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The Triumph and Transformation of Antidiscrimination Law

Brown both crystallized and launched a revolution in the way our society understands what equality requires, a revolution that is ongoing. I want to discuss two basic aspects of this revolution.

The first is that we have witnessed a triumph of the antidiscrimination model, by which I mean that more and more areas of social life are now viewed as raising a problem of "discrimination"—rather than viewed as raising some other kind of problem, or raising no problem at all.

My second claim is that at the very time that the nondiscrimination idea has been emerging triumphant as a way of addressing matters as diverse as race, gender, age, religion, sexual orientation, and disability, the meaning of nondiscrimination has itself been transformed. Originally, nondiscrimination meant an obligation to treat people the same. But today, nondiscrimination is coming to mean accommodating differences. This transformation has occurred across the board, in all the subject matter areas where nondiscrimination ideas have now come to be applied—and when these changes are seen as a kind of unity, they are really quite striking, and are having a profound impact on American life.

My goal here is not to make particular claims about *Brown* itself, but about the world that *Brown* helped to create. Thus, I am not particularly interested here in establishing a precise causal nexus between *Brown* and these developments. I certainly do not wish to claim that *Brown* made any of this inevitable, or that the road from *Brown* could not have taken other directions. Put another way, I am not suggesting that *Brown* has to be read as so many people came to read it, as a powerful endorsement of a generative principle of nondiscrimination—indeed, *Brown* is written quite narrowly.

But I do see *Brown* as a strong contributing cause of what I will discuss. For example, I think there is a clear link between *Brown* and the 1964 and 1965 civil rights acts that bar various forms of discrimination. In this causal story, *Brown*'s constitutional law strengthened a political movement that in turn helped to enact the civil rights acts, which in turn influenced the future direction of constitutional law, of other legislation, and of politics more broadly—all of which influenced the culture and cultural beliefs, and each of which has kept feeding back upon the others to help produce the reality I describe. My main goal here, however, is not to trace out causal links, but to describe and to some extent evaluate our post-*Brown* situation.

The Triumph of Antidiscrimination Law

First, let me explain what I mean by the triumph of antidiscrimination law. I am certainly not claiming that antidiscrimination law has been a triumphant social success. I do think that in the core area of race it has helped change the world for the better in near-revolutionary ways. But coming as I do from New Haven, Connecticut, where the black poor live lives of much misery, despair, and fear, and where the vicious circle of racial disparities, racial anger, and racial apprehension continues unabated, I know that antidiscrimination law has had only limited success in addressing our great national problem of race. What I mean by the triumph of the antidiscrimination idea is that vast areas of social life—not only racial matters but many other areas as well—are now treated as raising problems of "discrimination." Before they came to be seen in this way, these areas were either not seen to raise legal issues at all, or seen to raise legal issues not conceptualized as "discrimination."

Some Examples

Gender Consider women's rights. Although many people obviously saw the status of women as a major social issue long before *Brown*, and a social issue concerning equality and nondiscrimination, it was not until the post-*Brown* era that the struggle for women's rights produced a general law of sex discrimination. *Brown* and the post-*Brown* black civil rights movement surely helped give new energy to the modern women's rights movement and also helped to shape its identity and some of the terms of its claims (echoing in some ways how the Thirteenth, Fourteenth, and Fifteenth Amendments affected the women's movement in the nineteenth and early twentieth century).[1]

Women's rights lawyers—including those at the NOW Legal Defense Fund, which self-consciously named itself to parallel the NAACP Legal Defense Fund—borrowed legal concepts developed in the racial context, such as the "suspect classification" doctrine. Reflecting *Brown*'s influence, they also made a crucial choice among competing strands of feminism. Most significantly, they advocated "formal equality" as the antidiscrimination ideal: nondiscrimination required that women be treated the same as men, and the

normative claim to this formal equality rested on the view that women were basically the same as men for the purposes of law. This echoed the basic claim underlying the movement for full civil rights for blacks.[2]

The extension of antidiscrimination principles to women and the conceptual linkage between feminism and black civil rights were solidified in the 1964 Civil Rights Act, which made it unlawful to discriminate against any individual "because of such individual's race, color, religion, sex, or national origin."[3] Opponents of the bill's prohibition of race discrimination were among those pushing most strongly to include "sex" as a forbidden basis of discrimination, believing that would scuttle the entire bill.[4] But the act passed, the modern law of sex discrimination got its statutory footing, and the parallelism the act established between various types of forbidden discrimination assured that concepts developed in one area would be used in others.

It is probably uninteresting, however, to point out that women's rights issues have generally become issues of antidiscrimination law in the post-*Brown* era. What I have called the triumph of the antidiscrimination idea is more nicely revealed by noting how a few particular issues associated with women's interests, but not self-evidently to be characterized as issues of sex discrimination, have become so.

Sexual harassment is one example. Until quite recently, of course, sexual harassment was not a legally cognizable wrong at all. It has now become conceptualized as a matter of sex discrimination, and in fact became legally redressable in a broad way only when it came to be so conceptualized. One could easily imagine that, once society moved to provide remedies for what we now call sexual harassment, it would do so through tort law, treating such harassment as a subcategory of assaults or other wrongs to the person. (To call it discrimination "because of sex," some early judges argued, would immunize people who harassed both men and women, which would make no sense; and how could it be employment discrimination, they said, where the victim did not lose her job or lose compensation?)[5] As matters developed, of course, such harassment came to be seen dominantly through the legal lens of antidiscrimination law, and seen as sex discrimination.[6] Indeed, I would argue that it was *because* harassment was so conceptualized as "discrimination" that it came to be seen so rapidly as a wrong at all, given the broad social consensus that had developed against "discrimination."

Refusing to pay disability benefits for pregnancy leave is another example. Until recently, this was not seen as a legal wrong at all, even where the employer granted disability benefits for other medical conditions. Rather, it was seen as a plausible way for employers to limit expensive fringe benefits and to manage the need for continuity in the workforce. As recently as the 1976 case of *General Electric Co. v. Gilbert*,[7] decided at a time when the law of sex discrimination was already quite developed, the Supreme Court rejected an argument that the exclusion of pregnancy from GE's otherwise comprehensive disability leave program was sex discrimination. The Court concluded, first, that this was not a "gender" distinction at all, since the category of

nonpregnant persons includes members of both sexes, and, second, there was no proof that, on average, GE's program was worth less to women than to men even with pregnancy benefits excluded from coverage. Congress ultimately overturned this decision, by amending Title VII to deem rules based on pregnancy the legal equivalent of rules based on sex, and to make it actionable sex discrimination to treat pregnancy benefits less favorably than other benefits.[8]

Lastly, consider the evolution in how abortion rights are understood. In *Roe v. Wade*,[9] laws prohibiting abortion were characterized as interfering with individual rights of "privacy" and "liberty" protected by our constitution. But nowadays, laws prohibiting abortion are commonly characterized as interfering with women's equality, as discriminatory to women—not only because they single out a medical procedure needed by women alone or because they impose on women alone the burden of pursuing a government interest in protecting fetal life, but, more importantly, because laws requiring women to bear children they do not want restrict women's capacity to achieve equality in other spheres of life.[10]

Age The emergence of age discrimination law is another example. Making distinctions based upon a person's age need not be seen as invidious discrimination, and for much of world history was not seen as such discrimination. There were seasons of a person's life. When we were "minors," certain privileges were withheld from us and certain protections granted. Various privileges came to us, and protections removed, when we "came of age." Then, at a certain point, it was understood that we could no longer have the same obligations and opportunities that we previously had. This was not seen as discrimination in the contemporary sense, both because these fluctuations in the life cycle were widely accepted and also because everyone was pretty much treated the same. The usual form of discrimination involves different treatment of different people—black people treated differently from white people, women differently from men—but the treatment we received when we got older was the treatment everyone would receive when they got older (if they were lucky enough to live so long). If older people were required to retire at a certain age, that was seen as a way of making scarce jobs available to younger people (who would be expected to make way in turn later) and a means of avoiding the awkwardness of making individual late-career determinations about who was capable of high-quality work and who was not; mandatory retirement was not seen as a matter of discrimination.

