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THE ORIGINS AND FATE OF ANTISUBORDINATION THEORY

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A Partial Defense of an Anti-Discrimination Principle

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A Partial Defense of an Anti-Discrimination Principle

Michael C. Dorf

Abstract

Over a quarter century ago, Professor Fiss proposed that the constitutional principle of equal protection should be interpreted to prohibit laws or official practices that aggravate or perpetuate the subordination of specially disadvantaged groups. Fiss thought that the anti-subordination principle could more readily justify results he believed normatively attractive than could the rival, anti-discrimination principle. In particular, anti-subordination would enable the courts to invalidate facially neutral laws that have the effect of disadvantaging a subordinate group and also enable them to uphold facially race-based laws aimed at ameliorating the condition of a subordinate group. Since Fiss's landmark article appeared, Supreme Court doctrine has, at every turn, rejected his anti-subordination principle in favor of a narrower, more formalistic anti-discrimination principle. In the Court's view, the equal protection guarantee primarily targets discrimination against individuals on a small number of forbidden grounds. However, the anti-discrimination principle as such should not be taxed with the Court's adoption of equal protection hyper-formalism in the name of anti-discrimination. Both anti-discrimination and anti-subordination are sufficiently open-ended conceptions of equality to produce a variety of morally attractive and not-so-attractive outcomes.

I. Two Conceptions of Equality

What is the best interpretation of the Equal Protection Clause of the Fourteenth Amendment?[1] The Clause grew out of an American tradition honoring the general principle of equality that goes at least as far back as Andrew Jackson,[2] if not to the Declaration of Independence,[3] or even the Mayflower Compact.[4] In an earlier age it might have been possible to argue that the Clause requires only that the law, whatever its content, be "equally binding upon every member of the community."[5] Yet, the time when the meaning of "equal protection" could be separated from the meaning of "equality" has long passed, if it ever existed. Today, any convincing account of the Equal Protection Clause must also be, at least in substantial part, an account of the general concept of equality.

At the conceptual level, however, equality is, if not entirely empty,[6] so hotly contested that it can be invoked with (equal?) aplomb by those on either side of our most divisive national questions: Does affirmative action remedy or create inequality? Is a right to abortion necessary for sex equality or anathema to the equal right to life of the unborn? Is the proscription of some but not all categories of discrimination in civil rights statutes the paradigmatic instance of legally required equality or the conferral of special rights? Answers to such questions do not derive from the abstract concept of equality but, at best, from more particularized conceptions of equality and other norms.

To what sources should a contemporary reader of the Constitution turn in choosing an appropriate conception of equality? After constitutional text, courts and

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[1] Except where otherwise noted, in this essay I use the term "equal protection clause" to include the principle of equal protection applicable to the federal government via the Fifth Amendment Due Process Clause. See Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

[2] See Michael Les Benedict, Laissez-Faire and Liberty: A Reevaluation of the Meaning and Origins of Laissez-Faire Constitutionalism, 3 Law and History Review 293 (1985); Howard Gillman, The Constitution Besieged: The Rise and Demise of Lochner ERa Police Powers Jurisprudence (1993).

[3] It may seem difficult to take seriously the Declaration's egalitarian language in light of its co-existence with slavery. See Scott v Sanford, 60 U.S. (19 How) 393, 410 (1857) ("the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration"), although even before the Civil War there were those who did argue that the Declaration could be taken as an applying to *all persons.* See id. at 574-75 (Curtis, J., dissenting); Cf. Frederick Douglass, The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?, 2 Life and Writings of Frederick Douglass 467-80 (P. Foner, ed. 1950), reprinted in Paul Brest & Sanford Levinson, Process of Constitutional Decisonmaking 207-11 (3d ed. 1992) (arguing that slavery was inconsistent with the ante-bellum Constitution).

[4] Compact Made on Board the May Flower (Nov. 11, 1620), in Contexts of the Constitution 1 (Neil H. Cogen, ed. 1999) (undertaking to "enact constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions, and Officers, from time to time, as shall be thought most meet and convenient for the general Good of the Colony").

[5] Durkee v. Janesville, 28 Wis. 464, 470 (1871) (approving the Tennessee Supreme Court's derivation of this principle from the "law of the land" clause of the Tennessee Constitution) (citing Wally's Heirs v. Kennedy, 10 Tenn. (2 Yer.) 554 (1831)).

[6] See Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537 (1982).

scholars typically list history as the next most authoritative source of guidance, but here too, the conventional approach provides scant help. There is general agreement that the central, original purpose of the Equal Protection Clause, indeed, of the entire Fourteenth Amendment, was to protect African-Americans against the Black Codes (whether directly or through Congressional legislation).[7] Yet today virtually no one thinks the meaning of the Equal Protection Clause can be restricted to its original purpose, narrowly defined. The Clause is majestically inclusive in its language, not confined to African-Americans, inequalities based on race, or even unequal treatment among citizens.

