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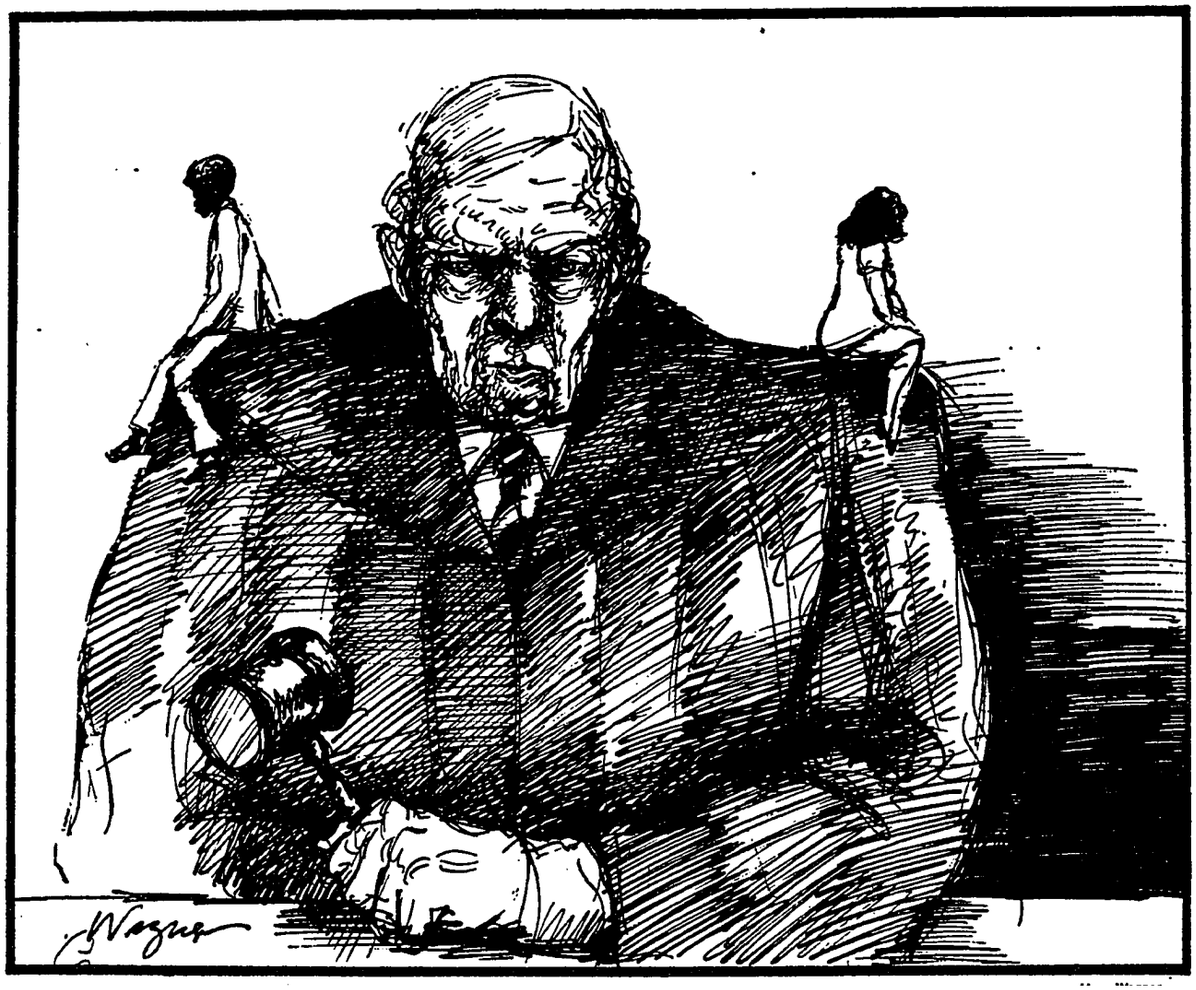

By WILLIAM B. GOULD

The United States Supreme Court's recent decision upholding seniority systems that perpetuate discrimination—a decision that a dissenting justice said would "write off an entire generation of minority group employees"—did not only affect minority groups. The ruling, based in the 1964 Civil Rights Act, also affected women, perhaps even more seriously because blacks can still seek relief, as women cannot, under the Reconstruction statutes, laws that ban race discrimination but not sex discrimination.