The elderly, of course, have always faced many problems: they often are poor, are treated as if their lives are already over, are in need of medical care they cannot afford, are often disabled. But to the extent these were historically seen as matters of governmental concern, rather than the concern of families or charities, they were seen as social needs contending with other social needs for their share of limited public resources, not as questions of discrimination. Government responded to these needs area by area, deciding how much of its limited resources would be allocated to particular facets of this problem. Thus,

the Social Security System, Medicare, and other programs were established to deal with particular problems that the elderly had.[11]

But in 1967, three years after the 1964 Civil Rights Act and thirteen years after *Brown*, Congress adopted the Age Discrimination in Employment Act.[12] Rather than addressing the problems of the elderly (such as mandatory retirement) solely by improving government benefits, Congress defined many of these problems as private discrimination against the elderly—and authorized legal redress for this discrimination.[13] The antidiscrimination idea thereby decisively extended its reach to certain matters that had either never before been defined as a problem or had been defined as a problem to be addressed through public benefits.

Disability The emergence of strong antidiscrimination laws for disabled people reflects a similar shift. The government's role in addressing problems faced by disabled people used to be primarily grant-making and benefits programs, and was therefore fundamentally seen as raising issues of resource allocation.[14] To a considerable extent it still is. But beginning with the Rehabilitation Act of 1973,[15] and culminating in the sweeping provisions of the Americans with Disabilities Act of 1990 (ADA),[16] the problems facing disabled people have increasingly been reconceptualized as problems of "discrimination" in the public and private sector—discrimination in employment (ADA, Rehabilitation Act), discrimination in education (ADA, Rehabilitation Act, Individuals with Disabilities Education Act),[17] discrimination in housing (Fair Housing Amendments Act of 1988),[18] discrimination in access to public accommodations (ADA, Architectural Barriers Act,[19] Air Carriers Access Act of 1986),[20] and discrimination in medical treatment (Child Abuse Amendments of 1984).[21]

Religion The 1964 Civil Rights Act also made "religion" one of the forbidden bases of discrimination. Traditional matters of religious *liberty* thus became redefined as also questions of religious *discrimination and equality*.

Even more interesting is the way in which antidiscrimination principles have also come to influence contemporary interpretation of the religion clauses of our Constitution. It is perhaps coincidental that modern legal doctrines involving the Establishment Clause begin their development just a few years before *Brown*, in the 1947 case of *Everson v. Board of Education*.[22] That case is most famous for its embrace of Jefferson's metaphor that the First Amendment "erect[s] 'a wall of separation between church and State.'"[23] But, in fact, the decision in *Everson* actually permitted a breach of the proclaimed "wall of separation," for it upheld a local school board's policy of reimbursing parents for money paid to have their children transported to parochial schools on public buses. The lasting vision of *Everson*, the one cemented in the post-*Brown* era, is not a principle of unbreachable separation but a principle of nondiscrimination.

Under this approach, the Establishment Clause allows some government action that benefits religious entities, but, in Justice Black's words, it forbids the government from passing laws which "prefer one religion over another" or that "aid all religions" over religious disbelief.[24] As crystallized in later post-*Brown* cases, the government may not prefer one religion over another or prefer religion over nonreligion—a principle of nondiscrimination and neutrality. The old metaphor of a "wall of separation" has largely been displaced by the modern trope of "no discrimination" in favor of or against religion. Under this approach, the government may (as in *Everson*) spend tax money to aid religious groups "as a part of a general program" to help religious and nonreligious students alike, analogous to "such general government services as ordinary police and fire protection."[25]

Other Areas I could continue with many other examples of the reach of antidiscrimination ideas, ranging from First Amendment law, where the courts have prohibited "above all" government restrictions on speech that discriminate among viewpoints or discriminate based on the content of speech,[26] to a vast range of state and local laws prohibiting many different types of discrimination (including laws prohibiting discrimination against gay people and AIDS patients in certain localities). But I have said enough, I hope, to illustrate how broadly and powerfully the antidiscrimination idea has now swept through American life and law in the post-*Brown* era.

Assessing the Triumph

Why has the antidiscrimination idea triumphed, vastly extending its reach and displacing or broadly supplementing other ways of conceptualizing and addressing many social problems? I have three hypotheses.

First, the civil rights revolution of black Americans, including *Brown*, assumed a centrality as political experience and metaphor. Other marginalized groups borrowed analytic tools and rhetoric from that movement, hoping thereby to repeat its successes. Other decision makers followed suit, as the moral power of the black civil rights movement and the idea of nondiscrimination in that context created a broader social receptivity to the nondiscrimination norm in other contexts.

Second, a politics based on personal self-identity emerged. As part of broader cultural trends in the 1960s, people came to identify themselves more and more as members of social groups based on important personal characteristics rather than abstractions such as "citizen" or "class." This helped to produce a politics in which people's concerns rested more centrally on their conceptions of themselves as black, women, religious, gay, or disabled. Although it is possible to see this development as a product of the triumph of the antidiscrimination idea, rather than one of its causes, at the very least I think these forces were mutually reinforcing.

Third, government itself sought to shift the costs of addressing various

social problems to the private sector and away from costly government benefit programs. Antidiscrimination norms gave the government a moral basis for requiring the private sector to carry a greater burden in addressing serious social problems.

But rather than speculate at length about why the antidiscrimination idea has triumphed, let me trace out a few consequences of this legal and cultural turn toward nondiscrimination principles. Most obviously, much irrational social conduct has been delegitimated. The idea that women cannot do this or that job—an idea that was pervasive in our society twenty-five years ago—is utterly irrational. Mandatory retirement rules are irrational for society in many circumstances (among other things, they deprive the workforce of productive workers and individuals of productive work lives, and they increase the social cost of the government programs for the elderly). Antidiscrimination law dismantled these and many other irrational ideas and rules.

In addition, conceptualizing these social practices as "discrimination" immediately presents these matters as issues of justice, not just resource allocation. It underscores that we are talking about moral wrongs, not just competing claims on society's resources. It makes these practices transgressions of the great American ideal of equality—and equality, as a group of America's leading historians recently wrote, is "the most powerful and influential concept in American history."[27] Thus, those who suffer what has been defined as discrimination become linked to a moral value of extraordinary prestige in our culture. Moreover, because the word "discrimination" in American culture is inescapably linked to the racial oppression of black people, all victims of what becomes labeled as "discrimination" become linked, at least by language, to perhaps the greatest moral evil in our country's history.

Deeming more and more conduct "discrimination" also creates legal rights, and that too is very significant. To be sure, rights to nondiscrimination are often less demanding than other rights in certain respects. The right to nondiscrimination is a right that people be treated equally, but they can be treated equally well or equally badly—so conceptualizing some burden as a violation of a right not to be discriminated against does not require that the burden end, only that it be imposed or not imposed more equitably. (This is one difference between conceptualizing some claim as a "liberty" right and an "equality" or "nondiscrimination" right. If constitutional "liberty" bars the imposition of some burden, it may not be imposed at all; if constitutional "equality" bars the imposition of a particular burden, the bar usually disappears if the burden is imposed more evenhandedly and equally.) But still, to conceptualize conduct as a legal wrong is undoubtedly very significant.

