Issues in Legal Scholarship

THE ORIGINS AND FATE OF ANTISUBORDINATION THEORY

2004 *Article* 20

Another Equality

Owen Fiss*

*Yale Law School,

Issues in Legal Scholarship is one of The Journals of Legal Scholarship, produced by The Berkeley Electronic Press (bepress).

Another Equality*

Owen Fiss

Abstract

Returning to "Groups and the Equal Protection Clause" after 25 years, this essay responds to the many comments that it provoked and that are presented in the Symposium. It identifies the shift in civil rights practice that led me to question the then prevailing norm of antidiscrimination and to formulate an alternative, first called the group-disadvantaging principle, now known as antisubordination, that more fully responds to the problems of social stratification associated with the racial caste structure that scarred this nation from the beginning. My argument was largely premised on the view that the status of groups and the welfare of individuals are inextricably linked, but in this essay I go beyond that and explore justifications for antisubordination that make the character of community central. I also chart the struggle between antisubordination and antidiscrimination as a gloss on equal protection in a variety of contexts, including school desegregation, the challenge to standardized employment tests, and affirmative action. The role of Congress in advancing the antisubordination principle during the waning days of the Second Reconstruction is duly noted and defended, but without qualifying in any way the importance I attach to securing a more robust place for antisubordination in the work of the Supreme Court. The essay closes with a formulation of the challenge ahead, above all, the elimination of the structures of subordination responsible for the persistence of the black underclass, and calls upon the Court to propound a theory of equal protection adequate for that challenge and for the Third Reconstruction.

*I am most grateful to the editor of this symposium and all those who participated in it. I am honored by their attention and have been deeply stirred by their comments. I also wish to acknowledge the many important contributions that my research assistants, Michael Gerber and Thomas Crocker, have made to this essay.

"Groups and the Equal Protection Clause" was a way station. I sensed the inadequacy of the antidiscrimination principle and sought to articulate another principle that would more fully respond to the dictates of justice. I there referred to it as "the group-disadvantaging principle," though in the decades following it has been variously referred to as the anticaste, antisubjugation, and, more generally, the antisubordination principle.

Antidiscrimination is transaction focused. It concentrates on the process through which a scarce opportunity is allocated or a burden imposed on an individual and seeks to regulate the criteria that might be used in that process. It assumes a finite list of disfavored criteria – race, religion, sex, etc. – and forbids that the allocation or decision be based on those criteria. Although the rule against discrimination is sometimes cast in terms of the "motive" or "intention" of the decisionmaker, it might more properly be understood as regulating the criterion, ground, or basis of the decision – what might, in an objective sense, justify the decision.

As a regulatory device, the ban on discrimination seeks to further transactional fairness. It seeks to make certain that individuals are treated fairly in the selection process. (This explains why antidiscrimination laws are often called "Fair Employment Laws" or "Fair Housing Laws"). To reject a black applicant for a job on the basis of race is to treat him unfairly. The crucial premise underlying that judgment is that the individual's color is unrelated to his performance on the job.

Antidiscrimination can thus be seen as an expression of instrumental rationality, as the permissibility of a practice turns not on the worthiness of the end pursued or the severity of the harm caused, but rather on the relationship between means and ends. In this account we must assume that the chosen end, for example, productivity, is permissible or legitimate, though, as explained in "Groups," the standard for making such substantive judgments is extraneous to the antidiscrimination principle itself and an indication of its incompleteness.

As a theoretical matter, the antidiscrimination ban should be relaxed whenever the use of the criterion is functionally related to some permissible end. Accordingly, the ban on sex discrimination in Title VII of the Civil Rights Act of 1964 is qualified to permit the use of sex as a criterion of employment when it is a bona fide occupational qualification (BFOQ). It was assumed by the sponsors of the legislation that it would be perfectly permissible for a female patient in a hospital to insist upon a female nurse, and the BFOQ was created to accommodate such preferences. In the case of race, however, the instrumental logic of antidiscrimination fails to account for the law. The Title VII ban on discrimination against blacks is absolute, even though there are situations in which the use of race might be functionally related to an end – efficiency – that is presumably permissible.

By way of example, I imagined a social setting in which those who were inclined to use a local restaurant had an antipathy towards blacks and a strong preference for white waiters. Title VII would prohibit the restaurateur from accommodating those preferences, even though the restaurateur might have acted for no other purpose than to maximize profits. Of course, faced with a choice between accommodating the customers' preferences and enhancing the employment opportunities of blacks, we would readily favor the latter. But nothing within antidiscrimination theory, focusing as it does

on isolated transactions and the fit between means and ends, gives us the material for making that choice.

In a similar vein, I also noticed that there are the situations in which race, though itself unrelated to any legitimate purpose, is used as a proxy for a criterion that is functionally related to such an end. Standing by itself, race is unrelated to productivity, but there are situations in which educational attainment is an important indication of performance and in which, due to the notorious inequalities of Jim Crow schools, the educational level of blacks might be lower than that of whites. Would it be permissible, I asked, to use race as a proxy for educational achievement? Certainly not, yet as with the decision denying a restaurateur the capacity to accommodate customers or third party preferences, it is difficult to derive that answer from antidiscrimination theory alone. The use of proxies minimizes the costs of more particularized determinations, and thus may be rational from the businessman's perspective. So why would we ban the use of race as a proxy in such cases?

The problem for antidiscrimination theory arising from using race as a proxy is not just an artifact of the Jim Crow era, but as David Strauss points out, is of great significance today. It is at the heart of the debate over "racial profiling," where the use of race becomes rational because it is statistically related to another criterion that is concededly an appropriate basis of decision. By way of illustration, Professor Strauss points to the Supreme Court decision in United States v. Martinez-Fuerte (1978), which allowed immigration officials – stationed at a fixed point on the interstate highway between San Diego and Los Angeles – to stop motorists of "apparent Mexican ancestry" for questioning concerning their status in the country. "Apparent Mexican ancestry" was used as a proxy for those likely to be illegal immigrants. Although that relationship was sustained in only 20 out of 100 cases, for the Court that was sufficient, given available alternatives and the minimum intrusion (a momentary stop on a highway), to endow the practice with rationality.

In the years following Martinez-Fuerte, the decision and the practice of using race or its near cousin as a basis for assuming that an individual has engaged in an illegal activity have come under increasing criticism. This criticism has declined only a little in the post-9/11 era, in which the Department of Justice has used "Arab ancestry" or "apparent Middle Eastern ancestry" as a proxy for dangerousness. Those protesting against racial profiling invoke the language of antidiscrimination but transcend its underlying logic because these practices cannot be faulted for being irrational. What, then, is the basis for the objection?

Confronted with such puzzles, Michael Dorf sensibly invites us to explore the underlying theory of antidiscrimination and to see whether that principle could be adjusted to accommodate our deeply felt intuitions. Such an adjustment would obviate the need to move to antisubordination and thus would preserve antidiscrimination. In this spirit, some have suggested that the antidiscrimination principle be adjusted to condemn not only present but also past discrimination. The argument would be that the rule against discrimination seeks not just to guard against unfairness in the specific transactions under scrutiny, for example, the refusal to hire blacks, but rather the unfairness inherent in the educational system that gives rise to the differences in achievement or in the very formation of the customers' preferences that makes present discrimination rational. The

appeal of such an argument is manifest, yet there is nothing in antidiscrimination that justifies the shift from the present to the past or the emphasis on the general background conditions that shape the transaction under scrutiny.