The outcome of the seniority case illustrates how racial discrimination and sex discrimination may fare differently before the Supreme Court even though both forms of discrimination are deeply imbedded institutions. In a number of cases during the last few years the Court has applied varying standards to race and sex codes.

In the extensive desegregation litigation of the 1950's and 1960's, the Court announced that racial classifications created by government were nearly always constitutionally "suspect." In the comparatively few sex discrimination cases brought to the Court's attention, that exacting scrutiny was not extended to sexual classifications. In *Reed v. Reed,* a 1971 decision, a less rigorous standard of judicial review was applied: Government might treat groups of individuals differently so long as the difference was rationally related to a legitimate objective. Thus, the Court upheld a challenge to the Idaho Probate Code, which gave preference to men over women as administrators of estates.

The Court has never articulated a reason for its divergent approaches to race and sex bias. The legacy of slavery, disenfranchisement, post-Civil War black codes and systematic public and private discrimination against blacks has obviously influenced judicial thinking. The stigma associated with racial categories probably led to the "suspect classification" approach. Moreover, it can be argued that undoing the effects of past racial discrimination, unlike sex discrimination, is complicated by the lack of personal contact between blacks and whites in American society.

In employment matters, the contrast between the Court's treatment of race and sex discrimination has been vivid. In race cases the Court has provided retroactive seniority for rejected job applicants and fashioned liberal standards for back pay awards. In another 1971 decision, *Griggs V. Duke Power Company,* a unanimous Court concluded that unions and employers could be held in violation of the 1964 Civil Rights Act even though they did not intend to discriminate. The Court said, "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivations." It therefore held that written examinations and educational requirements which exclude blacks in disproportionate numbers violate the law unless they are shown to be necessary to job performance.

These principles might also apply to sex discrimination. Indeed, legal challenges by women to employee weight and height requirements gain support from the Griggs ruling. But last December, Justice William H. Rehnquist, speaking for a majority of the Court, refused to apply the Griggs doctrine to a company's failure to include pregnancy benefits in an employee medical plan. Rejecting the disproportionate impact approach, the Court said: "Pregnancy is confined to women, but it is in other ways significantly different from the typical disease or disability. The District Court found that it is not a disease at all and is often a voluntarily undertaken condition." The extent to which Griggs will be relied upon in future sex discrimination cases remain to be seen. But the pregnancy ruling raises a doubt.

Sometimes the standards developed separately in race and sex cases can prove to be mutually beneficial to the causes of women and racial minorities. For example, in March the Court upheld the rearrangement of electoral boundaries in Brooklyn to avoid the dilution of black and Puerto Rican votes, despite the objections of Hasidic Jews in the area. Justice Byron White's opinion for the Court seemed to accept the view that benign discrimination is permissible under certain circumstances. That, of course, is an argument made for women, as well as minority groups, in support of some kinds of preferential hiring.

Similarly, in 1974, the Court issued a ruling in a sex case that may prove useful to minorities. The justices decided that a property tax exemption for widows but not widowers was valid because it was a vehicle for eradicating the effects of past discrimination against women. That rationale could be one of the best arguments for sustaining the constitutionality of giving minority applicants preference in admission to universities. The Bakke case, challenging a preferential admissions system at the University of California, will be heard by the Court after it begins its next term, in October.

The recent ruling in the seniority case, however, places the admissions system in some jeopardy. The seniority decision implied that proof of discrimination against a particular individual, rather than the general effects on a whole category of persons, is necessary to justify affirmative remedies. No evidence of such discrimination has been produced in the Bakke litigation, an omision that may prove fatal to the university's case.