Legal rights are empowering even if one never goes to court. That is why so many cases are settled. Legal rights also bring with them the machinery of enforcing the law: courts, lawyers, trials, and so forth. Expanding the reach of antidiscrimination law brings more issues within the courts, with their comparative independence from political pressure—in contrast to the political

fights for more resources that groups without legal rights have to make. Being able to go to court to enforce a legal right can be very empowering, even liberating, for those who had previously viewed themselves as powerless. (This is why the "critique of rights" that was fashionable among some on the left a few years ago seems strikingly blind to the actual situation of otherwise quite powerless people.)[28]

Each of these potentially positive consequences of the expansion of nondiscrimination rights does have a potentially darker side. Not all "discriminations" among people have the irrationality or invidiousness typically associated with the word "discrimination" today; the expansion of nondiscrimination rights can potentially go "too far." In addition, conceptualizing a social problem as a matter of morality or justice or right can obscure that resource allocation questions really are central, and that the social response actually should rest on a careful assessment of benefits and costs; a reallocation of resources typically is taking place when the government creates antidiscrimination rights, but the reallocation often comes about in a less visible and more decentralized fashion that may make it hard to assess the costs and benefits of what the government has done.

Moreover, legal claims mean litigation, and litigation is often very wasteful. The dynamic of a lawsuit, as is well known, often heightens the plaintiff's sense of grievance and embitters the defendant, turning disputants into enemies, turning a potential route to solve a problem into a war for vindication. Thus, expanding legal rights to nondiscrimination may conceivably heighten social and personal divisions rather than provide a mechanism for overcoming them. Part of this dynamic is that legal claims, surely including discrimination claims, create a rhetoric of wrongdoers, violations, blame, and victimhood. Indeed, widening definitions of discrimination may have contributed to what some have called a growing culture of victimization.[29]

Additionally, expanding the classes of people protected by antidiscrimination laws arguably dilutes the moral force of the antidiscrimination idea. In particular, it arguably weakens the distinctiveness of the moral claim of black Americans, whose history of slavery and oppression have traditionally made them the core group protected by antidiscrimination laws. Although it is rarely discussed, blacks do often resent the fact that other groups are piggy-backing on their moral claims—assimilating nonracial wrongs to the racial paradigm. The practical side of this is that as the classes of people protected by antidiscrimination laws grow, there is a growth in the scope of responsibilities of law enforcement agencies such as the Equal Employment Opportunity Commission (EEOC). And with that, enforcement resources may be spread very thin. Enforcement priorities, moreover, can become skewed in the direction of groups whose members file the most complaints with the agency, which may not be the groups hurting the most from discrimination.[30]

Lastly, there are real limits to what antidiscrimination law can do to address many problems of social inequality; antidiscrimination law is unlikely

to provide much help for the black poor in New Haven, for example. As I see my students at Yale Law School being inspired by famous antidiscrimination law cases—indeed, as I try to inspire them—I sometimes wonder whether they are being distracted from other strategies for reform, strategies that may be outside the particular expertise of lawyers.

The Transformation of Antidiscrimination Law

So much, then, for the first aspect of the post-*Brown* revolution—the triumphant emergence of the antidiscrimination idea as a way of addressing matters as diverse as race, gender, age, religion, sexual orientation, and disability. The second aspect of the post-*Brown* revolution is this: at the same time that antidiscrimination ideas have been spreading their subject-matter hegemony, the very meaning of nondiscrimination has itself been transformed.

Originally, nondiscrimination typically meant "formal equality," an obligation to treat people the same. Today, in area after area, nondiscrimination is coming to mean *accommodating differences*. Nondiscrimination used to require that we ignore or deem irrelevant various differences among us that had previously been the basis for treating some people as inferiors. But today, in area after area, "difference" is everywhere emphasized, and nondiscrimination has come to require that explicit account be taken of those differences, that the differences be accommodated,[31] that social practices be adjusted to assure that those differences are supported. This, I believe, represents a major sea-change in American culture.

In one sense, of course, the idea that equal treatment may mean accommodating difference is an ancient one. Aristotle's *Ethics*, the progenitor of many of Western civilization's ideas about distributive justice, articulates an equal treatment principle that has two parts: distributive justice requires that similarly situated people shall be treated the same, but also that differently situated people be treated differently.[32] This second half has been invoked far less often in discussions of equality, but most of us intuitively recognize its plausibility. A five-year-old recognizes that it is not equal treatment to give a person with size 6 feet and a person with size 10 feet the same size shoes (I asked mine); equal treatment sometimes requires different treatment.

To an extent, then, even the original understanding of nondiscrimination allowed for the differently situated to be treated differently. But differences in race, gender, or religion were not adequate reasons for differential treatment. Discrimination meant failing to treat people alike in their common humanity—their common humanity was emphasized, not their differences; and formal equality was required, not accommodating differences. Today, to a large degree, differences-in-fact are emphasized, and accommodation of those differences is the goal. Today, taking account of differences by treating people differently hardly implies discrimination; rather, it is often viewed as

discriminatory to treat everyone the same, to fail to accommodate differences. The shift has been within the antidiscrimination paradigm itself, in the very *meaning* of the word discrimination itself. Nondiscrimination once meant insisting that certain characteristics of people be treated as irrelevant in dispensing benefits and burdens, and nondiscrimination has now come to mean an insistence that those same characteristics of people be treated as highly relevant as the basis for requiring accommodations.

Some Examples

Race Consider, most immediately relevant here, how the law has moved beyond requirements of formal equality in the core area of race discrimination. First, in the context closest to *Brown* itself, school desegregation, the notion that racial differences should be accommodated and supported is reflected in a weakened commitment to integration and greater acceptance of racially identified black institutions—a development that occurred in part because blacks themselves often experienced "integration" as a coercive strategy of assimilating them to white norms and devaluing their differences.[33] Within racially integrated settings, there has been a dramatic growth of multicultural perspectives that recognize and take account of racial and cultural differences, and view it as racist or discriminatory to treat certain values as universal or to privilege a Western canon and give a less central place to other cultural traditions.

Second, the idea of accommodating differences has emerged clearly with race-based affirmative action and racial preferences. The type of affirmative action I am speaking of is the explicit taking account of race in order to assure the actual inclusion of members of certain racial minority groups. It means recognizing racial differences and counting them as relevant, and it obviously moves us beyond formal equality. Historically, affirmative action arose out of the gradual recognition that, given the effects of centuries of discrimination against blacks, strict insistence on formal equality would still leave blacks far behind and greatly segregated. As the perception grew that a legal regime of formal equality, along with persistent white racism, perpetuated the exclusion of blacks from the mainstream of American society, pressure developed for affirmative action that would assure fuller inclusion, entailing a shift away from formal equality. However beleaguered affirmative action is in certain respects, it is socially pervasive and deeply entrenched in many of the major institutions of American life, including (perhaps most importantly) American business.