A defender of antidiscrimination, such as Professor Dorf, might also criticize Martinez-Fuerte on the ground that the ends furthered by the practice of the immigration authorities are not sufficiently compelling to justify the harm. Such an argument moves us beyond the instrumental rationality of antidiscrimination – is the criterion (race) functionally related to the end (law enforcement)? – to a more substantive conception of rationality – how important are the ends served compared to the harm inflicted? It also inevitably entails a consideration of the consequences of the practice for a group. The harm in Martinez-Fuerte, considered transaction-by-transaction and measured in terms of the individuals involved in the transaction, is relatively trivial. It consists of a momentary stop on the highway. The real harm is far more substantial, but such an assessment necessarily introduces a group dimension: The policing policy leads us to think of persons of "apparent Mexican ancestry" as non-citizens. To conceive of the harm of Martinez-Fuerte and other cases of racial profiling in group terms, and to engage in substantive normative judgments, necessarily modifies antidiscrimination in crucial respects and points us toward antisubordination.

Sometimes race is used as a positive rather than a negative proxy, as in affirmative action. In these cases the defenders of antidiscrimination are again embarrassed, now by the fact that our attitude towards the use of the supposedly forbidden criterion switches. We may protest the use of race in Martinez-Fuerte as a proxy for criminality or dangerousness, but not when it is used as a basis for preferring blacks for university admission or the award of radio and TV licenses, a practice that has been defended on the ground that it enhances the diversity of opinion in the classroom or on the airwaves. Admittedly, inclusion of blacks is different than exclusion, but antidiscrimination, focusing as it does on means-end rationality, cannot accommodate that difference and explain why inclusion is a permissible goal and exclusion not. Nor can antidiscrimination explain why diversity of opinion is so much more compelling than the ends served by negative proxies, like efficiency or law enforcement. Professor Dorf virtually acknowledges the incompleteness of antidiscrimination in such cases when he says of the 1979 United Steelworkers v. Weber decision – which squared preferential treatment for blacks in an on-the-job training program with what appeared to be an absolute ban on racial discrimination – that it was "based on the statute's legislative history and the context in which it arose." What was it in the legislative history and context that was guiding the Court?

Antisubordination is not insensitive to transactional unfairness, either in the context of affirmative action or the more traditional Jim Crow setting, where, for example, blacks are excluded on the basis of their race, but it is founded on another concern altogether – social stratification. The underlying logic is substantive and, as a concern for social stratification always implies, group- oriented. The overarching idea of the antisubordination principle is that certain social practices, including but not limited to discrimination, should be condemned not because of any unfairness in the transaction attributable to the poor fit between means and ends, but rather because such practices create or perpetuate the subordination of the group of which the individual excluded or

rejected is a member. In the development of this principle, the situation of blacks was central, which is not at all surprising given their utterly deplorable social condition and the intention of the framers of the Equal Protection Clause and civil rights statutes – to eliminate practices that maintain or aggravate the racial caste system that has so scarred American history.

Understood in these terms, antisubordination can be seen, as Jack Balkin and Reva Siegel rightly note, as an indispensable supplement to antidiscrimination. Antisubordination resolves many of the puzzles of antidiscrimination law and fills many of the explanatory gaps. Antisubordination helps explain why certain classifications or criteria (race) are strongly disfavored, while others are somewhat disfavored (sex) and others not disfavored at all (eye color). Even within the domain of race, it helps explain the asymmetry introduced by affirmative action – why a policy that disadvantages whites is less disfavored than one that disadvantages blacks. Antisubordination explains why one practice is labeled "reverse discrimination" (or in the European tradition, "positive discrimination") while the other is labeled simply "discrimination." Antisubordination also explains why certain racial groups (blacks and Hispanics) receive preferential treatment and others (Asians) typically do not.

Antisubordination also explains why accommodating third party racial preferences cannot be tolerated even if the business's only interest is wealth maximization. Such an accommodation would only perpetuate the subjugation of blacks. Similarly, antisubordination explains law's stance towards proxies. It explains why certain uses of race as a proxy – blackness as a proxy for low educational attainment or dangerousness – are proscribed, regardless of how "accurate" or "rational" those uses of race may be deemed by various decisionmakers. Antisubordination also explains the differential stance of antidiscrimination law toward positive and negative proxies – black is an acceptable proxy for inclusion but not for exclusion or the imposition of other disadvantages – regardless of the margin of error in the statistical generalizations. Even more, antisubordination explains why we might prohibit the direct use of race even when the use of race is functionally related to a legitimate end and thus there is no transactional unfairness.

"Groups" was written in 1975-1976, and at that time there were few cases where the use of race was forbidden even when it was functionally related in some direct sense to a legitimate end. So I used by way of illustration Paul Brest's hypothetical of the principal who segregates black and white students for purely aesthetic reasons. This was, as Professor Strauss and I agree, a trivial example, but that could not be said of the 1984 decision of the Supreme Court highlighted by Professor Strauss, Palmore v. Sidoti, where an award of custody predicated on race was set aside even though the Court was prepared to accept the finding below that the award would serve the best interest of the child. The case arose from Florida. The mother and the man who was both her first husband and the biological father of the child were white. After a divorce, the mother remarried a black man, and the Florida court rested its decision awarding custody to the biological father on a concern for the prejudice that a child would suffer from growing up in an interracial household (the biological mother and her new husband). The Supreme Court in Palmore did not use the language of antisubordination, but what else could it have had in mind when it set aside the award of custody by the Florida court and said: "Private biases may

be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."

Such interstitial or supplemental uses of antisubordination outlined by Professors Balkin and Siegel are important. Indeed, seeds for "Groups" might have been planted when, in my earlier work, most notably "A Theory of Fair Employment Laws" (1971), I began to puzzle over the shortcomings of the antidiscrimination principle and sought to extend that principle beyond its logical bounds in order to meet the perceived difficulties. By the time I wrote "Groups," however, I more fully grasped the inadequacies of the antidiscrimination principle and tried to formulate another theory of equality altogether. The result – the group-disadvantaging principle – was offered not as a supplement to antidiscrimination, but rather as an independent principle to govern the interpretation of the Equal Protection Clause and civil rights statutes. In the encounter with Jim Crow during the early years of the Second Reconstruction, no choice had to be made between antidiscrimination and antisubordination. Excluding blacks from a firm or a university, or denying them the vote or jobs, or segregating blacks in school assignments as Jim Crow did, offended both antidiscrimination and antisubordination. Yet as the Second Reconstruction unfolded and as the law began to encounter new and different challenges, it seemed more and more important to me to mark the difference between these two principles and to establish a priority between them.