Moreover, there is broad consensus that, whatever its merits in other contexts, a jurisprudence of narrowly defined original understanding of the Equal Protection Clause is morally unacceptable because it would license such odious institutions as racially segregated schools, anti-miscegenation laws, and the grossest forms of discrimination against women. This is not just a problem for liberals. Whatever they may think in their heart of hearts, conservatives who are generally sympathetic to originalism cannot openly say that *Brown v. Board of Education*[8] was wrongly decided. Accordingly, they concoct implausible accounts of the Reconstruction-Era understanding of segregation.[9] And those conservatives who wish to preserve not only the decisions invalidating segregation but also those invalidating most forms of affirmative action must blind themselves even further. Strikingly, not a single Supreme Court opinion arguing for the unconstitutionality of race-based measures aimed at helping rather than harming African-Americans even attempts to reconcile that view with the Freedman's Bureau and like Reconstruction-Era institutions.[10]

Thus, neither liberals nor conservatives are willing to be guided by the nineteenth-century understanding of equal protection in its narrowest form. And as soon as one

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[7] See Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 67-71 (1872); Akhil Amar, The Supreme Court, 1999 Term Foreword: The Document and the Doctrine, 114 Harv. L. Rev. 26, 64 (2000) ("the Fourteenth Amendment framers clearly aimed to prohibit [Black Codes] as a paradigm case of impermissible legislation"); Eric Foner, Reconstruction 257 (1989); Michael W. McConnell, The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution, 65 Fordham L. Rev. 1269, 1281 (1997) ("The clearest and most indisputable purpose of the Fourteenth Amendment was to provide constitutional authority for the Civil Rights Act of 1866, which outlawed the Black Codes.").

[8] 347 U.S. 483 (1954).

[9] See, e.g., Michael W. McConnell, Originalism and the Desegration Decisions, 81 Va. L. Rev. 947 (1995) (invoking Republican support in the 1870s for a bill outlawing segregated schools as evidence of the original understanding of the Fourteenth Amendment); see contra Herbert Hovenkamp, The Cultural Crises of the Fuller Court, 104 YALE L.J. 2309, 2337-43 (1995) (reviewing Owen M. Fiss, Troubled Beginnings of the Modern State, 1888-1910 (1993)) (observing, *inter alia*, that in its day, the separate-but-equal doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896), was largely uncontested); Michael J. Klarman, Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell, 81 Va. L. Rev. 1881, 1884-1914 (1995) (arguing that *Brown* contradicts the original understanding of the Fourteenth Amendment); Earl M. Maltz, Originalism and the Desegregation Decisions—A Response to Professor McConnell, 13 Const. Commentary 223, 228-31 (1996) (same).

[10] See generally Jed Rubenfeld, Affirmative Action, 107 Yale L.J. 427, 429-32 (1997); Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753, 754-83 (1985).

moves to a somewhat higher level of generality – but not one that is so general as to provide no real guidance, like "equal protection means treating people who are similarly situated in the same way" – the disagreement over the appropriate conception of equality re-emerges.

Nonetheless, the Supreme Court has tended to favor a particular conception of equality in its Fourteenth Amendment jurisprudence. Defining the Clause as targeted primarily at discrimination against individuals on a small number of forbidden grounds, the Court views it as a mandate of formal equality. This conception stands in stark contrast to the principle, elaborated by Professor Fiss over a quarter century ago, and at the time a plausible description of the Court's doctrine, that the Equal Protection Clause prohibits laws or official practices that "aggravate[] (or perpetuate[]?) the subordinate position of a specially disadvantaged group."[11] Despite Fiss's contention that the group-disadvantage principle could do a better job of accounting for the egalitarian jurisprudence of the Warren Court than the anti-discrimination principle could, in the years since Fiss wrote *Groups and the Equal Protection Clause*, the Court has, at every turn, chosen anti-discrimination over group-disadvantage.

Fiss argued that non-discriminatory government actions ought to be invalid under the Equal Protection Clause when they directly disadvantage a subordinated racial group.[12] He explained that the group-disadvantage principle made sense of the otherwise-problematic decision in *Shelley v. Kraemer*.[13] There is no difficulty finding unconstitutional state action in a case like *Shelley*, Fiss contended, if one does not treat equal protection as co-extensive with the anti-discrimination principle. The argument was accordingly critical of the Court's decision in *Moose Lodge No. 107 v. Irvis*,[14] not to mention *Milliken v. Bradley*.[15]

Closely linked to Fiss's proposed reinterpretation of state action doctrine was his contention that laws and policies that have a negatively disparate impact on a traditionally disadvantaged racial minority are, *ipso facto*, unconstitutional, even absent a showing of intentional discrimination.[16] He found some support for this proposition in then-current precedent, especially cases interpreting statutory norms,[17] but his main line of argument for this and other manifestations of his group-disadvantage principle was straightforwardly normative: the central command of the Equal Protection Clause is that the government shall not subordinate African-Americans or similar social groups, regardless of motive. Current doctrine squarely rejects that view.[18]

Fiss also contended that race-based government programs that benefit traditionally disadvantaged groups, and especially those that benefit African-Americans, are generally valid because they do not relegate those persons who do not receive the