Third, we see the shift away from formal equality in the emergence of the so-called disparate impact concept of discrimination. Nondiscrimination as formal equality in the racial context prohibits decision makers from using criteria that either on their face treat racial groups differently or are used with the motive to disadvantage people because of their race.[34] By contrast, the doctrine treating disparate impact as discrimination holds that a law or employment criterion may be deemed discriminatory when it has a more adverse

effect on certain groups than others, even though the law formally treats whites and blacks the same. For example, Title VII of the Civil Rights Act is violated if an employment practice has a disparate impact on racial minorities, unless the employer can demonstrate that the practice is significantly related to effective job performance. Thus an employment requirement (say, requiring a high school diploma) may be found discriminatory because it has a more adverse effect on blacks than other groups, even though the employer has no discriminatory intent, even though the employment requirement formally treats whites and blacks the same, and even though there are actual group "differences" in some sense (say, differences in the percentage of each racial group having a high school diploma). The basic premise here is that employment practices that have the effect of excluding blacks at a higher rate than whites should be deemed discriminatory unless the employer can demonstrate a good reason for using them.[35]

Strictly speaking, this disparate impact standard does not require accommodation of differences. Although the standard requires employers to change facially neutral employment requirements that disparately exclude minorities where those requirements are unjustified, employers are not required to change employment requirements that genuinely relate to job performance, even where such requirements fail to include or accommodate racial minorities. And unlike affirmative action, at least in theory, the standard does not require employers to take explicit account of race to assure that more racial minorities are hired. Nevertheless, the cost and risks of validating those criteria create strong pressures toward deliberate inclusionary efforts that will avoid creating any disparate impact. In any event, employers must at least be attentive to the racial consequences of their practices.[36]

The Supreme Court first interpreted Title VII of the Civil Rights Act as incorporating a disparate impact test in 1971, in *Griggs v. Duke Power Co.*[37] Given its status in between formal equality and accommodating differences, this disparate impact test, perhaps unsurprisingly, was until recently a highly controversial Supreme Court doctrine that Congress had never endorsed with full explicitness—and that the Supreme Court itself had eroded.[38] But in the 1991 Civil Rights Act, Congress determinedly did embrace it, for the first time amending Title VII to use language that made clear that formal equality was not a sufficient measure of discrimination—and underscoring the movement in our political culture away from formal equality as the exclusive meaning of discrimination.

Some might argue that antidiscrimination law never really meant formal equality, that it always reflected a commitment to a results-oriented approach requiring accommodation of differences, a particular racial mix in public schools, proportional representation in the country's workforces, and so forth—in other words, that from the beginning the focus on formal equality was just a public relations strategy that masked very different principles of equality. On this view, there was never really a shift in approach. I do not agree with this view of history. To be sure, in the early post-*Brown* years it was

commonly assumed by civil rights advocates that formal equality would eventually produce something like racially proportional outcomes and full integration among the races—and this was something to be hoped for. But the principal moral and legal commitment, even if not the exclusive one, was to the principle of formal equality. Formal equality was the principle that gave civil rights activists the high moral ground. The gradual recognition that formal equality was not producing sufficient inclusion and sufficiently equal results undoubtedly led many people to reconsider whether their moral principle was really formal equality, and led many to move toward a principle of accommodating differences that focused more on results—but that is to agree with my point, not disagree with it.

While much has been written about the shift from color blindness to color consciousness in the area of race, much less attention has been paid to the fact that a parallel norm of accommodating differences is taking hold in virtually all the areas to which nondiscrimination norms are now applied. What is particularly striking, and has received virtually no attention, is that this shift has been occurring in so many areas simultaneously.[39]

Gender As recently as ten years ago, the women's rights movement was predominantly a movement seeking formal equality—a movement that descriptively emphasized the ways in which women were the same as men, and normatively argued that women should be treated the same as men. This is what Ruth Bader Ginsburg, the leading appellate litigator of the women's movement in the 1960s and 1970s, stood for.[40]

In 1987, when a major case involving pregnancy leaves was being litigated in the Supreme Court of the United States, the feminist movement was sharply divided over a "formal equality" and "accommodating differences" conception of nondiscrimination. The Supreme Court case was *California Federal Savings & Loan Ass'n v. Guerra*,[41] and involved a California statute that required employers to give women up to four months' disability leave for pregnancy, but required no such leaves for people with other medical conditions that might force them to need a disability leave. The legal issue was whether the federal government's requirements of nondiscrimination between men and women permitted California to single out pregnancy for particular legal protections. Leading feminists filed briefs on both sides of the case, one side arguing that the California law was special protectionist legislation that violated federal antidiscrimination norms of formal equality, and the other side arguing that women's unique capacity to become pregnant permitted distinctive measures to accommodate that uniqueness in the workforce.

The Supreme Court upheld the California statute, concluding that accommodating differences between men and women in this context promoted equality. According to the Court, "By 'taking pregnancy into account,' California's pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs."[42] This case was a watershed.

Although the legal issue involved only the permissibility of accommodation, not whether federal law required it, the case marked the triumph of the "accommodate differences" idea in feminist legal thought and action, and the other side essentially folded its hand. There is now broad support for the view that it is discrimination against women to fail to accommodate pregnancy in the workplace.[43] And there is increasing support for the idea that nondiscrimination for women means accommodating differences in other contexts as well.

Carol Gilligan's basic thesis that men and women tend to have different voices[44] is now widely (if not universally) accepted, and has given new respectability to the idea that these different voices must be valued as such. Among many other things, it has greatly reduced objections to single-sex educational institutions for girls and women. (Much stronger objections to single-sex schools for men persist, not because gender differences are denied but because such institutions are thought to replicate men's current social dominance.) More broadly, it has helped foster challenges to formal equality as an adequate conception of nondiscrimination, on the ground that the norms being applied in formally equal fashion are male norms, norms that reflect the needs of a typical male biography or the values and voice of the typical male. "Difference feminism," as it is sometimes called, stands for the proposition that institutions must take account of women's differences, either by specially accommodating them or by revamping the norms applicable to everyone. And these ideas are gaining strength outside the feminist community. For many purposes, of course, nondiscrimination is still understood to mean that men and women must be treated the same. But for many other purposes nondiscrimination has come to mean something else: different treatment of men and women, accommodation of women's differences, nonsubordination of women, or just plain inclusion of women.

Religion We also see the notion of accommodating differences playing a role in the area of religion. In fact, in prohibiting discrimination based on religion, the text of Title VII of the Civil Rights Act explicitly requires "accommodation," which it does not do for any of the other categories of prohibited discrimination—race, sex, color, or national origin. Title VII deems it discrimination "because of . . . religion" for an employer to fail "to reasonably accommodate to an employee's . . . religious observance or practice," unless doing so would cause "undue hardship" to the employer.[45] Read literally, this suggests that nondiscrimination requires more than formally equal treatment of religious observers and nonobservers. Formal equality would be satisfied by an employer requiring all employees to work on Saturday; but "reasonable accommodation" might require the employer to accommodate Orthodox Jewish employees whose religious "difference" made it impossible for them to work on Saturday (even though the employer would not have to accommodate employees who wanted Saturday off to be with their families for important secular reasons).

In 1977, however, the Supreme Court essentially gutted this "reasonable accommodation" provision of Title VII by holding, in *Trans World Airlines, Inc. v. Hardison*,[46] that anything more than a "de minimis" burden on the employer was an undue hardship that extinguished any duty to accommodate religious differences. This restrictive construction of the "reasonable accommodation" language of Title VII was consistent with the still-dominant place of formal equality principles in legal thought; indeed, one explanation for the *Hardison* decision is that it reflected the Court's anticipatory uneasiness about the "racial preference/affirmative action" cases that were on the Court's doorstep. (The famous *Bakke* case was decided the following year.)[47] The members of the Court who were the most uneasy with race-based "preferences" were generally the most uneasy about what they saw as religious-based "preferences" in the *Hardison* context.

But accommodation of religion and religious differences—rather than strict neutrality—has had a resurgence in recent years. The permissibility of certain "accommodations" of religion has become a theme of the Supreme Court's Establishment Clause cases since the 1980s.[48] And although the Supreme Court's decision in *Employment Division, Dept. of Human Resources of Oregon v. Smith*,[49] refused to read the Free Exercise Clause to mandate accommodations of religious exercise when government applies a neutral and generally applicable law, Congress promptly embraced that mandate legislatively. The Religious Freedom Restoration Act, passed overwhelmingly by Congress in 1993, broadly prohibits government from burdening religious exercise "even if the burden results from a rule of general applicability," unless doing so is the least restrictive means of furthering a compelling interest.[50] This effectively requires accommodation of religious differences, either by special exceptions from general requirements to avoid interference with religious exercise or by abandonment of the general requirement altogether.