One such challenge was affirmative action, which gained increasing saliency during the early 1970s. Antisubordination, or the group-disadvantaging principle, was in fact offered in "Groups" as a way of sustaining the practice of giving a preference to blacks in the allocation of scarce opportunities. In Regents of the University of California v. Bakke (1978), handed down two years after "Groups" appeared, the Supreme Court sustained the policy of preferring blacks in university admission, but with no clear rationale – the majority was divided. For the next twenty-five years, as the personnel of the Court changed, the constitutionality of affirmative action remained in the balance. Although affirmative action continued to spread and become more and more entrenched in industry, government, and higher education, key decisions of the Burger and Rehnquist Courts, most notably City of Richmond v. J.A. Croson Co. (1989) and Adarand Constructors, Inc. v. Pena (1995) indicated a marked hostility towards it.

Eventually, in the June 2003 University of Michigan Law School decision (Grutter v. Bollinger), affirmative action was sustained by the Court in the university context under a rationale – to enrich the educational environment by presenting diverse viewpoints – that on its face might seem more reflective of antidiscrimination than antisubordination: It was Justice O'Connor who spoke for the Court, and her decision was premised on the view that racial classifications are suspect and can be sustained only if they serve a compelling purpose and are narrowly tailored to serve that purpose. She rested her judgment on the view that creating diversity in the educational setting – seemingly the same rationale offered by Powell in Bakke – is a compelling purpose, and that an indeterminate, though nondecisive plus for blacks, Hispanics, and Native Americans, is narrowly tailored to furthering that end.

O'Connor's opinion in the Michigan case utilizes the language of antidiscrimination, yet we can see the substance of antisubordination at work, guiding her judgment. Concern for social stratification explains why race traditionally has been

treated as suspect, why diversity is deemed sufficiently compelling, and why O'Connor is prepared to say that the fit between means and end is tight. Beyond that, antisubordination provides a stronger and better justification for the practice sustained and endows the Court's decision with greater force than that supplied by the stated rationale. Antisubordination functions in the Michigan cases as a shadow rationale, compensating for the weakness of diversity understood in the terms originally offered by Justice Powell in Bakke, that is, as a way of enriching the educational environment.

The weakness of the diversity rationale is manifest. No explanation is given for why the intellectual diversity provided by increasing the number of students from various racial or ethnic groups is favored over the diversity of opinion that would be increased by favoring religious, economic, political, or geographic groups. True, admissions officers can take the diversity offered by membership in these other groups into account, but members of these groups do not get the automatic plus that members of ethnic or racial groups do. Nor does a regard for diversity explain why blacks, Hispanics and Native Americans get an automatic plus, but members of other racial or ethnic groups, for example Asians, do not, even though they have as much to offer by way of intellectual diversity. Beyond that, it is hard to imagine that diversity, conceived of purely as a means to enrich the educational environment – almost as a pedagogic technique – has the normative force to justify or overcome the claims of unfairness voiced by those who do not get the automatic plus, some of whom are members of other minorities.

Although O'Connor speaks in terms of diversity, there are scattered indications that she has something else in mind than diversity as it was understood by Powell. Arguably for O'Connor, diversity is not just a technique to enhance the educational environment, but also and perhaps more fundamentally aims to give members of the most disadvantaged groups a greater share of the privileged positions in society, access to which are controlled by admission to various elite institutions like the University of Michigan Law School. "Effective participation by members of all racial and ethnic groups in the civic life of our Nation," O'Connor declares, "is essential if the dream of one Nation, indivisible, is to be realized," and she goes on to explain why access to the premier law schools is necessary for this purpose. On this reading O'Connor seeks not only, as Powell did, a diversification of opinion, but also a diversification within the structures of power. Accordingly, we should not be surprised to see the Court sustain affirmative action beyond the university context, and apply the so-called diversity rationale in employment and commercial contexts, for example to the hiring and promotion of public officers, such as police and firemen. Such an understanding of the Michigan decision not only broadens its reach, but also yields a more appealing account of affirmative action, and in so doing rests more on antisubordination than antidiscrimination.

Antisubordination conceives of affirmative action not as a means of enriching the educational environment, but rather as a strategy for ending the subordination of disadvantaged groups. It gives individual members of those groups a larger share of the positions of power and prestige in society than they might otherwise receive. Not only does this improve the positions of the individuals who are the specific beneficiaries of the program, but it alters the relative position of the group itself because more members of that group have positions that once belonged exclusively to the more

privileged groups in society. Once the positions of a good number of the members of the subordinate group begin to change, then the position of that group itself and all those identified with it – not just those who receive the prized positions – will change. The danger that these individuals will see themselves as inferior simply by virtue of their group membership will be minimized. Even more significantly, the attitudes of others will also change. Affirmative action for blacks thus can be seen, as Daniel Sabbagh elaborates and as a second reading of O'Connor's opinion suggests, as part of the process of altering people's expectations and understanding of what it means to be black. Only equals will be treated as equals.

To achieve this goal – what Sabbagh calls "racial dehierarchization" and others might call the eradication of caste – the institutions to which the members of the disadvantaged group are admitted must retain their prestige and power. That is one reason why universities pursuing affirmative action cannot drop all pretense of selectivity and simply admit students on a random basis. Granted, there is a danger that the admission of blacks or members of other disadvantaged groups into these select institutions will not alter the positions of these groups. For example, the achievements of all blacks, even those who do not need the additional plus, might be called into question on the theory that they only are admitted to these elite institutions because of the extra advantage they received on account of their race. The assumption underlying affirmative action is that these doubts will be dispelled by the performance of blacks within the school and the critical importance, in the eyes of so many, of simply having the diploma in hand. A Michigan graduate is a Michigan graduate.

Whites who might otherwise be admitted were it not for the preferential treatment of blacks, Hispanics, Natives Americans, or members of other disadvantaged groups have a grievance. They can claim that they are being treated unfairly when their competitive position is impaired because of their race or national origin. Such a claim presupposes the continued vitality of meritocratic criteria in the admissions process, as indeed must be the case if the university is to maintain its elite status. The sense of grievance expressed by those who are not preferred is real and will persist no matter whether the governing principle is antidiscrimination or antisubordination. An important difference arises, however, as to how the law views that grievance. Antidiscrimination grants the grievance constitutional status and lends force to the claim that the university is violating the Equal Protection Clause; there is no denying that preferential treatment is a form of discrimination based on race. Under antisubordination, however, the unfairness can be acknowledged without endowing it with constitutional status.

In addition, antisubordination allows us to defend affirmative action as a means to an end that is highly favored, if not required, by the Equal Protection Clause. As a result, the unfairness experienced by those who are disadvantaged in the competitive process can be justified as a sacrifice incurred in order to achieve a transcendent goal – accelerating the process by which caste and its cognates are eliminated. Antisubordination thus operates as the rationale for the preferential treatment and supplies the normative force necessary to justify the sacrifice or suffering inflicted through pursuit of this policy. Creating diversity of opinion and the other justification offered for affirmative action (providing role models; making certain that there are lawyers and doctors to serve black neighborhoods, etc.) are worthy and important, and

thus sufficient to render affirmative action rational, but are not sufficient to justify the sacrifices that it entails. In contrast, eradicating structures of subordination is an imperative of justice.