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[11] Owen M. Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Aff. 107, 157 (1976).
[12] See id. at 136-41.
[13] 334 U.S. 1 (1948).
[14] 407 U.S. 163 (1972).
[15] 418 U.S. 717 (1974). Quite literally. Fiss did not mention *Milliken*
[16] Fiss, supra note 11, at 157-59.
[17] See id. at 142 n.55.
[18] See Washington v. Davis, 426 U.S. 229, 248 (1976) (holding that facially neutral laws that disparately impact minorities do not, absent more, trigger heightened scrutiny).

relevant benefit to a subordinate status.[19] In contrast, pursuant to a principle of symmetry, the Court has held that all racial classifications must be subject to the same exacting scrutiny.[20]

Finally, Fiss conceded that there may be institutional reasons why the courts are poorly positioned to enforce the group-disadvantage principle. All manner of government actions not motivated by race – from funding of schools, transportation, and health care to siting of locally undesirable land uses – can and do disadvantage subordinated racial groups; yet it would be unmanageable for courts to assume responsibility for all such occurrences. Thus, Fiss allowed that the anti-discrimination principle might be justified as a judicially enforceable shadow of the Equal Protection Clause.[21] However, acting pursuant to Section Five of the Fourteenth Amendment, Congress would remain free, and perhaps would be obliged, to enforce the group-disadvantage principle.[22] The Supreme Court has rejected this view as well, holding that Congress has no authority to legislate on the basis of a broader substantive understanding than the Court's own.[23]

Was the Court right to prefer the anti-discrimination principle over Fiss's group-disadvantage principle as the exclusive conception of the Equal Protection Clause? Neither the text nor history of the Fourteenth Amendment dictates one rather than the other principle.[24] Perhaps, then, it is a mistake to seek a coherent overarching conception of equality. Courts might instead simply decide equal protection cases on an *ad hoc* basis. After all, there may well be no theory of equal protection that is both acceptable to all of the Justices of the Supreme Court and explains all or even most of the Court's jurisprudence. In this view, incompletely theorized agreement, as a *modus vivendi*, is all that one can hope for.[25]

But such minimalism is, at best, an account of the outputs of a multi-member institution like a legislature or court that must reach compromises among persons with different convictions. It is hardly a prescription for how an individual judge, legislator, or citizen should think about the meaning of equality – or anything else. Moreover, the formal requirement that judges provide reasons for their decisions tends to produce

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[19] See Fiss, supra note 11, at 129-36.

[20] See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995); City of Richmond v. J. A. Croson Co., 488 U.S. 469, 493-94 (1989). The Court's most recent pronouncement on this subject indicates that strict scrutiny may not always be fatal when applied to affirmative action programs. See Adarand, 515 U.S. at 237 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)). The claim that strict scrutiny is "'strict' in theory and fatal in fact," was first made in Gerald Gunther, The Supreme Court, 1971 Term–Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972)).

[21] See Fiss, supra note 11, at 175-76.

[22] See id. For a fuller elaboration of this idea, see Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1239-42 (1978).

[23] See Board of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000).

[24] See Paul Brest, The Supreme Court 1975 Term, Foreword: In Defense of the Anti-discrimination Principle, 90 Harv. L. Rev. 1, 5 (1976) ("The text and history of the clause are vague and ambiguous").

[25] See generally Cass R. Sunstein, Legal Reasoning and Political Conflict (1996).

relatively abstract formulations of the equality principle, such as the Justices' frequent claim that Fourteenth Amendment rights belong to individual persons, not groups.[26]

Furthermore, with few exceptions, even minimalists are not nihilists.[27] Minimalists, along with virtually everyone else, accept that *purposeful discrimination* against members of a *traditionally subordinate group* on the basis of *race* denies equal protection. And this then raises the question of which, if any, of the italicized terms are essential to such a judgment. That question cannot be answered except by reference to a substantive conception of equality.

To be sure, a somewhat different sort of minimalist might say that the judicially enforceable interpretation of the Equal Protection Clause should not extend beyond the core of consensus. On such a view, racially neutral laws that have a disparate impact would be valid absent an illicit subjective purpose, but so too would most forms of affirmative action – a complete victory for neither the anti-discrimination principle nor the group-disadvantage principle. The competing conceptions would battle it out in the political domain.

Whatever the attraction of such a conventionalist jurisprudence in other contexts,[28] it creates an enormous embarrassment where equality is concerned. The contemporary consensus that purposeful discrimination against members of a traditionally subordinate group on the basis of race denies equal protection is of relatively recent vintage. Earl Warren's appealing rhetoric in *Brown* notwithstanding, different treatment on the basis of race is not inherently unequal in the sense that a society cannot be *conceived* in which segregation connotes no subordinate status for one group or the other.[29] Only by rejecting separate-but-equal in favor of some other conception of equality (but-exactly-what-we-are-not-quite sure), could the *Brown* Court overrule *Plessy v. Ferguson.*[30] And thus the embarrassment: the now-widely-accepted principle that purposeful discrimination against members of a traditionally subordinate group on the basisof race denies equal protection was not at all a matter of consensus when *Brown* was decided. Accordingly, the conventionalist minimalist must say that *Brown* was wrongly decided, even if it has become right by virtue of subsequent acceptance. One can think, as I do, that public acceptance plays a substantial role in determining the path of constitutional and other judge-made law, but making retrospective acceptance the pivot on which turns the correctness of the defining decision of a half century is at least highly problematic.

