the Lives of Three American Families* (New York: Vintage, 1986), p. 251.

³⁰ United States Constitution, Article III, Section 2, paragraph 1.

had its origins in the National Labor Relations Act of 1935, where it described a requirement that employers reinstate workers who were victims of unfair labor practices. But the term took on its present connotations only in the late 1960s, beginning with the Nixon administration's "Philadelphia Plan," an executive order that required federal contractors to hire designated minorities in proportion to their presence in the local labor pool. Congress followed with the Public Works Employment Act in 1977, mandating that 10 percent of federal construction contracts be awarded to "minority enterprises." A series of enormously consequential Supreme Court decisions followed. *Griggs v. Duke Power Company* in 1971 prohibited "practices that are fair in form but discriminatory in operation," such as aptitude tests and educational requirements for employment. *Regents of the University of California v. Bakke* in 1978 disallowed explicit racial quotas in university admissions but did permit race to be taken into account for purposes of maintaining "a diverse student body." Together, these executive, legislative, and judicial actions entrenched affirmative action practices in both employment law and educational policy.

Today affirmative action may be summarily described as a set of rules and practices that vest the right to preferential treatment in contracting, employment, and educational access in certain racially defined groups, including African-Americans, Latinos, and Native Americans (and occasionally in women). Understood especially against the history of the Civil Rights struggle to secure the equal protection promises of the Fourteenth Amendment, the African-American community's embrace of affirmative action is a stunning development. In effect, affirmative action rests on arguments about the need to recognize racial difference that evoke the logic that informed the Plessy decision and that resemble the defense of gender difference in Muller—both of which decisions were later repudiated as inconsistent with the Fourteenth Amendment. As one authority succinctly puts it: "affirmative action embodies ideas that are philosophically antithetical to the principle of equal protection of the laws."³¹

³¹ Herman Belz, "Affirmative Action" in *The Oxford Companion to the Supreme Court of the United States*, ed. Kermit L. Hall (New York: Oxford University Press, 1992), p. 19. See also the Supreme Court decisions in *Griggs v. Duke Power*, 401 U.S. 424 (1971) and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); as well as Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy, 1960–1972* (New York: Oxford University Press, 1990); the same author's "Race History, and Policy: African Americans and Civil Rights since 1964," *Journal of Policy History* 6, no. 1 (1994): pp. 12–39; and John David Skrentny, *The Ironies of Affirmative Action: Politics, Culture, and Justice in America* (Chicago: University of Chicago Press, 1996).

How can that apparent historical non-sequitur be explained? How could Martin Luther King, Jr.'s dream that his four children would "live in a nation where they will not be judged by the color of their skin but by the content of their character" give way, even in its hour of triumphant fulfillment, to a revival of claims about unique racial experiences as the grounds for legally enforceable racial preferences?³² How, in short, could the spirit of Plessy, with its premises of racial distinctiveness, somehow arise from the legal sepulcher in which the Warren Court had interred it to become the regnant legal and social philosophy of the post-Civil Rights era, among blacks and many whites alike?

Simple self-interest and shrewd psychologizing may amount to a sufficient explanation, as minority communities saw a material advantage in the nation's racially deferential mood in the Civil Rights era and moved smartly to exploit white America's manifest wish to atone for centuries of dishonoring the national creed. Yet another part of the answer may lie in Booker T. Washington's peculiar legacy. Though his emphasis on racial difference was born as a strategy of desperation in the 1890s, his thinking nevertheless continued to lead a kind of shadow life in the minds of some black Americans and re-emerged with improbable vigor in the late 1960s as a strategy of opportunity. Washington himself had only grudgingly assumed the posture of racial distinctiveness, but some others who came after him took it up with relish. They trumpeted Washington's message of black self-determination and often entertained doctrines of racial essentialism. A kind of genealogical lineage thus connects Washington to the black nationalist Marcus Garvey, leader of the Universal Negro Improvement Association in the 1920s, to Nation of Islam figures including Wallace Fard, Elijah Muhammad, Malcolm X, and Louis Farrakhan, as well as to other African-American Civil Rights leaders such as Stokely Carmichael, Huey Newton, and Eldridge Cleaver.