Disability No statute demonstrates the transformation of antidiscrimination law better than the Americans with Disabilities Act (ADA), enacted in 1990 and now having such a major impact on American society. In the ADA, discrimination means far more than formal equality and far more than refusing to hire or admit disabled people who can meet existing criteria and utilize existing physical structures and arrangements. If that were all that discrimination against the disabled meant, only a fraction of disabled people would be helped. Instead, the act explicitly defines discrimination as the failure to accommodate disabled people—and the text of the statute spells out in extraordinary detail what this means. Nondiscrimination requires restructuring of workplace norms to assure accommodation rather than taking those workplace norms as givens; it requires rebuilding physical structures; it requires that job descriptions be rewritten; it requires modifying (and, yes, even lowering) employment qualifications to assure inclusion of the disabled in the workforce. Formal equality is barely visible in the statute.

Assessing the Transformation

How should we think about this broad and profound shift within antidiscrimination law away from "formal equality" and towards "accommodating differences." Is it a good or bad thing?

There are undoubtedly many good things about the transformation. First, it can help address the fact that some norms that formal equality would have us apply across the board are biased norms. An important contribution of difference feminism, for example, is that it forces us to become more self-conscious about the norms of institutions and to see the way in which institutions can privilege ostensibly neutral practices just because they serve the interests of men. It was the emphasis on women's differences from men that made many people see for the first time what now seems obvious: that the basic reason pregnancy has not been treated as a normal part of the workplace is that workplace norms evolved out of the male biography, and that equal treatment of men and women requires "taking account" of pregnancy in setting leave policies and disability benefits. Equality requires treating pregnancy as a normal event in the workplace.

Second, even if the norms that formal equality would have us apply across the board are not biased, the reality on which they are superimposed may reflect past violations of formal equality—indeed, the effects of past oppression. Formal equality, with its insistence on the same treatment for all, can ignore and therefore perpetuate differences caused by past departures from formal equality. More generally, the idea of accommodating differences encourages us to tailor social policy to current social realities—always a good thing.

Third, accommodating differences in the name of the ideal of equality is actually linked to another powerful American ideal, the ideal of tolerance. Tolerance means accepting a range of ideas and behaviors different from our own—indeed, it has no bite except where there are differences. To the extent that formal equality insists that all people be governed by the same rule, it may sometimes insist upon a conformity to a single norm that is at odds with tolerance. The concept of accommodating differences is tied to an attitude of tolerance that not only accepts differences but allows them to flourish and make their distinctive contribution.

Lastly, and most practically, an approach that "accommodates differences" is simply more likely than "formal equality" to produce a speedy and broad inclusion of previously disadvantaged or subordinated groups in important institutions. That, after all, explains why affirmative action developed, and why "accommodation" is now the centerpiece of disability law. And in some areas—most obviously where religious minorities are involved—the idea of accommodating differences more easily lets us see that allowing opt-outs and separation can sometimes provide as much equal treatment as a guarantee of inclusion.[51]

Nevertheless, I think we need to face more fully the problems that this "accommodate differences" version of nondiscrimination surely raises. First,

there is a real risk that good norms will be sacrificed or that the differences that will be accommodated are differences that impose excessive costs. Sometimes people's differences are that they are less skilled or less productive than others—and the costs of accommodation may outweigh the gains even if we view the gains most comprehensively. Similarly, in some circumstances we may find ourselves valorizing differences that in fact are regrettable products of oppression, differences that we should try to change rather than valorize or "accommodate." Indeed, in the effort to promote more equal status among groups, there is the risk that we may lose our moorings about what human qualities are in fact right to value and right to try to develop.

Second, there is individual fairness. Scarcity means that not everyone's "difference" can be accommodated. Since we cannot adjust standards for everyone, when is it fair to adjust them for some people and not for others? This is not just the standard question about race-based affirmative action. Consider disability law. Given that lots of people who are *not* disabled may be turned down for jobs when they cannot do parts of the job as well as others, when is it fair to require that jobs be redefined to accommodate people defined as disabled when *they* cannot do a job as well as others?

Lastly, to view nondiscrimination as "accommodating differences" runs the risk that we will overemphasize people's differences from each other, rather than their commonalities. This can exacerbate social friction and social division—and, in any case, it may *encourage* people to identify themselves and others primarily in terms of group membership rather than as human beings, primarily as factions rather than as Americans with common interests.

Although I have long been a supporter of race-based affirmative action, some of the concerns I have just mentioned about the general approach of "accommodating differences" have made me more troubled by some aspects of affirmative action in recent years. A development that has particularly raised concerns for me is the profound and important shift in the *rationale* for affirmative action.[52] Until quite recently, the prevailing rationale for affirmative action was as a *corrective for past discrimination*, a view that I have endorsed and written about, and still endorse.[53] But the dominant rationale for affirmative action today in universities, business, and government is to promote *diversity*.[54] This shift represents a much more decisive move away from formal equality and toward a policy of accommodating differences than affirmative action based on a corrective rationale.

The "corrective" rationale accepts the centrality of formal equality as the ideal. It does not reject the view that official color-blindness is a worthy ideal. Rather, affirmative action is viewed as a temporary departure from formal equality for one specific overriding reason: to eliminate conditions traceable to past discrimination—indeed, conditions traceable to past departures from the norm of formal equality.

Nor do defenders of corrective affirmative action fault most qualification criteria as biased. Where corrective affirmative action is used because the usual, sensible qualifications criteria were ignored when minorities applied for jobs, affirmative action assures that minorities with equal or better qualifica-

tions under the existing criteria are given their due.[55] In other cases, to be sure, corrective affirmative action is used to give preferences to people who may be less qualified than those not preferred under the existing qualifications criteria, typically on the ground that this may be necessary to eliminate an underrepresentation of minorities caused by cumulative effects of past discrimination. But this too does not require faulting existing qualifications criteria as biased. After all, given generations of harmful discrimination it should not be surprising if members of historically victimized groups, on the average, possessed somewhat fewer of the skills and achievements that reasonable "qualification criteria" properly measured. To temporarily supplement and modify these criteria somewhat in order to correct historic exclusionary patterns causally linked to past discrimination may be an approach that accommodates differences, those resulting from past discrimination. But this corrective approach does not permanently embrace race-based policies or repudiate formal equality or the usual qualification criteria. Rather, race-based action is used temporarily with the goal of rectifying past wrongs and then, after a corrective period, applying qualifications criteria in a race-blind way.

The movement away from the corrective rationale has many causes, including complexities in establishing causal linkages between past discrimination and particular current disadvantages, perceived moral problems in imposing the costs of rectifying continuing effects of past discrimination on people who are not themselves wrongdoers or unique beneficiaries of past wrongs, and strains from using a rationale for affirmative action that acknowledges that its beneficiaries are at times less qualified than nonbeneficiaries. While not insurmountable, in my judgment, these problems have helped produce a widespread shift to a diversity rationale for affirmative action that is quite different from the corrective rationale.

The diversity rationale rests entirely upon a premise of racial differences, and insists upon, emphasizes, and typically celebrates those differences. It is asserted differences that produce the diversity, and the equal value of those differences that justifies efforts to establish diversity within a program or institution through self-conscious racial preference policies.