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[26] See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); City of Richmond v. J. A. Croson, Co., 488 U.S. 469, 493 (1989) (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948)).

[27] Indeed, while there are those who doubt the ability of *courts* to provide principled interpretations of constitutional norms such as equality, see, e.g., Mark Tushnet, Taking the Constitution Away From the Courts (1999); Jeremy Waldron, Law and Disagreement (1999), even they argue forcefully for some conception of equality as a political principle.

[28] See Henry H. Wellington, Interpreting the Constitution: The Supreme Court and the Process of Adjudication 20-40 (1990), for a defense of conventionalist judicial review.

[29] As Charles Black explained, what made separate unequal was the social meaning of segregation in the real world. See Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421 (1960).

[30] 163 U.S. 537 (1896).

In any event, even conventionalism is itself a controversial conception of the Equal Protection Clause (or perhaps of constitutional interpretation more generally), for which reasons can appropriately be demanded. The argument that conventionalism better respects democracy than either the anti-discrimination principle or the group-disadvantage principle is just that, an argument. It takes no great imagination to envision conceptions of democracy in which even (indeed especially) widely approved discriminatory or group-disadvantaging decisions provide the occasion for judicial interference with majoritarian decision making.

II. Which Anti-Discrimination Principle?

Groups and the Equal Protection Clause did not, however, directly grapple with these jurisprudential questions. At bottom, it was result-oriented. Although Fiss granted that there were difficult questions for any conception of equality, it is hard to read *Groups and the Equal Protection Clause* without drawing the inference that the main virtue of the group-disadvantage principle was its ability to produce certain answers that the anti-discrimination principle could not plausibly produce.

One could criticize Fiss's methodology as backwards. Should not constitutional principles determine concrete results, rather than vice-versa? But perhaps this criticism is not as potent as it first appears. Constitutional adjudication might be thought to strive for a reflective equilibrium between, on the one hand, moral intuitions about concrete cases and, on the other hand, a variety of factors that go into the selection of a conception of some constitutional command. The argument would then focus on the institutional mechanisms for measuring both the moral intuitions and the factors on the other side of the balance.

In the balance of this Essay, I want to put this institutional question aside and ask whether Fiss was right even on his own terms. Let us grant *arguendo* that, even standing by itself, the pattern of results reasonably obtainable under any particular conception of a relatively open-ended constitutional provision is a legitimate basis for selecting one rather than another interpretation. Nonetheless, Fiss overstated the extent to which an anti-discrimination principle naturally leads to the conception of equality as formal equality that has characterized the Supreme Court's jurisprudence over the last quarter-century. The constitutionality of neutral laws that have a disparate impact on a protected class, of affirmative action, and of Congressional efforts to "enforce" a version of the Fourteenth Amendment that differs from the one the courts enforce are all difficult questions – but they are difficult whether or not one accepts group-disadvantage, anti-discrimination, or something else as the best conception of the Equal Protection Clause. Let us take these questions in turn.

A. Disparate Impact

Should laws that have a disparate impact on a traditionally disadvantaged group be understood to trigger any special judicial scrutiny? Fiss thought that they should, and that this understanding was a logical interpretation of the Equal Protection Clause but not one that flowed out of the anti-discrimination principle.[31] Yet we can see that the very debate that Fiss characterized as a struggle *between* group-disadvantage and anti-

[31] See Fiss, supra note 11, at 136-46.

discrimination re-emerges even if one accepts anti-discrimination as the appropriate conception of equality.

Consider a statutory provision that is expressly written as an anti-discrimination principle. Title VI of the Civil Rights Act of 1964 provides that no person shall, "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any [federally funded] program or activity."[32] In *Alexander v. Sandoval*,[33] a 5-4 Supreme Court ruled that there is no private right of action to enforce a Department of Justice regulation prohibiting recipients of federal funds from using neutral criteria that "have the effect of subjecting individuals to discrimination because of their race, color, or national origin."[34] The core prohibition of Title VI is on express or purposeful discrimination, the Court reasoned, and prohibition of disparate impact was too far removed from that core to permit the assumption that Congress intended there to be a private right of action to enforce the regulation.[35]

Although the *Sandoval* majority asserted that it is "beyond dispute . . . that [Title VI] prohibits only intentional discrimination,"[36] the four dissenters thought that the disparate impact "regulations are inspired by, at the service of, and inseparably intertwined with [the statute's] anti-discrimination mandate. Contrary to the majority's suggestion, they 'apply' [the statutory] prohibition on discrimination just as surely as the intentional discrimination regulations."[37] My concern here is not with who has the better of the argument,[38] but with the *fact* that the argument persists in nearly all of its intensity once one moves from the general concept of equal protection to the supposedly more determinate conception of anti-discrimination.