To be sure, none of those figures mimicked Washington's diffident manner. But all, in varying degrees, were uncomfortable with the devotion of Du Bois and Marshall and King to the equality idea, whether as a descriptor of the African-American character or as a principle that could inform their legal and political strategies. By keeping alive at least a few cells of the much-abused body of thought that posited black

³² Martin Luther King, Jr., *I Have a Dream: Writings and Speeches That Changed the World* (San Francisco: HarperSanFrancisco, 1992), p. 104.

racial uniqueness, they facilitated the acceptance of affirmative action policies, which rest by their very nature on a presumption of difference, not equality. Though it may discomfort both parties to say it, within the black community modern-day champions of affirmative action like Jesse Jackson and Al Sharpton are thus in a sense the spiritual heirs of the reviled accommodationist Booker T. Washington; and anti-affirmative action figures like University of California regent Ward Connerly and the writer Shelby Steele are the legates of the notorious radical and exiled Communist W. E. B. Du Bois.

The continuing controversy over affirmative action serves to remind us of the intractable persistence of the dilemma of difference. History can illuminate that dilemma, but it cannot resolve it. It may in fact be unresolvable by any means.

It may well be true that affirmative action is justified in light of “social usages, customs, and traditions,” “the facts of common knowledge,” and “the world’s experience,” all of which point to the need for remedial action to overcome the historical exclusion of African-Americans, as well as others, from full membership in the American polity. But it is no less true that preferential policies based on race are difficult, if not ultimately impossible, to reconcile with the Constitution’s forthright guarantees of the equal protection of the law. Affirmative action policies have served *all* Americans well in the last three decades and can be stoutly defended as sound in both politics and morals. They have compensated for the liabilities of past discrimination, catalyzed black advancement, facilitated the absorption of millions of Latinos into American society, and brought a measure of social peace along racial frontiers that had been restless, and sometimes violently inflamed, for centuries. But to say that no appreciable measure of the equality principle has been sacrificed by affirmative action programs is to deny their very predicate. As Isaiah Berlin insisted in “Two Concepts of Liberty”: “Nothing is gained by a confusion of terms... [A] sacrifice is not an increase in what is being sacrificed...however great the moral need or the compensation for it. Everything is what it is.” To paraphrase his formulation, substituting “equality” where he uses “liberty”: equality is equality, not “fairness or justice or culture, or human happiness or a quiet conscience.”³³

³³ Isaiah Berlin, “Two Concepts of Liberty” (originally published 1958), in *Four Essays on Liberty* (New York: Oxford University Press, 1969), p. 125.

So the vaunted mystique of the equality principle in American life turns out on close inspection to be neither so simple nor so consistent as Alexis de Tocqueville imagined. The history of the equality idea has taken some curious, even capricious, turns. The equality claim has on occasion been egregiously and violently denied, as in the case of blacks in the century after the Civil War; or willfully repudiated, as in the case of women for much of the same period; or warmly embraced, as with African-Americans in the Civil Rights era and many women after the passage of Title VII; or won and then purposely relinquished, as with African-Americans again in the era of affirmative action.

And yet, and yet...for all its oddities, the equality principle still casts its enchantment over the American imagination. Americans' passion for it, as Tocqueville said, might be occasionally modified or temporarily redirected, but may still prove to be "ardent, insatiable, incessant, invincible." Many observers have asserted that affirmative action policies will not in the end be able to survive the inexorable strength of that passion, nor the implacable logic of the Fourteenth Amendment's equal protection clause.

But, to touch on one last complication, that passion may not have the same valence with respect to gender as it does with respect to race. Having already tampered with Isaiah Berlin's prose, I'll make this concluding point by tampering with the words of two Supreme Court Justices from whom we've already heard.

Had John Marshall Harlan said not that the Constitution is color-blind, but that it is gender-blind, he would have spoken a defensible constitutional truth, but one that could not fully erase the common intuition that sexual differences are biologically irreducible, psychologically meaningful, and socially consequential. That intuition may yet trump strict constitutional doctrine and permanently sustain some kind of affirmative action policies based on gender.

Yet if Oliver Wendell Holmes, Jr., who you will remember thought the Nineteenth Amendment insufficient to voice the Muller decision's recognition of gender difference, had said: "It will need more than the Fourteenth Amendment to convince me that there are no differences between blacks and whites" he would have flatly contradicted the letter and spirit of the amendment and would surely have profaned the widespread modern sensibility that racial distinctions have no substantial biological basis, no meaningful psychological implications, and no ineradicable social consequences that we care to countenance.

Or would he? That, in the end, is what the debate over race-based affirmative action is all about. Its proponents take their stand, in effect, on that hypothetical reformulation of Holmes's famous dictum. Its critics take theirs on the literal language of the Constitution. Between them there seems to be little common ground. But history has witnessed even more improbable accommodations between the fact of difference and the principle of equality, and, rumors to the contrary, history has not ended.