In this way, antisubordination renders preferential treatment – giving racially defined disadvantaged groups a plus in a competitive process – legally *permissible*. It also has a role in defining what is *required* by the Equal Protection Clause and civil rights statutes. Specifically, the antisubordination principle condemns practices that systematically harm blacks and other disadvantaged groups but that elude antidiscrimination because they do not entail the use of a forbidden criterion or embody a forbidden classification. Antisubordination, but not antidiscrimination, can reach seemingly innocent employment criteria, such as performance on standardized tests that have a disparate impact.

Some such tests may have no relationship whatsoever to performance. An example would be a test on Latin given to production workers, which might in fact give an edge to whites on the assumption that Latin is taught in schools that are predominantly white. In such a case, the test could be seen as a subterfuge or the functional equivalent of race: There is no relation between means and ends and thus the test is irrational. There are, however, many tests that are in fact predictive of performance but still have a greater adverse effect on blacks as a group than on whites due, for example, to inequalities in the educational system. With such tests there is neither an element of instrumental irrationality nor a claim that the selection is made on the basis of race or its equivalent. For that reason, the office of antidiscrimination is exhausted. This is not true of antisubordination.

Antisubordination does not necessarily forbid the use of such tests. Rather it puts pressure on the employer to undertake what might be seen as another form of affirmative action – to develop new tests that lessen the exclusionary impact on blacks. The test eventually developed might actually be a better predictor of performance and thus economically rational for the company to adopt on its own. The bite of antisubordination, however, arises not when an employer is compelled to further his economic self-interest, but rather when an economic sacrifice is required. Such a sacrifice would be called for even when the test that minimizes the adverse impact on blacks is not a better predictor of performance, or even when the costs of developing or administering the test exceed the gains from its enhanced predictive power.

In this way, antisubordination might call for a sacrifice of productive efficiency in a way that antidiscrimination does not. True, on my assumption that the differential impact of the challenged test is traceable to discrimination in the public education system, it can be argued that although the test itself is not discriminatory, it perpetuates discrimination. Still, antidiscrimination does not explain why the company's performance should be judged on the basis of the discrimination it perpetuates as opposed to the economic interests it currently furthers. Nor does it explain why the company, which, after all, might have just moved to the community from abroad and thus is in no way implicated in the existing educational system, should be held accountable for the differential impact. It is the present effects of the test – the subordination of blacks – that constitutes the wrong and requires a sacrifice of efficiency to avoid the harm.

Those who conceive of law as a means of maximizing total welfare in an economic sense may well object to such sacrifices. Yet these sacrifices can be justified as an incident of citizenship, much like the sacrifices – disorder and impairment of reputation – imposed on citizens in order to fulfill the larger purpose of the First Amendment, namely, to preserve the vitality of public debate. The sacrifices of equal protection, much like those called for by free speech, must be reasonable or proportional to the gains achieved. In the language of the Americans with Disabilities Act of 1990, employers must make a "reasonable accommodation." Or to use the language of Griggs v. Duke Power Co. (1971), employers cannot use an employment test that has a differential impact on blacks unless it is adjudged a matter of "business necessity."

The difference between antisubordination and antidiscrimination is also felt in the context of school desegregation. Antisubordination can reach so-called de facto segregation, while antidiscrimination cannot. De facto segregation arises where the school board assigns students to schools, not on the basis of race, but rather according to a criterion such as geographic proximity that may well have an independent, nonracial justification, such as minimizing transportation costs or facilitating parental involvement in the school. Given pervasive patterns of residential segregation, the use of this seemingly innocent criterion produces virtually the same demographic patterns as in a Jim Crow system – whites in one school, blacks in another.

In the employment context, the harm to blacks or other disadvantaged groups from the impact of the standardized test – the facially innocent criterion – is clear: blacks are denied a scarce employment opportunity. In the educational context, a question can be raised as to whether the racially segregated pattern of school attendance perpetuates the subordination of blacks. If there is no harm arising from the segregated pattern alone, then there is no subordination, and even under the antisubordination principle there is no denial of equal protection. Antisubordination and antidiscrimination would produce the same result. A difference would arise, however, if a theory can be formulated – as I believe it can – showing that blacks are harmed by the segregated pattern.

The Supreme Court declared in Brown v. Board of Education (1954) that segregated schools are inherently unequal, and by that it meant that segregated schools impair the educational opportunities of blacks. Certainly, as Rogers Smith emphasizes, segregation hurts everyone, whites and blacks, but it has an especially pernicious effect on blacks. That is why it is not just a bad educational policy, bordering on the irrational, but more pointedly, a denial of equal protection. Admittedly, the Brown assessment was made in the context in which assignments were made on the basis of race, and some of the harm – the stigmatization of blacks – may be attributed to that practice. However, there is reason to believe that the segregated pattern attributable to the neighborhood school plan is also harmful to blacks, especially where students are poor. Segregation in an inner city school, even if based on the neighborhood school plan, might impair the quality of education received by students assigned to that school because it impairs social networks, depresses motivation and aspirations, and lessens the quality of what students inevitably learn from one another. The disadvantage of background is carried into the classroom. Also, students assigned to such a school, knowing that the school board is unwilling to expend the resources necessary to achieve integration even though it would

enhance their education, may feel a stigma akin to that experienced by black students who are assigned to schools on the basis of race.

This theory of harm strikes me and most social scientists who have looked into the matter over the last thirty years as entirely plausible. It can be used in conjunction with antisubordination, though not antidiscrimination, to bring the neighborhood school plan and its use of geographic proximity under scrutiny and require the school board to take steps to eliminate the segregated attendance patterns. The world need not be turned upside down, but once again reasonable sacrifices would have to be made to avoid the harm. In the words of the Court in Swann v. Charlotte-Mecklenburg Board of Education (1971), every effort must be made "to achieve the greatest possible degree of actual desegregation." In demanding this sacrifice, antisubordination would not place any reliance on the fact that at some time in the recent past the school assigned students on the basis of race (which might, as Justice Powell said in his concurrence in Keyes v. Denver School District No. 1 (1973) produce one rule for the South, another for the North). Nor would the judgment turn on establishing complicity of the state in the creation of the segregated housing problem. The denial of equal protection derives immediately and directly from the drawing of the attendance line in such a way that produces racially segregated schools, whites in one set of schools, blacks in another, which impairs the educational opportunities of blacks, and thereby perpetuates their subordination.

De facto segregation and disparate impact caused by standardized tests can be seen as second generation problems. Like affirmative action, these issues became salient in the late 1960s and early 1970s once the tide had turned against Jim Crow and new forms of subjugation became the center of judicial concern. As Professors Balkin and Siegel observe, the shift in the civil rights agenda at this historical moment revealed the limits of antidiscrimination and helped point me toward antisubordination. Yet in formulating the group-disadvantaging principle I also tried to speak to a problem that had been with us from the beginning – how to reconcile the 1948 decision of Shelley v. Kraemer with the state action requirement of the Fourteenth Amendment.