B. *Affirmative Action*

The same broad point applies as well to the question of whether race-based affirmative action is legal. Here too, the disagreement persists even after one moves from equal protection to anti-discrimination.

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[32] 42 U.S.C. § 2000d.
[33] 121 S. Ct. 1511 (2001).
[34] 28 C.F.R. § 104(b)(2) (1999).
[35] See Alexander v. Sandoval, 121 S. Ct. 1511, 1518-23 (2001).
[36] Id. at 1516.
[37] Id. at 1531 (Stevens, J., dissenting).
[38] Proponents of treating disparate impact as by itself constitutionally objectionable seldom address the question whether a policy's disparate impact voids the policy *in toto* or only for members of the disadvantaged group. Consider, for example, Test 21, the civil service examination used by the Washington, D.C. police force and challenged in *Washington v. Davis*, 426 U.S. 229, 234-35 (1976). Test 21 had a disparate racial impact on African-Americans. Under a disparate impact regime, could the test nonetheless be used in screening white applicants? Doing so would create an *explicit* racial classification, in which white applicants take Test 21 but African-Americans are screened by some other mechanism. If that is unacceptable, does this mean that an unsuccessful white applicant should have standing to challenge the use of Test 21 on the grounds that it has a disparate impact on African-Americans? For a discussion of this kind of standing inquiry in equal protection cases, see Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 251-61 (1994); Michael C. Dorf, The Heterogeneity of Rights, 6 Legal Theory 269, 278 (2000).

Consider another federal statutory provision that is expressly worded as an anti-discrimination principle. Title VII of the Civil Rights Act of 1964 instructs employers not "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[39] A parallel provision applies the identical principle to job training programs.[40] Nonetheless, in *United Steelworkers v. Weber*,[41] the Supreme Court ruled, 5-2, that Title VII does not prohibit an employer's voluntary efforts to redress a racial imbalance in its workforce by giving a hiring preference to African-American applicants for an on-the-job training program.[42] Although Chief Justice Burger and then-Justice Rehnquist thought this result impossible to square with the express anti-discrimination language of the Act,[43] the majority had no difficulty finding, based on the statute's legislative history and the context in which it arose, that this law forbidding racial discrimination permitted at least some forms of affirmative action.[44]

Scholars have long debated whether the Court correctly characterized Congress's purpose in enacting Title VII, and if so, whether that should have been dispositive in *Weber*.[45] As with our disparate impact example, so here, I am not now much interested in the right answer as such. Rather, my point is that the debate over the validity of affirmative action is not resolved by construing equal protection as an anti-discrimination principle. Most of those who read anti-discrimination language as categorically barring affirmative action also read the language of the Equal Protection Clause as having exactly the same effect.[46] And by the same token, as *Weber* shows, those Justices and scholars who find the words "equal protection" malleable enough to permit some preferences for members of traditionally disadvantaged groups typically reach the same conclusion when interpreting statutory anti-discrimination provisions.

To be sure, the actual decision in *Weber* conceded that a "literal" reading of the anti-discrimination norm would forbid race-based affirmative action, but rejected that

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[39] 42 U.S.C. § 2000e-2(a)(1).

[40] See 42 U.S.C. § 2000e-2(d) ("It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.")

[41] 443 U.S. 193 (1979).

[42] The particular program at issue in *Weber* was jointly administered by an employer and a union. See id. at 197.

[43] See id. at 216 (Burger, C.J., dissenting); id. at 220 (Rehnquist, J., dissenting).

[44] See id. at 202-08 (opinion of the Court).

[45] See, e.g., Ronald Dworkin, A Matter Of Principle 316-31 (1985); William N. Eskridge, Jr., Dynamic Statutory Interpretation 14-47, 80, 135, 173, 303-06 (1994); Philip P. Frickey, From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation, 77 Minn. L. Rev. 241, 245-57 (1992) (describing *Weber* as the catalyst for theories that defend it, like those of Dworkin and Eskridge, as well as public choice theory, which attacks it).

[46] For example, Justice Scalia, concurring in Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), laid emphasis on the fact that the Equal Protection Clause applies to "any person." See id. at 239 (Scalia, J., concurring in part and concurring in the judgment).

reading based on the statute's purpose and spirit.[47] Yet the concession was not obviously necessary. One could plausibly argue that where a program of affirmative action is sufficiently justified, the denial of some opportunity to non-minority applicants is not, in the end, *on the basis of race* (or whatever the forbidden characteristic is), but is instead, on the basis of whatever reason justifies the affirmative action program. Alternatively, one might think that as used in the statute and every-day language, the word "discriminate" means "invidiously discriminate," so that distinctions drawn to benefit traditionally disadvantaged groups fall outside its ambit.[48] Whether one finds such arguments persuasive is likely to have much less to do with one's views about language than about the moral and practical implications of affirmative action.