There are several troubling things about this rationale. The first is that it gives up the strong moral predicate of the "corrective" rationale, which is rooted in our country's shameful history of racial wrongs and provides the strongest possible reason for taking account of racial differences in distributing scarce benefits. In its place, it has substituted a weaker and debatable instrumental claim that promoting greater diversity will make various programs and institutions function better.

In addition, racial preference policies justified by diversity typically rest on the doubtful and disturbing assumption that all, or at least most, members of the racial group in fact share or should share some distinctive characteristic, outlook, or voice. The empirical claim of difference is often unproven, and, beyond that, the diversity rationale signals to everyone an expectation that they will speak or act differently from members of other racial groups. This can be

both unfair and unwise, creating pressures to conform one's ideas and actions to some diversity-producing stereotype of one's racial group and to emphasize differences even where they do not exist or are minor, and reinforcing ideas of difference rather than commonalities. The diversity rationale also creates pressure for continued division of groups into subgroups, each claiming to be different from the larger group in certain respects and therefore to add an additional dimension of diversity that deserves separate consideration. Moreover, in at least some of its forms, race-based diversity policies can wind up catering to and entrenching people's racial prejudices, as when an employer says, "I want a racially diverse workforce to appeal to the preferences of my racially diverse customers." We heard the "customer preference" argument from southern whites thirty years ago, and it does not sound any prettier now.

There is also something troubling in the way that diversity theory makes race definitionally a qualification and an aspect of merit. This can obscure the degree of some of the real trade-offs regarding other qualifications that affirmative action sometimes does require. I appreciate that this is precisely one appeal of diversity theory: by defining away the question of whether affirmative action leads to any "lowering" of qualifications, it sidesteps a difficult and divisive debate over qualifications and merit. But the trade-offs involved in instituting affirmative action should be faced. That is the only way to separate any real trade-offs from imagined ones, and, to the extent real trade-offs do exist, the only way to find the right balance among possibly contending values that each deserve our respect—as promoting racial inclusiveness and fostering meritocratic decision making both do.

Diversity theory also seems to permit a ceiling to be placed on the representation of some groups (say, Asians or Jews) on the ground that "too many" representatives of that group are inconsistent with achieving diversity from other groups. This problem arises because the diversity rationale makes the simple absence of diversity a basis for race-conscious measures, rather than requiring that the absence of diversity be causally linked to past discrimination, as the corrective theory does.[56]

Lastly, the diversity rationale would seem to invite and justify race-conscious policies permanently. For those of us who have not given up the view that our ideal is that government should distribute benefits and burdens without regard to race, it is important to insist that race-conscious measures are temporary and transitional—that they are not permanent and not our ideal. The corrective rationale does this, even if it accepts that the transition may prove to be quite long.

In short, to the extent we have abandoned the corrective rationale for racial preferences and now embraced the diversity rationale, I think we have taken a wrong turn. I underscore that I certainly am not arguing that diversity is a bad thing—only that promoting this diversity by using race-based policies is a wrong turn in light of the distinctive dangers of such policies. In addition, I confess that I am less firm about this conclusion in the context of educational institutions than in other settings such as government contracting or employment. The dangers of race-based diversity policies generally do seem as great

in the education context as elsewhere. On the other hand, education is centrally about exposing students to people with ideas and life experiences different from their own; and, in a multiracial society, where learning to understand and interact with people of all races is essential, I acknowledge that there are some distinctive arguments for allowing educational institutions to use race-based policies to foster a more racially diverse student body. Most importantly, I underscore that my argument here is limited to the diversity rationale. It is one thing to criticize the diversity rationale for race-based affirmative action, quite another to criticize all race-based affirmative action.

I should also add that I do not find it particularly helpful in the present debates to point to statements by Thurgood Marshall and other civil rights advocates in the *Brown* period to the effect that color blindness or formal equality, not racial preference, was the policy that they wanted.[57] True enough. But whatever one thinks is the right way to deal with our racial dilemmas, we surely see more clearly now than forty years ago the various consequences of insisting upon color blindedness after long centuries of racial oppression—just as we now see more clearly than twenty years ago some of the consequences of affirmative action. Experience has taught us things, and it taught Thurgood Marshall things after the *Brown* era. As I have written elsewhere about Thurgood Marshall (for whom I was a law clerk):

> [W]hen affirmative action issues first started to emerge in bold relief [on the Supreme Court], he was very uneasy with race-conscious hiring, admissions, and set-asides as a corrective for past discrimination. In time, he became their most passionate defender on the Court. He came to that position, I think, in much the same way many others did: reluctantly, through a gradually developed judgment that, against the backdrop of centuries of oppression, colorblind measures would not work, or at least not work fast enough, to achieve a significantly greater inclusion of minorities in mainstream American life. Those who have tried to quote back at the Justice his endorsement of colorblind remedies at the time of *Brown* ignore the fact that judges continue to change while in office, and that the life revealed in cases continues a judge's education.[58]

In a similar way, of course, one's views about race-conscious remedies may continue to evolve over time as experience and reflection continue to teach us about their benefits and costs. The views about the diversity rationale for affirmative action contained in this essay certainly represent that sort of evolution for me. And as I have already suggested, I have come to see both benefits and risks in some of our other policies that make accommodating differences the antidiscrimination approach.

This is not the place to spell out what I consider to be the precise boundaries of the concept of accommodating differences. All of us who see some merit to the approach, as I do, need to think more about where the limits are, and where we should still insist on formal equality. It is right, I think, to reexamine the norms of institutions to make sure they are not irrationally or self-interestedly promoting the norms of their current occupants; but it goes too far to say all general norms that disparately exclude members of certain

groups are discriminatory norms. It is right to recognize that racial integration completely on white terms can itself be insulting and a form of cultural domination; but it goes too far to accept uncritically the valorizations of all cultural differences. It is right to conclude that workplaces must accommodate pregnancy if there is to be gender equality; but we should be much more cautious about assuming that women inherently have different voices from men. It is right to insist that employers take steps to accommodate the disabled, but it goes too far to be indifferent to costs. It is right to recognize that many claims to neutrality and evenhandedness really reflect a self-interested privileging of certain values; but it goes too far to insist reflexively that privileging of certain values is always a bad thing.

The transformation from "formal equality" to "accommodating differences" is occurring across a broad spectrum of American law and American life. Like *Brown*, this development is changing the way our society understands what equality and nondiscrimination require. And just as we could say of *Brown*, the very moment of triumph of antidiscrimination ideas has opened up a new range of difficult issues for our society.

Notes

1. See Reva B. Siegel, "Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880," 103 *Yale Law Journal* (1994), 1073, 1146–52.

2. This choice for "formal equality" was not inevitable, nor, as we know, was it irreversible. See text accompanying notes 40–44 infra. Feminism had long had another strand that insisted upon women's differences from men, and made those differences the normative basis for either rights to inclusion or rights to special protection. For example, the women's suffrage movement had two main strands: the first strand argued that women should have the right to vote because women were basically the same as men and therefore deserved the same civic role as men. But there was an alternative strand that argued that women were different from men, among other things having a different perspective on public issues. It was this valuably different perspective, many women argued, that made it right for women to have the vote; difference, in other words, was what entitled women to inclusion. See Nancy F. Cott, "Feminist Theory and Feminist Movements: The Past Before Us," in *What is Feminism?*, Juliet Mitchell & Ann Oakley eds. (New York: Pantheon Books, 1986), 49–62; William H. Chafe, *The American Woman: Her Changing Social, Economic, and Political Roles*, 1920–1970 (New York: Oxford University Press, 1972), 13.

3. 42 U.S.C. § 2000e-2(a)(1) (Supp. 1995).