ADDENDUM ON *Gratz v. Bollinger* AND *Grutter v. Bollinger*

Just six weeks after these lectures were delivered, the United States Supreme Court handed down two anxiously awaited decisions concerning affirmative action: *Gratz v. Bollinger* and *Grutter v. Bollinger*. At issue, respectively, were undergraduate and law school admissions policies at the University of Michigan (whose president at the time the suits were initiated was Lee Bollinger). The Court split the difference. It disallowed an undergraduate admissions procedure that automatically assigned minority candidates a 20-point advantage in the university's 150-point admissions-rating scale but upheld the law school's practice of taking an applicant's race into account as one factor among many for the purpose of "obtaining the educational benefits that flow from a diverse student body."

Those divergent opinions, and the reactions they have elicited, emphatically confirm that the history of the dilemma of difference in American society has not yet ended. They vividly reflect the Court's—and American society's—continuing discomfort with the issue of affirmative action. They also illustrate the ingenious, not to say tortured, means by which Americans are still trying to reconcile their not easily compatible commitments to both diversity and equality. Historians of the future may well wonder at the forces that held the manifestly consistent desire of this generation of Americans for racial comity in such precarious equilibrium with their reverence for the magisterial preachments of the Constitution.

Justice Sandra Day O'Connor's majority opinion in the Grutter case encapsulates the contradictions that have long beset this issue. Even as she defended the law school's reliance on racial preferences, she declared: "We expect that 25 years from now, the use of racial preferences will no

longer be necessary to further the interest approved today.” In other words, she has put the country on notice that by 2028 the guardians of the Constitution will have exhausted their patience with a practice that so clearly violates what she calls “a core purpose of the Fourteenth Amendment,” namely, “to do away with all governmentally imposed discrimination based on race.... Accordingly, race-conscious admissions policies must be limited in time.... Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle.”

It’s as if she had said: “We like affirmative action, and we really don’t want to do away with it—but we understand that it’s constitutionally offensive, so we’ll only do it for a little while longer.” As Oliver Wendell Holmes, Jr., would have appreciated, that argument is sensitive to the felt needs of the historical moment. But it is also conspicuously at odds with the nominally timeless precepts of the Constitution. Indeed, most Americans seemed to breathe a sigh of relief at the Court’s reasoning, grateful that they will not immediately face the wrenching disruption of suddenly ending affirmative action, but comforted that the pain of living with a flagrant contradiction of the patent language of the Constitution will be assuaged in a mere quarter-century. Yet from this latter consideration, some Americans, including a minority of the Supreme Court, took no comfort at all. As Justice Clarence Thomas noted in a scathing dissent: “While I agree that in 25 years the practices of the Law School will be illegal,” he wrote, “they are...illegal now.”³⁴

Scholars are likely to concur with Justice O’Connor that the Fourteenth Amendment’s equal protection clause was for a time justifiably bent to accomplish a worthy social purpose—“the interest approved today,” as she put it—but that it eventually had to be bent back to conform more comfortably with the letter and spirit of the Constitution.

But can it be so easily rebent? And will Justice O’Connor’s projected death sentence for affirmative action really be carried out twenty-five years from now? There is reason to be skeptical. The debate to date over affirmative action has pitted the claims of history and experience (how people have been treated) against the claims of abstract principle (how the Constitution asserts that they should be treated). Now the Court has embraced a concept that Justice Lewis Powell articulated in the *Bakke* case but that has not until the *Grutter* decision commanded a majority

³⁴ *Grutter v. Bollinger* (123B S.Ct. 2411).

on the bench: that “diversity” constitutes a sufficiently compelling interest to justify racial preferences. Unlike discrimination, diversity is not an accumulated historical experience whose harmful effects need to be offset with compensatory policies. Nor is it merely, in the Court’s new formulation, a simple demographic fact. The Court has now elevated diversity to the status of a theory about what constitutes a socially beneficial arrangement.

The facts about the future of diversity in America are predictable. The United States in 2028 will surely be more, not less, variegated—racially, ethnically, culturally—than it is in 2003. Just to that extent, there will likely be more, not less, pressure for preferential policies to perpetuate diversity in schools and the workplace. The looming new debate about affirmative action will therefore no longer pit the claims of historical experience against the claims of constitutional principle but will turn instead on the claims of two alternative theories of the good society—one founded on the desirability of diversity, the other on the value of equality. And if granting preferences for the sake of diversity leads to providing incentives for more and more groups to emphasize their differentness, then the very grounds of Justice O’Connor’s decision will have given affirmative action a renewed lease on life.

Like the famously premature announcement of Mark Twain’s demise, predictions about the death of affirmative action, and a final resolution of the dilemma of difference, may therefore prove greatly exaggerated.