Still, it could be objected, it is at least a *little bit easier* to uphold affirmative action under the group-disadvantage principle than under the anti-discrimination principle. But this objection is perfectly ambiguous with respect to the question: easier for whom? Once we acknowledge the substantial flexibility inherent in concepts like group-disadvantage and anti-discrimination, to say nothing of the flexibility of the more general equal protection norm, it is hard to imagine that these concepts – rather than first-order moral intuitions, pragmatic judgments, and the like – are going to do much work.

Moreover, even if we grant that group-disadvantage makes it somewhat easier to reach some normatively desirable results than anti-discrimination, it does not follow that group-disadvantage is the better interpretation, for by the same token, group-disadvantage will make it somewhat harder to reach other normatively desirable results.

Consider the intuition that discrimination against whites on the basis of race or discrimination against men on the basis of sex, if not quite as harmful as discrimination against African-Americans and women, nonetheless poses a more substantial constitutional problem than discrimination against people who rent rather than own their homes[49] or against people who drive red cars.[50] This intuition is widely shared. For example, even those Justices who have been sympathetic to race-conscious measures that aim to assist members of traditionally subordinated groups have advocated intermediate scrutiny of such measures, rather than mere rationality review.[51] Yet, by contrast with the anti-discrimination principle, the group-disadvantage principle has difficulty vindicating the intuition that there is always something at least a little problematic about the use of certain criteria like race or sex, even if they are not being used to disadvantage a subordinated group.

Fiss complained that under the anti-discrimination principle, "the permissibility of preferential treatment [for blacks and, by extenstion, other disadvantaged groups] is tied

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[47] See 443 U.S. at 201 (citing Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892)).

[48] See Ronald Dworkin**,** A Matter of Principle 318 (1985) (explaining how "discriminate" can be used evaluatively as well as descriptively; William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. Pa. L. Rev. 1479, 1489-90 (1987) (same).

[49] See I.R.C. § 163(h)(3) (permitting deduction for interest on a home mortgage).

[50] I have heard claims that this is a real phenomenon, although I have been unable to discover any reliable empirical study. Cf. Gary Jacobs, Cops Driving Me Round the Bend, The Mirror (UK), Jan. 22, 1997, at 6 (claiming that police stop drivers of red cars and "heaps" most often).

[51] See Regents of University of California v. Bakke, 438 U.S. 265, 355-63 (1978) (Brennan, J, joined by White, Marshall and Blackmun, JJ., concurring in part and dissenting in part).

to the permissibility of hostile treatment against blacks [and other such groups]."[52] This is a fair complaint against color-blindness in its most extreme form, but not against anti-discrimination, nor even against a doctrinal structure that subjects all uses of some suspect classification to the same level of scrutiny. An anti-discrimination principle does not say that whites and blacks, men and women, or heterosexuals and homosexuals are identically situated. What it does say "is that the government's use of race [or sex or sexual orientation] is frequently inconsistent with notions of human dignity,"[53] in a way that the use of other classifications – like owning versus renting or the color of one's automobile– is not.

C. *The Section Five Power*

As Fiss himself acknowledged, a judicial understanding of equal protection in even the most narrowly formalist anti-discrimination terms is perfectly consistent with a broader Congressional understanding pursuant to Section Five of the Fourteenth Amendment. *Groups and the Equal Protection Clause* argued that even if one were to accept the anti-discrimination principle over the group-disadvantage principle as a matter of judicial doctrine, such a decision should not bind Congress, because the principal virtue of the anti-discrimination principle is its ease of administration by judges, and that factor has no bearing on Congress's judgment.[54] Congress gets its warrant for action from the People, not from its willingness to conform its decisions to formal barriers, and thus should be free to go beyond the Court's extrapolation from constitutional text.[55] Although a 5-4 majority of the Supreme Court rejects this logic, the Court's argument is based in principles of federalism, rather than the entailments of the anti-discrimination principle.

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Accordingly, an anti-discrimination principle can, without undue distortion: lead to close scrutiny of laws that have a disparate impact on a racial minority; validate affirmative action; and co-exist with a broader Congressional understanding of the Fourteenth Amendment than the one endorsed by the Supreme Court.

III. Anti-Discrimination and Means-Ends Scrutiny

If the anti-discrimination principle can rather handily produce the results Fiss sought, why was he so eager to criticize it? The answer, I think, is that despite nominally targeting "the anti-discrimination principle," the real focus of criticism in *Groups and the Equal Protection Clause* was a peculiar version of the anti-discrimination principle, namely, means/ends scrutiny of the sort described in the Venn diagrams of the classic article by Tussman and ten Broek.[56]

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[52] Fiss, supra note 11, at 129.

[53] Peter J. Rubin, Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny after Adarand and Shaw, 149 U. Pa. L. Rev. 1, 18-19 (2000).

[54] See id. at 175-76.

[55] See Board of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356, 121 S. Ct. 955, 972-74 (2001) (Breyer, J., dissenting).