Shelley v. Kraemer involved provisions in real estate deeds that prohibited sales to or occupancy by blacks. Obviously the contracting parties who created such a covenant were discriminating on the basis of race. The private parties relied on the state court to enforce the covenant, yet there was nothing discriminatory about that action by the state. The state court held itself ready to enforce the agreement regardless of whether it excluded blacks or whites. The state's enforcement policy was not based on a racial criterion nor did it include a racial classification. The breadth or seeming neutrality of the state enforcement policy is of no consequence, however, from the perspective of antisubordination. Antisubordination reaches discriminatory action by the state, but also goes beyond it. Any state action that systematically creates, aggravates, or perpetuates the subjugation of blacks – most assuredly a consequence of state enforcement of racially restrictive covenants that invariably excluded blacks – would constitute a violation of equal protection.

In stating this conclusion in "Groups," I strayed further than I should have, as some of the commentators in this symposium, most notably Kenneth Karst and Robin West, have stressed. I reaffirmed the state action requirement in a way that denied that

inaction could be a form of action and thus removed from the scope of the Fourteenth Amendment many of the practices that subjugate blacks and other disadvantaged groups. This was an error, as I subsequently recognized in my work on the First Amendment ("Liberalism Divided" (1996) and "The Irony of Free Speech" (1996)). The failure of the state to do all that it could to prevent a mob from attacking and brutalizing blacks, to use Professor West's example, would certainly be a paradigmatic instance of a denial of equal protection. Of course, inaction becomes action only when the state has a duty to act, as in the example of the lynch mob. This duty need not be explicit in the Constitution – in the case of the lynch mob it is not. Rather, it can arise from a consideration of the constitutional interests at stake, and the options available to the state to protect those interests.

In writing "Groups," my primary concern was not the action/inaction distinction, but rather the elemental riddle of Shelley v. Kraemer itself – how can there be a violation of equal protection when the state did not discriminate? In Moose Lodge No. 107 v. Irvis (1972), in an opinion by William Rehnquist, then a newly appointed Associate Justice, the Supreme Court held that the state grant of a liquor license to a private club that discriminated on the basis of race was not a violation of equal protection. It was the club, not the state, that discriminated, and the state action required a nexus, so Rehnquist reasoned, between the state and the discrimination. That is, the state had to require or encourage discrimination. This decision put Shelley v. Kraemer – assumed to be good law throughout the civil rights era – in jeopardy.

I was very much aware of this threat in writing "Groups" and sought to protect against it. Not only would antisubordination, so I assumed, provide a sound basis for sustaining affirmative action and the then emerging disparate impact approach to equal protection, but it would also bolster Shelley v. Kraemer and undermine Moose Lodge. Antisubordination does not require the state to discriminate in order to make out a violation of equal protection, but only to engage in a practice that creates or perpetuates the subordination of a disadvantaged group. Certainly that could be said of the state practice of enforcing racially restrictive covenants and awarding liquor licenses to clubs that openly exclude blacks, either as members or guests. Little did I know, however, that Moose Lodge not only sought to reverse the prevailing understanding of state action, but also was an incipient repudiation of antisubordination in its entirety, even though, only a year earlier, that principle in effect had been endorsed by the Court in both Swann and Griggs.

The assault on antisubordination launched by Moose Lodge became even more apparent in the 1974 decision in Milliken v. Bradley. To fully appreciate that decision, it must be placed in the context of a series of school desegregation cases that began with Green v. New Kent County School Board (1968), continued with Swann v. Charlotte-Mecklenburg Board of Education (1971), and achieved further development in Keyes v. Denver School District No. 1 (1973). In these cases the Court increasingly brought de facto segregation within the sweep of the Equal Protection Clause. In Green, the Court spoke metaphorically; borrowing the language of Judge Wisdom, the Court declared that the aim of desegregation was a unitary non-racial school system, where there are no black schools, no white schools, just schools. Disallowing a particularly egregious freedom-of-choice plan (initial assignments were made on the basis of race,

and then children could opt-out of the assigned school), the Court did not specify what would meet this "just schools" standard; it simply remanded. In Swann and Keyes the Court refused to abide by the neighborhood school plan, and upheld decrees requiring extensive busing. Once again, the Court did not explicitly rely on antisubordination. Rather, it invoked the state's obligation to correct for past discrimination, and upheld the elaborate busing plans as a way of eliminating segregation attributable to past discrimination. Yet, as I explained soon after those decisions came down ("School Desegregation: The Uncertain Path of the Law" (1974)) the causal chains supposedly linking the present segregation under the neighborhood school plan to the past discrimination were not credible and thus the decrees could not plausibly be regarded as designed to eradicate the vestiges of past discrimination. There was reason to believe that a more powerful theory – antisubordination – was at work.

Milliken v. Bradley, by contract, was a piece with Moose Lodge. The majority opinion was written by Chief Justice Warren Burger (who, oddly, only three years earlier had written the Court's opinion in both Swann and Griggs). The Milliken case arose from Detroit, and involved the validity of a desegregation plan that bused students beyond the city limits to the white suburbs. Technically, the case posed the question of a metropolitan-area remedy, not the neighborhood school plan itself, yet the implications for the entire theory of de facto segregation were unmistakable. In declaring that "absent an interdistrict violation, there is no basis for an interdistrict remedy" and insisting that any violation required what it called "segregative purpose," the Court in Milliken made clear that the demographic pattern at the core of antisubordination – whites in one school (suburbs), blacks in another (city) – was not sufficient in itself to constitute a violation of equal protection.

As usual, there were some ambiguities. Justice Stewart, the fifth vote that Burger needed, wrote separately to say that the case involved not substantive equal protection doctrine but only a question of remedy. A further ambiguity arose from a difference in the interests served by the neighborhood school plan and those served by according a measure of autonomy to separate political entities. Although the neighborhood school plan is largely defended on the ground that it minimizes transportation costs, democratic interests may underlie the respect for local autonomy that Burger demanded. In fact, the metropolitan desegregation remedy approved by the district court in Milliken but disapproved by the Supreme Court would have been less expensive than a desegregation remedy confined to the city.

"Groups" was written in the shadow of Moose Lodge and Milliken and tried to move the law in a different direction. It was published shortly before the Court handed down Washington v. Davis (1976), in which the Court indicated that it was of another mind altogether. The Court went out of its way to reject antisubordination as a gloss on equal protection, and in so doing repudiated the theory condemning de facto school segregation that had its roots in Green, Swann, and Keyes. Nominally, Washington v. Davis was an employment case, involving testing for police officers by the District of Columbia, but it had its biggest effect on schools. At the time of the decision, the District of Columbia's employment practices were covered by Title VII of the Civil Rights Act of 1964, which had been interpreted in Griggs to reach disparate impact claims, and thus to embrace the antisubordination principle. Title VII had been amended in 1972 to cover

employment practices of the various states and the District of Columbia. The Court noted, however, that the suit was filed in 1970, shortly before the amendments to Title VII, and used that as a basis – a pretty slender one, in my view – to speak authoritatively as to what the Equal Protection Clause demanded.