4. "Note, Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964," 84 *Harvard Law Review* (1971), 1109, 1167.

5. See, e.g., Corne v. Bausch and Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975), vacated on procedural grounds, 562 F.2d 55 (9th Cir. 1977); Neeley v. American Fidelity Assurance Co., Civ. Act. No. 77-0151-B, 1978 Westlaw 65, at 5 (W.D. Okla. Feb. 21, 1978).

6. For the pathbreaking analysis, see Catharine A. MacKinnon, *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979). The leading Supreme Court case is Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1987).

7. 429 U.S. 125 (1976).

8. Pregnancy Discrimination Amendments of 1978, 42 U.S.C. § 2000e(k) (Supp. 1995).

9. 410 U.S. 113 (1973).

10. In contrast to *Roe*, the more recent decision in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), placed greater emphasis on the equality perspective. See id. at 856, 912, 927. On the equality basis of abortion rights more generally, see Reva Siegel, "Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection," 44 *Stanford Law Review* (1992), 261, 263; Sylvia A. Law, "Rethinking Sex and the Constitution," 132 *University of Pennsylvania Law Review* (1984), 955, 1013–28.

11. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (1936), codified as amended 42 U.S.C. § 301 et seq. (Supp. 1995); Health Insurance for the Aged Act of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1966), codified throughout 42 U.S.C.

12. 29 U.S.C. §§ 621–34 (Supp. 1992). The act has been amended several times to expand its coverage: Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (1980), 29 U.S.C. § 623(f)(2) (1985); Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (1989), recodified throughout 29 U.S.C. §§ 621–34 (1994).

13. See Peter H. Schuck, "The Graying of Civil Rights Law: The Age Discrimination Act of 1975," 89 *Yale Law Journal* (1979), 27 (distinguishing between allocative and nondiscrimination models of legislation involving the elderly).

14. E.g., Vocational Rehabilitation Act of 1918, Pub. L. No. 65-178, 40 Stat. 617 (1919) (amended 1919, Pub. L. No. 66-11, 41 Stat. 158 (1921)) (providing for vocational rehabilitation of disabled veterans); Act of June 2, 1920, Pub. L. No. 66-236, 41 Stat. 735 (1921) (providing for the vocational rehabilitation of persons disabled in their occupations, and also authorizing limited services to those whose disability, whether congenital or caused by injury or disease, leads them to be incapacitated for remunerative occupation); Randolph-Sheppard Act, Pub. L. No. 74-732, 49 Stat. 1559 (1936) (aiding blind people in employment). On the transformation of approaches to the disabled due to the models provided by civil rights law, see Jonathan C. Drimmer, "Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities," 40 *U.C.L.A. Law Review* (1993), 1341.

15. Pub. L. No. 93-112, 87 Stat. 355 (1974), codified as amended, 29 U.S.C. §§ 701 et seq. (Supp. 1992).

16. 42 U.S.C. §§ 12101–213 (1995).

17. 20 U.S.C. §§ 1400–85 (Supp. 1995).

18. 42 U.S.C. §§ 3601–31 (1994).

19. 42 U.S.C. §§ 4151–57 (1994).

20. 49 U.S.C. § 1374(b) (Supp. 1995) (repealed).

21. Pub. L. No. 98-457, 98 Stat. 1749 (1986), codified throughout 42 U.S.C.

22. 330 U.S. 1 (1947).

23. Id. at 16.

24. Id. at 15.

25. Id. at 17. On the requirement of government neutrality as a central element of what the Establishment Clause has been interpreted to mean, see also Rosenberger v. Rectors and Visitors of the University of Virginia, 115 S. Ct. 2510, 2521 (1995); Lee v. Weisman, 505 U.S. 577, 610, 612 (1992) (Souter, J., concurring); Mueller v. Allen, 463 U.S. 388, 398–400 (1983); Gillette v. United States, 401 U.S. 437, 454 (1971); Walz v. Tax Commission of the City of New York, 397 U.S. 664, 668–69 (1970); Larson v. Valente, 456 U.S. 228, 246 (1982). This principle of neutrality has prohibited government action that favors religion over nonreligion, see, e.g., *Lee*, 505 U.S. at 610–12 (Souter, J., concurring) (reviewing history and precedents), as well as government action that favors some religious sects over others. This requirement of neutrality has been interpreted in various contexts to permit the government to grant certain benefits to religious entities and persons if the benefit is granted on a "neutral basis to a wide spectrum" of entities or individuals, so that it cannot be said that the government is discriminating against some sects in favor of others, or against nonreligion in favor of religion. E.g., *Rosenberger*, supra (access to university funding); *Muller*, supra (tax deductions for costs of sending children to parochial schools); *Walz*, supra (exemption from property tax for religious organizations).

In interpreting the scope of the Free Exercise Clause, the Court has also used a principle of nondiscrimination to uphold the constitutionality of government action that may burden religion. "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" Employment Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 879 (1990), quoting United States v. Lee, 455 U.S. 252, 263n.3 (1982) (Stevens, J., concurring in the judgment). And when it invalidated a local regulation as violative of the Free Exercise Clause after *Smith*, it explicitly invoked principles familiar from Equal Protection law in holding that "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against government hostility which is masked, as well as overt." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2227 (1993).

26. E.g., Police Department of Chicago v. Mosley, 408 U.S. 92, 95–96 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message. . . . There is 'an equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard."); R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2545–46 (1992); id. at 2568–69 (Stevens, J., concurring in the judgment) (discussing impermissibility of "viewpoint discrimination"); Perry Educ. Assn. v. Perry Local Educators' Ass'n., 460 U.S. 37, 62 (1983) (Brennan, J., dissenting) ("Viewpoint discrimination is censorship in its purest form.").

27. Bernard Bailyn et al., *The Great Republic: A History of the American People*, 4th ed., vol. 1 (Lexington, Mass.: D. C. Heath, 1992), 277.

28. For an overview of the legal literature critiquing rights, see "Symposium: A Critique of Rights," 62 *Texas Law Review* (1984), 1363–1599; see also Mark Tushnet, "The Critique of Rights," 47 *Southern Methodist University Law Review* (1993), 23. Influential responses to this literature include Patricia J. Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights," 22 *Harvard Civil Rights–Civil Liberties Law Review* (1987), 401, and Randall L. Kennedy,

"Racial Critiques of Legal Academia," 102 *Harvard Law Review* (1989), 1745, 1785–86.

29. E.g., Robert Elias, *The Politics of Victimization* (New York: Oxford University Press, 1986). On victimization culture among blacks, see Shelby Steele, *The Content of Our Character: A New Vision of Race in America* (New York: St. Martin's Press, 1990); Glenn C. Loury, *One by One from the Inside Out: Essays and Reviews on Race and Responsibility in America* (New York: Free Press, 1995). Of course, believing oneself or one's group or community to be victimized is not necessarily bad. If more and more people over time are hurt by environmental hazards, we do not become exercised over the fact that more people view themselves as victims. The finger of blame, we would say, should be pointed at those who are causing more harm, not those who are suffering it.

The recent criticism of a so-called culture of victimhood in the discrimination context reflects several things, I think. Some critics believe that many people falsely claim or exaggerate claims that they have been hurt by discrimination. Others are concerned that the laws now define victims too broadly, or that the concept of victim is now interpreted so broadly that virtually all members of society can see themselves as victims. For others, the concern about "victimization" reflects not a view about the actuality or seriousness or scope of harm, but rather a view about how the harms are best ameliorated. On this view, people who view themselves as victims and seek redress from those who have caused their victimhood are unlikely to assume enough responsibility themselves for changing their situation. They will await redress from others, rather than develop their strengths and capabilities to change their lot themselves. The latter, many people think, is the only truly effective way to reverse social disadvantage. As with so much else today, even though the distemper we hear about a so-called culture of victims is usually phrased generally, a lot of the distemper probably rests on views about black Americans in particular—a view that too many blacks feel an anger and resentment that is self-destructive and unproductive, or that too much conduct is being labeled as "racism" and "discrimination" that is really innocent or just the jostles of life that other people put up with.