[56] See Joseph Tussman & Jacobus tenBroek, The Equal Protection of the Laws, 37 Cal. L. Rev. 341, 341 (1949)

Means-ends rationality, Fiss argued, was the core of the anti-discrimination principle;[57] yet means-ends rationality could not, absent elaborate mental gymnastics, identify those policies that offended the equality norm. To make the point, Fiss borrowed an example from Paul Brest: "How should a court treat a [public] school principal's decision, based solely on aesthetics, to have black and white students sit on opposite sides of the stage at the graduation ceremony?"[58] Fiss thought it obvious that such a decision would violate the Equal Protection Clause but that the anti-discrimination principle could not easily reach this conclusion because the school principal's chosen means are extremely well suited to the end.[59]

The criticism is indeed telling, but only against a feeble version of the anti-discrimination principle. It is always possible to concoct *some* end that any challenged policy fits perfectly, especially if aesthetics counts as a permissible end. There is, after all, no accounting for taste. If aesthetics justifies racial segregation on a graduation stage, it would also justify racial segregation on a school-by-school basis: the pattern of black and white children walking to their respective separate schools may be more pleasing to observers – purely as a matter of aesthetics, mind you – than the chaotic pattern that results from integrated schools. Yet such a result is manifestly absurd.

In the foregoing examples, we might readily say that "aesthetics" is an impermissible justification for treating people differently on the basis of race. That judgment seems easy enough given that an aesthetic taste for seeing children separated on the basis of race is likely to be related to other, more pernicious, attitudes about race. More broadly, these examples show that any plausible account of means/ends scrutiny must include some specification of what ends are permissible. To have any teeth at all, means/ends scrutiny cannot be about fit alone.

Current equal protection doctrine recognizes this point by asking whether racial classifications are narrowly tailored to serve *compelling* interests. What is this if not an inquiry into whether the ends served by a racial or other presumptively invalid classification are sufficiently weighty to justify the classification?

To see the role that ends scrutiny plays in current doctrine, it is worth asking what goal heightened scrutiny serves. On one account, the compelling interest test is solely a means for distinguishing legitimate from illegitimate purposes. If a challenged policy is not narrowly tailored to advance a compelling interest, courts assume that it serves an invalid purpose, such as racial or gender subordination, and strike it down. There is considerable support in the case law for understanding the compelling interest test in this way.[60]

However, the compelling interest test is over-inclusive as a mechanism for discovering illicit purpose. Suppose that a fire department hires only men. One explanation for such a policy, perhaps the most likely, is illicit sex-stereotyping. Yet, the

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[57] Fiss, supra note 11, at 111.

[58] Id. at 116 (quoting Paul Brest, Processes of Constitutional Decisionmaking 489 (1975)) (internal quotation marks omitted).

[59] Fiss, supra note 11, at 112.

[60] See Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) ("[T]he purpose of strict scrutiny is to 'smoke out' illicit uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."); see generally Rubenfeld, supra note 10, at 432-44.

compelling interest test will condemn the policy even if uncontroverted evidence shows that no sexist thoughts entered the minds of the fire department's policymakers. Imagine that these policymakers testify that their sole motivation was financial; they acknowledge that there are some women who could satisfy a strength requirement that they sincerely believe to be essential for doing the job, but they claim further that there are not enough such women to justify the screening costs. Even if the court believes each of these claims, the compelling interest test would condemn the blanket exclusion of women applicants. The fact that a generalization based on a presumptively invalid criterion happens to be true as a statistical matter does not justify the criterion's use in particular cases.[61]

The over-inclusiveness of the compelling interest test could be explained in prophylactic terms. The *real* targets of the Equal Protection Clause, on this view, are actions that reflect illicit motive, but because of the difficulty of proving motive, the law presumes that a racial or other proscribed classification that cannot satisfy strict scrutiny was adopted or employed because of an illicit motive.[62]

Alternatively, one can understand the compelling interest test as a limit on ordinary cost-benefit analysis. In this view, the law permits some use of presumptively invalid classifications, but, because of the dangers of such classifications, it does so only when the benefits very clearly outweigh the costs.[63] This account makes sense of the intuition that in the fire department example we would not permit sex to be used as a proxy for strength even if we ignored the problems of proving motive.

I do not attempt to resolve the question whether the compelling interest test is best understood as simply about discerning illegitimate purposes or also includes a cost-benefit component. I do note, however, that either understanding requires that courts distinguish among different sorts of ends. They cannot simply inquire whether the means fit whatever ends the government chooses to pursue.

That there is some weighing of ends under the cost-benefit view of the compelling interest test seems obvious enough, but even under the prophylactic view, ends analysis is necessary. Ends analysis is needed to sort sham from real purposes, because of the possibility of articulating some purpose to which any policy is narrowly tailored. To return to Brest's example, aesthetics cannot ordinarily count as a compelling interest because of the substantial risk that aesthetic judgments reflect or disguise illicit judgments of other sorts.