The particular significance of the Court's ruling for education stemmed from the fact that virtually all other activities, including employment, were covered by some civil rights statute. To understand how this came about, and more generally, how the Equal Protection Clause and Title VII are related, the legislation of the Second Reconstruction needs to be placed in historical context. Specifically, we must recall that although the Civil Rights Act of 1964 and the Civil Rights Act of 1968 were bold initiatives, on enacting these measures Congress did not primarily view itself as creating new substantive norms, but only as extending the principle of Brown v. Board of Education to private parties. Title II of the 1964 Act extended Brown to restaurants, hotels, and other places of public accommodation. Title VII of that Act prohibited discrimination on the basis of race by private employers (and extended the same protection to women). Title II of the 1968 Act, enacted after the assassination of Martin Luther King, Jr., reached race-based violence inflicted by persons who were not state officers. Title VIII of that same statute covered private housing. Public education, the precise subject of Brown, was already covered by the Equal Protection Clause itself, so there was no need to enact a substantive norm to regulate that domain.

For public education, Congress only sought to strengthen enforcement mechanisms. Specifically, the 1964 Act authorized the Attorney General to commence school desegregation suits and to intervene in any equal protection suits brought by private parties. Title VI of the same act required the government to deny federal financial assistance to any program or activity that discriminated on the basis of race. At first, the enforcement of Title VI was entirely in the hands of the funding agency, but in the 1970s a practice began of allowing suits to be brought to compel recipients of federal financial assistance to comply with the nondiscrimination rule contained in Title VI (which like Title VII was construed to embody antisubordination). This practice extended statutory coverage to an enormous number of activities, including education, because so many institutions receive federal financial assistance. Yet in the recent Alexander v. Sandoval (2001) decision, the Court denied that Title VI was enforceable by private suit.

Given that the civil rights legislation of the 1960s was understood to be adding enforcement mechanisms to equal protection and extending its coverage to private activities, including employment, it would seem to follow that the same principle should govern both the Equal Protection Clause and Title VII. In Washington v. Davis, however, the Court adopted a bifurcated approach: Antidiscrimination for equal protection and antisubordination for Title VII. At first glance, the Court's willingness to accept antisubordination as a gloss on Title VII seems odd: the precise wording of Title VII, which specifically proscribes discrimination based on race, is less congenial to antisubordination than the Equal Protection Clause. Yet the Court's position may have reflected a respect for precedent. The 1971 decision in Griggs had adopted antisubordination for Title VII under the rubric of disparate impact, though the Court drew heavily on constitutional interpretations to support its understanding of Title VII. Or the bifurcated approach may have resulted from a due regard for the distribution of

powers among the various branches of government: When antisubordination is treated as a statutory principle, the legislature shares responsibility for it and the sacrifices entailed, for Congress could always modify the statute if it so chose.

In any event, because of the common purpose underlying Title VII and the Equal Protection Clause, the distinction drawn between the two and the bifurcated scheme to which it gave rise was and remains inherently unstable. From time to time, the distinction is likely to collapse. In the late 1980s, for example, the Court brought the statute into conformity with its own understanding of the Constitution. The Court held in Wards Cove Packing Co. v. Atonio (1989) that no sacrifice would be required of employers to end the subjugation of disadvantaged groups. Not business necessity but economic rationality – the hallmark of antidiscrimination – would be the test of legality. The legal profession saw Wards Cove as an attack on Griggs and antisubordination. Congress responded in the Civil Rights Act of 1991 by reaffirming Griggs. As a result, antisubordination once again governs employment cases, while schools and other domains not covered by statute are governed by antidiscrimination.

The 1991 Act was part of a larger pattern. In Moose Lodge (1972), again in Milliken v. Bradley (1974), and then most emphatically in Washington v. Davis (1976), the Court declared its hostility to antisubordination and insisted on a return to antidiscrimination. This marked the beginning of a new phase of the Second Reconstruction in which the Supreme Court, once the leader of the reform enterprise, turned against it. The burden of defending the Warren Court achievements fell primarily to Congress. Starting in the mid 1970s, roughly at the time of Washington v. Davis and continuing until the Newt Gingrich Congress of 1994, Congress maintained the civil rights agenda and in effect defended the antisubordination principle. Congress had no inclination to take up school segregation, but, as with the Civil Rights Act of 1991, antisubordination can be found in the Pregnancy Disability Act of 1978 and the Voting Rights Act of 1982 – both altering statutory interpretations by the Supreme Court, one of Title VII of the Civil Rights Act of 1964, the other of the Voting Rights Act of 1965. As previously noted, the Americans with Disabilities Act of 1990, requiring that employers and other parties subject to the act make reasonable accommodations for those with disabilities, also expressed a concern with subordination. The Americans with Disabilities Act sailed through Congress, with little or no resistance, perhaps because the disadvantaged group is, unlike blacks or women, one of which anyone might become a member. The Civil Rights Act of 1991 was hard fought, but in the final hours language used in the Americans with Disabilities Act was incorporated into the 1991 Act and enactment became possible.

This institutional division of labor – antisubordination for statutes, antidiscrimination for the Constitution – is not absolute. There are exceptions. As already noted, antisubordination has had an important supplemental role to play in the formulation of equal protection doctrine. The recent University of Michigan decisions sustaining affirmative action are abundant testimony to this fact and so are the many oddities of antidiscrimination doctrine – disallowing certain negative proxies, permitting positive ones – described above. Even beyond that, the Court now and then has used antisubordination theory as an independent principle in specifying the requirements of the Constitution. One notable instance is the famed 1976 Hills v. Gautreaux decision, in

which the Supreme Court upheld an order requiring the federal housing agency to supply residents of public housing in Chicago with the means to move out of the ghetto to scattered housing in the suburbs. Another is the 1982 Plyler v. Doe decision in which the Court struck down a Texas law denying admission to the public schools to children who were in the United States illegally. Speaking for the Court, Justice Brennan feared that the law would create an "underclass" or a "subclass of illiterates." I think it fair to say, however, though I wish it were otherwise, that decisions like Gautreaux and Plyler are exceptional. As Samuel Issacharoff and Pamela Karlan emphasize in their contributions to this symposium, during the later stages of the Second Reconstruction it was the legislature that principally made antisubordination principle into law.

Why this should be so is not entirely clear to me. "Groups" explained that antisubordination might be more attractive to the legislature than to the judiciary, simply because the legislature is not hampered by norms of craft that make the line-drawing demanded by antisubordination more difficult. But this was a minor concession, and I never anticipated the stark, bifurcated pattern that eventually emerged. That pattern cannot be explained by the terms I offered. In fact, at times courts are called on to apply antisubordination as a statutory principle, and thus encounter the very same difficulties in application likely to be found if antisubordination were treated as the mediating principle of the Equal Protection Clause.