30. These are not hypothetical concerns. Peter T. Kilborn, "Backlog of Cases Is Overwhelming Jobs-Bias Agency," *New York Times*, Nov. 26, 1994 at A1, col. 6.

31. I use the term "accommodation" throughout this essay because it already has a place in statutes and case law, but it is imperfect. To say that some "difference" must be "accommodated" may suggest that something other than the "difference" will remain the benchmark, and that the difference will be "accommodated" without achieving equal status. Those who today view nondiscrimination as requiring the "accommodation of differences" obviously seek to assure equal status for those differences.

32. Aristotle, *Nicomachean Ethics*, Terence Irwin trans. (Indianapolis: Hackett Pub., 1985), bk. 5, ch. 3.

33. See, e.g., Derrick A. Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (New York: Basic Books, 1987), 102–22. Cf. Missouri v. Jenkins, 115 S. Ct. 2038, 2064 (1995) (Thomas, J., concurring) (objecting to integration remedies as "rest[ing] upon the idea that any school that is black is inferior, and that blacks cannot succeed without the benefit of the company of whites").

34. See, e.g., Washington v. Davis, 426 U.S. 229 (1976).

35. This approach has also been extended to employment practices disparately affecting women. Dothard v. Rawlinson, 433 U.S. 321 (1977).

36. See generally Paul Gewirtz, "Discrimination Endgame," *New Republic*, Aug. 12, 1991, 18–23.

37. 401 U.S. 424 (1971).

38. See, e.g., New York City Transit Authority v. Beazer, 440 U.S. 568 (1979); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

39. The fact that I have joined together and identified some common themes in the various subject matter areas of antidiscrimination law should not obscure some real differences in just how readily accommodation ideas are being accepted in the law. Compare, for example, disability and race. In the disability area, legislation *mandates* inclusionary accommodation and requires departures from formal equality. Where race is involved, however, the Supreme Court is still wavering on when it is even *permissible* to depart from formal equality and use affirmative action, and it has mandated affirmative action only for certain proven violations of law. In the area of disability, the ADA requires that job qualifications be redefined in order to achieve inclusion of the disabled, but where racial minorities are involved, the mere suggestion of changing the existing definition of qualifications to achieve greater inclusion of minorities is often explosive. The ADA with its sweeping accommodation requirements for the disabled achieved broad bipartisan support in Congress; but recent civil rights legislation that would codify the disparate impact test for racial minorities and women produced a protracted and bitter political struggle before its passage. In short, accommodation ideas have met with easier acceptance on some fronts than on others.

40. Ruth Bader Ginsburg & Barbara Flagg, "Some Reflections on the Feminist Legal Thought of the 1970's," 1989 *University of Chicago Legal Forum* (1989), 9 (fundamental premise of 1970s litigation was gender neutrality).

41. 479 U.S. 272 (1987).

42. Id. at 289.

43. This particular legal issue is now less significant, since Congress has now legislatively required that employers accommodate all medical conditions, not just pregnancy, by allowing up to twelve weeks of unpaid leave. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1994), codified in scattered sections of 2 U.S.C., 5 U.S.C., and 29 U.S.C.

44. Carol Gilligan, *In a Different Voice* (Cambridge, Mass.: Harvard University Press, 1982).

45. 42 U.S.C. §§ 2000e(j), 2000e-2(a) (1994).

46. 432 U.S. 63 (1977).

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

48. See, e.g., Lynch v. Donnelly, 465 U.S. 668, 673 (1984); Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334–35 (1987); Board of Education of Kiryas Joel Village School District v. Grumet, 114 S. Ct. 2481, 2495–500 (1994) (O'Connor, J., concurring in part and concurring in judgment).

49. 494 U.S. 872 (1990).

50. 42 U.S.C. § 2000bb-1 (1994).

51. I have in mind particularly the practice of accommodating religious differences by allowing religious students to opt out of certain school programs or activities—a practice sometimes required by the Free Exercise Clause of the Constitution, see Spence v. Bailey, 465 F.2d 797 (6th Cir. 1972) (allowing opt-out from ROTC); but see Mozert v. Hawkins County Board of Education, 827 F.2d 1058 (6th Cir. 1987) (holding that requirement that public school students study basic

reader series did not create unconstitutional burden on Free Exercise Clause), cert. denied 484 U.S. 1066 (1988), and more frequently simply permitted by local school policy. Sometimes accommodating religious differences allows a form of opt-out that itself permits a broader inclusion. For example, when Sabbath observers are accommodated by being given a different day off from other employees, they are allowed a form of opt-out—but this opt-out allows them to remain included in the employer's workforce rather than have to look for work elsewhere.

52. The scholarly literature on affirmative action is vast, of course. The legal literature is usefully summarized in John H. Garvey & T. Alexander Aleinikoff, *Modern Constitutional Theory: A Reader*, 3rd ed. (St. Paul: West Publishing Co., 1994), 559–617.

53. See, e.g., Paul Gewirtz, "Choice in the Transition: School Desegregation and the Corrective Ideal," 86 *Columbia Law Review* (1986), 728. The Supreme Court's fullest debate about the corrective rationale for affirmative action appears in City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) (especially the opinion of Justice O'Connor and Justice Marshall's dissent).

54. The diversity rationale is debated in the various opinions in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (see especially Justice Brennan's defense in the opinion of the Court and Justice O'Connor's criticism in her dissent). See also T. Alexander Aleinikoff, "A Case for Race-Consciousness," 91 *Col. L. Rev.* (1991), 1060, 1064–65, 1108–10 (supporting diversity rationale); Kathleen M. Sullivan, "Sins of Discrimination: Last Term's Affirmative Action Cases," 100 *Harvard Law Review* (1986), 78 (criticizing corrective argument and supporting diversity rationale); Patricia J. Williams, "Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times," 104 *Harvard Law Review* (1990), 525 (supporting diversity rationale).

55. See, e.g., United States v. Paradise, 480 U.S. 149 (1987).

56. The problem is illustrated by Justice Powell's opinion in the *Bakke* case, which concluded that using race as a "plus" to promote a more racially diverse student body in a university medical school would be constitutional. 438 U.S. 265, 311–15 (1978). Justice Powell concluded that giving this race-based plus for diversity purposes would be upheld as constitutional because it satisfies the most demanding constitutional test that exists: it is necessary to promote a compelling interest. Precisely the same constitutional arguments that Justice Powell used would lead to the validation of a university admissions policy that gave a race-based plus for non-Asians to achieve greater diversity. The problem with Justice Powell's reasoning, and a problem with the diversity rationale more generally, is that it does not require a causal link between the absence of diversity being addressed and a history of discrimination. This is precisely what the corrective approach requires, and what would usually furnish an easy distinction between a "plus" for blacks and a "plus" for non-Asians.

57. See, e.g., Charles Fried, *Order and Law: Arguing the Reagan Revolution* (Simon & Schuster: New York, 1991), 112–13; Andrew Kull, *The Color-Blind Constitution* (Cambridge: Harvard University Press, 1992), 146, 148, 156–57, 166–67, 173. Professor (now Justice) Fried elaborated on this point in a paper that was presented at the conference resulting in this volume, but does not appear here.

58. Paul Gewirtz, "Thurgood Marshall," 101 *Yale Law Journal* (1991), 13, 16.