Thus, even as debate continues about the justification for the compelling interest test, there is no doubt that it includes some weighing of ends. Fiss's critique – in targeting a version of the anti-discrimination principle that focuses solely on fit – does

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[61] See, e.g., Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975) (finding unconstitutional a provision of the Social Security Act that limited payments to survivors of deceased wives and mothers but not fathers and husbands even though "the notion that men are more likely than women to be the primary supporters of their spouses and children is not without empirical support.").

[62] See David A. Strauss, The Ubiquity of Prophylactic Rules, 55 U. Chi. L. Rev. 190, 204 (1988).

[63] See, e.g., Erwin Chemerinsky, Constitutional Scholarship in the 1990s, 45 Hastings L.J. 1105, 1117 (1994) (reviewing Public Values in Constitutional Law (Stephen E. Gottlieb ed., 1993)) ("The determination of whether there is a sufficiently compelling interest to override a right is inherently about balancing.")

not apply to modern anti-discrimination law. More broadly, whether or not *Groups and the Equal Protection Clause* fairly characterized the anti-discrimination principle in 1976, the intervening years have shown that a framework of anti-discrimination can indeed accommodate the anti-subordination concerns that moved Fiss.

Consider, in this regard, one of the most contentious questions in equal protection doctrine: what sorts of interests are sufficiently weighty to justify race-based affirmative action, and under what circumstances? Justice Powell's opinion announcing the judgment of the Court in *Regents of Univ. of California v. Bakke*,[64] stated that "the interest of diversity is compelling in the context of a university's admissions program."[65] Whether that view reflects current law is an open question.[66]

Fiss was right, of course, that means/ends analysis cannot tell us whether an interest such as diversity is compelling,[67] but wrong, I think, to conclude that the anti-discrimination principle is deficient as a consequence. Constitutional doctrine is rarely self-applying. Nonetheless, a doctrine that asks for especially strong justifications for some kinds of action provides real if not complete guidance to decision makers. Or, to put the point in a way that emphasizes that an anti-discrimination principle can leave room for Fiss's group-disadvantage principle, the fact that a challenged race-conscious government measure benefits members of a traditionally and still oppressed group should be relevant to the question whether the measure serves a compelling interest. The group perspective enters into the analysis on the compelling interest side of the ledger. In my view, this does not require us to "stretch and strain" the anti-discrimination principle,[68] but only to flesh it out.

IV. Conclusion

Viewed from one perspective, *Groups and the Equal Protection Clause* is a period piece, a relic of a more egalitarian but bygone era. Constitutional doctrine has rejected each of the central features of Fiss's group-disadvantage principle: facially neutral laws burdening subordinated groups receive no heightened judicial scrutiny; race-conscious government action that benefits such groups is presumptively invalid; and Congress has no substantive power to expand the judicial protections for equality.

Yet, even as the Supreme Court has embraced formal equality at nearly every turn, the last quarter century has witnessed an expansion in the coverage of anti-discrimination norms. Statutory prohibitions on age, disability, and sexual orientation discrimination have been enacted. And although the path remains rocky, even the Court

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[64] 438 U.S. 265 (1978).

[65] Id. at 314 (opinion of Powell, J.)

[66] *Compare* Hopwood v. Texas, 78 F.3d 932, 944 (1996) (finding that Justice Powell's *Bakke* opinion is not binding precedent on the question whether diversity is a compelling interest in university admissions) *with* Hopwood v. Texas, 85 F.3d 720, 723-24 (5th Cir. 1996) (Politz, Chief Judge, joined by King, Wiener, Benavides, Stewart, Parker, and Dennis, Circuit Judges, dissenting from the denial of en banc review) (arguing that Justice Powell's *Bakke* opinion is controlling). See also Johnson v. Bd. of Regents of Univ. of Georgia, 263 F. 3d 1234, 1244 (11th Cir. 2001) ("We need not, and do not, resolve in this opinion whether student body diversity ever may be a compelling interest supporting a university's consideration of race in its admissions process.")

[67] See Fiss, supra note 11, at 135-36.

[68] Id. at 171.

has broadened the scope of its proscription on sex stereotyping,[69] while admitting gays and lesbians into the circle of protected persons.[70] Especially in *United States v. Virginia*[71] and *Romer v. Evans*,[72] the Court's willingness to see the reality of exclusion for bona fide social groups reflects an understanding of the Equal Protection Clause that is both an interpretation of the anti-discrimination principle and, at bottom, consistent with the understanding Professor Fiss urged in 1976. Although Fiss did not think so, the anti-discrimination principle is broad enough to do much of the important egalitarian work that he so articulately championed in *Groups and the Equal Protection Clause*.

[69] In *United States v. Virginia*, 518 U.S. 515 (1996), the Court appeared to apply something like strict scrutiny to a sex classification, requiring an "exceedingly persuasive justification" for the Virginia Military Institute's all-male student body. *See id.* at 531. However, the Court's most recent sex discrimination decision, *Nguyen v. INS*, 121 S. Ct. 2053 (2001), is considerably more deferential to the government. See also Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.").
[70] See Romer v. Evans, 517 U.S. 620, 635-36 (1996).
[71] 518 U.S. 515 (1996).
[72] 517 U.S. 620 (1996).