The bifurcated pattern may of course be a happenstance of politics. Professors Issacharoff and Karlan properly emphasize the enormous changes in the electoral process wrought during the Second Reconstruction, largely due to the Voting Rights Act of 1965. The massive disenfranchisement of blacks that was such an integral part of Jim Crow has been brought to an end, and the electoral power of blacks is now more fully felt in the political process. Professors Issacharoff and Karlan point to these changes to explain why the Court's hostility to antisubordination was more effectively countered in the legislative forum. Admittedly, the Pregnancy Disability Act of 1978, the Voting Rights Act of 1982, and the Civil Rights Act of 1991 support their thesis. Yet the failure of Congress to take up school desegregation in a constructive manner, or to address adequately the many abuses blacks suffer in the criminal justice system is evidence to the contrary. Matters took a turn for the worse in 1994, with the seating of the Newt Gingrich Congress, which was responsible for the welfare reform act of 1996 and the Prison Reform Litigation Act of the same year – hardly tributes to newly discovered political power of blacks.

Roberto Gargarella points to a structural deficit of the judiciary – the absence of any incentives that will motivate judges to protect the disadvantaged. He looks to the democratization of the judiciary, that is, an inclusion of the disadvantaged, as a solution to this motivational problem. This theory might well explain why Congress is more receptive to antisubordination, since it is more inclusive – the disadvantaged have the very presence or voice in the legislature that is lacking in the judiciary. Still, once we recognize that the groups that antisubordination seeks to protect are usually low in social and economic power as well as weak in numbers, the difference between the representation of minorities in the national legislature and the federal judiciary is of no great significance. The Black Caucus consists of 39 Congressmen out of 435; it has no member in the Senate. The motivational problem of which Gargarella speaks is not

confined to the judiciary; it is ever present in the legislature. In both branches the disadvantaged must rely, not on interest representation or the presence or absence of the disadvantaged, but on the constitutional commitment to justice and the dedication to public reason as a way of discovering what is just. This dedication is stronger in the judiciary than the legislature simply by virtue of the procedural norms – political independence and the need to justify its action – that limit the exercise of judicial power.

Robin West also seeks to formulate a theory that might explain the hostility of the judiciary to antisubordination. For her, this explanation can be found in the self-understanding of the judiciary as to its function. The very point of adjudication, Professor West argues, is to guard against individual unfairness or the kind of irrationality proscribed by antidiscrimination. I start from another perspective, however: For me, the judicial function is not to eliminate individual unfairness or irrationality, but to declare what justice requires and to transform reality so that it conforms to this standard. Justice rendered can be atomistic, in the sense that West contemplates, but it can also be structural and must be so when the underlying grievance is structural.

In a series of essays written almost contemporaneously with "Groups," most notably, "The Civil Rights Injunction" (1976) and "The Forms of Justice" (1978), I developed the notion of the structural injunction and a theory of adjudication fully suited to antisubordination and other principles of justice that have a more structural character. In so doing, I drew on the efforts of the federal judiciary during the 1960s and early 1970s to implement the mandate of Brown v. Board of Education broadly conceived. Most of these cases arose in the school context, but some involved the protection of constitutional values in prisons, mental hospitals, police departments, and other branches of the bureaucratic state.

At the very moment that the Supreme Court declared war on the antisubordination principle, it launched an attack on the structural injunction. Rizzo v. Goode (1976) was the procedural counterpart to Washington v. Davis, separated in time by mere months. Like the assault on antisubordination, the attack on the structural injunction has not been unqualified; the structural injunction has sometimes been sustained by the Court in prisons, public housing, and even now and then in school desegregation. Yet the general position is unmistakable, and is derived more from the Court's substantive vision – a willingness to acquiesce in the status quo, including the stratification that it entails – than from a sober assessment of the judicial function. The trial judges who embarked on structural reform in an earlier era – figures like Frank Johnson, Jack Weinstein, Henly Smith, and Wayne Justice – saw that activity as entirely consistent with their understanding of their job and many of the norms of their craft that Professor West emphasizes, such as "treating likes alike." Even more, these judges were proud of all that they accomplished. In assessing Professor West's claim, account should also be taken of the fact that in the 1980s and 1990s antisubordination found a comfortable and secure home in the jurisprudence of other constitutional tribunals, most significantly the Supreme Court of Canada, whose judges generally have the same understanding of their function as ours do.

In the bifurcated scheme introduced by Washington v. Davis – antidiscrimination for equal protection, antisubordination for Title VII – the Court implicitly relied on the principle of Katzenbach v. Morgan (1966). Section 5 of the

Fourteenth Amendment gives Congress the power to enforce the Equal Protection Clause, and Katzenbach v. Morgan allowed Congress to use that power to counter a practice that the Court had not deemed a violation of equal protection: the application of an English literacy test in New York elections that effectively disenfranchised a large segment of the Puerto Rican community in the state. Broadly conceived, Katzenbach v. Morgan and the era of which it was a part emphasized the coordination, rather than the separation of powers, and sought to enlist all the branches of government in the reconstructive endeavor then afoot. As a purely technical matter, the Court upheld Title II, and by necessary implication Title VII, of the Civil Rights Act of 1964 under the Commerce Clause of Article I immediately after the statute was enacted; both provisions were applicable only to those engaged in interstate commerce. Yet the Court's judgment was reflective of the underlying principles of Katzenbach v. Morgan.

This principle underlies the position of commentators, such as Professors Young, West, and Issacharoff and Karlan, who primarily look to the legislature to give expression to antisubordination. I believe, perhaps even more strongly than I did when I wrote "Groups," that antisubordination is fully within the competence of the judiciary. Yet in the face of the resurgence of antidiscrimination in Supreme Court doctrine, it is important to acknowledge the congressional power to enact antisubordination as a gloss on equal protection, even if the Court is unwilling to interpret the Equal Protection Clause in such terms. Accordingly, the Katzenbach v. Morgan principle must be defended, in terms more explicit than those offered by West, Young, and Issacharoff and Karlan, against a number of recent developments that have thrown its continuing vitality into question.

Seeking to further the autonomy of the States, the Rehnquist Court has narrowed the scope of the Commerce Power. It held that Congress had exceeded the bounds of that power when it provided a damage remedy for victims of gender-motivated violence. The most direct assault on the Katzenbach v. Morgan principle came, however, when the Court recently considered legislation that had been enacted under Section 5 of the Fourteenth Amendment. In a decision striking down a provision of the Age Discrimination Act, the Court indicated that it would not sustain a Congressional exercise of power under Section 5 unless it itself was prepared to hold the conduct proscribed by Congress a violation of equal protection.

In its most recent application of this rule, the Court upheld the Family and Medical Leave Act, but without qualifying the general precept it earlier had laid down: Congress cannot use Section 5 to enact a view of equality that the Court itself was not prepared to endorse as an interpretation of Section 1. To reach this result – surprising to most commentators – the Court had to extend its view of Section 1 to embrace the antisubordination principle at least as applied to women. The statute in question guarantees employees paid leave to care for family members. In enacting this measure Congress did not seek to proscribe discrimination based on sex, but rather sought to combat the stereotypes that disadvantage women in the workplace (Robert Post, "Fashioning the Legal Constitution: Culture, Courts, and Law," Harvard Law Review, 2003).

This decision can be read as a victory for antisubordination, yet it still leaves the continuing vitality of the Katzenbach v. Morgan principle in doubt. The Rehnquist

Court's attack on this principle has been presented as necessary to protect judicial supremacy, but such a view is unfounded. Even under the most robust reading of Katzenbach v. Morgan, the Court remains the final arbiter of the Constitution. There is no power in Congress to abridge, dilute, or otherwise interfere with any right declared by the Court. The power only moves in one direction – to expand the rights the Court construed the Constitution to provide. Even within this sphere, the authority remains in the Court to decide whether the measure in question is within the power of Congress. In such a case, the issue is not whether the Court itself is prepared to proscribe the conduct or confer the right that Congress has, but whether there is a perceived basis for the action of Congress. Such a rule accords a coordinate branch the deference it properly deserves.

The power given to Congress in Section 5 of the Fourteenth Amendment is the power to "enforce" Section 1 of that Amendment, but there is no warrant to believe, as some contend, that enforcement should only consist of fashioning remedies and sanctions to implement the substantive norms created by the Court or that the Court would be prepared to endorse on its own. Enforcement necessarily includes interpretation. Narrowing enforcement to entail only the creation of remedies would be equivalent to restricting the meaning of "commerce" in Article I, Section 8, to transportation of goods from one state to another, a position the Court took in the notorious 1895 case of United States v. E.C. Knight Co., which excluded manufacturing from the Sherman Act on the ground that it was not "commerce" – a position the Court itself later repudiated. An equally strained interpretation of the word "enforce" in Section 5 would demean the powers of Congress and deny it the prerogatives that properly belong to it as a coordinate branch of government.

I would thus turn back the recent assaults on Katzenbach v. Morgan and defend the right of Congress to embrace antisubordination even if the Court is unprepared to accept it as the governing principle of equal protection. More fundamentally, I believe we need to confront the Court's unease with antisubordination. Washington v. Davis, written by Justice White, did not contain any sustained argument against antisubordination. White complained of the seemingly endless reach of the principle, but never considered the many limiting rules that could be developed, and in fact had been developed in the Title VII context, for bounding the principle. In a similar view, Lawrence Alexander and Peter Schuck complain about the difficulties likely to be encountered by a court in applying antisubordination. As I acknowledged in "Groups," these difficulties might well be greater than those found in applying a stripped-down version of antidiscrimination, with its individualistic orientation and focus on means-end rationality, for under such a rule the judiciary never needs to determine what groups should be protected, how much they should be protected, or who are members of these groups. Yet we must acknowledge, following Professor Dorf's lead, that the legal system has moved considerably beyond such a limited conception of antidiscrimination, and it is hard to believe that the implementation of current antidiscrimination law – requiring as it does substantive judgments concerning the worthiness of the ends pursued or the severity of the harm caused – is qualitatively more difficult for a court to implement than antisubordination. Professors Alexander and Schuck also need to take account of the fact that for more than thirty years courts have implemented antisubordination in the statutory context, particularly in employment and voting, and have surmounted whatever

difficulties courts might encounter in working with such a principle. The crucial issue is not whether difficulties will be encountered, but whether the judgments entailed in antisubordination are within the constitutional competence of the judiciary. Delivering justice is always difficult. Would they desist from Brown because of the difficulties of implementation?

Professor Alexander goes beyond this complaint about the difficulties of implementing antisubordination and voices a more philosophic objection. He sees the Constitution as a bulwark for the protection of individuals and complains that antisubordination, with its ban on practices that subordinate various groups, is inconsistent with this individualistic telos. This objection echoes the concern of a number of Justices who incessantly remind us that the Equal Protection Clause speaks of persons ("nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws") and quote the famous line from Shelley v. Kraemer that "[t]he rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual." By its terms? The Equal Protection Clause does refer to "any person," but that phrase can be understood in any number of ways. It is not the least inconsistent with a recognition of groups or any other social structures that help define the manifold ways people live their lives. Moreover, as a purely analytic matter, the claimed antinomy between antisubordination and the purported individualist telos of the Constitution is without basis. Even the most ardent defender of such an individualist reading of the Constitution must be concerned with the ordering of groups within society because individuals are not only judged on their own achievements but also on the basis of the status of the groups with which they are identified. Although not all groups are intimately connected with individual status, some are, as indeed is the case with race – the central preoccupation of equal protection.

In an effort to define the type of groups of special concern to the Equal Protection Clause, I used the phrase "natural classes," and for that I have been criticized by Richard Ford, Rogers Smith and Iris Young, among others. In retrospect, the choice of phrase was unfortunate. Let me make it clear that in using "natural classes" I did not mean to deny that the groups I had in mind are socially constructed, nor would I deny that law has played a role in that constructive process. I merely sought to distinguish the social groups that were at the center of my concern from wholly ephemeral groups (a group of individuals standing on a street corner) and from those groups wholly created by the law. I wrote against the background defined by the classic Joseph Tussman and Jacobus tenBroek article, "The Equal Protection of the Laws" (1949). My principal purpose was to distinguish social groups, such as blacks, from legal classifications, which according to the framework offered by Tussman and tenBroek also created groups. I used the phrase "natural classes" to mark that difference, not to make a point about social constructionism.

An acknowledgement of the constructive power of law does not allay all the concerns of the critics of antisubordination. To the contrary. It is precisely this constructive power that drives some of my critics, for example, Professors Ford and Schuck, to be particularly fearful of antisubordination. They worry that it will accentuate group identification in American life. Antisubordination will, they claim, make the recognition of groups almost a constitutional necessity, thereby institutionalizing the

difficulties inherent in determining whether an individual is a member of a disadvantaged group. This objection weighs heavily on me, as it did when I wrote "Groups," but does not take sufficient account of the social realities, forcefully described by Professor Karst, to which antisubordination responds. Antisubordination does not create group identification; that has been an almost permanent feature of American life. Rather, antisubordination acknowledges this reality, and seeks to provide a legal principle capable of eradicating the injustice that arises when group identification is turned into a system of subjugation. Admittedly, such a remedial strategy may accentuate group identification, but group identification will be less a source of concern once antisubordination has done its work and group identification ceases to be a source of injustice. Being black or white will be no different than being a Californian or a New Yorker, tall or short, a lawyer or a doctor, or any of the other group identifications we somehow manage to live with.

The most important criterion for the social groups on which I focused is interdependence, by which I meant that the status of individuals is inextricably linked to the status of groups with which they are identified. Because of this criterion, we can see that there is no antinomy between the group-disadvantaging principle and the supposition of an individualist telos for the Constitution – the view that protecting the welfare of individuals is the end of the Constitution. Professor Sabbagh amply makes this point in his defense of affirmative action and the antisubordination theory that underlies this practice. In protecting groups we protect individuals, and often we must protect groups in order to protect individuals. The same idea is advanced in "Groups" itself, albeit in a much abbreviated form and with the additional twist: Although I believe that a regard for the hierarchical relationship among groups is consistent with a regard for the welfare of individuals, the group- disadvantaging principle need not be defended solely in individualistic terms. A proper regard for the structure of society – a communal rationale – might also be a sufficient basis for condemning practices that systematically disadvantage various groups in society.

The difference between the individualist and communal foundations for antisubordination is manifest in the objections that might be raised to slavery. An individualist could condemn slavery because it limits the opportunities and well-being of those persons who happen to be slaves or might one day become slaves. Others may, however, object to slavery because of what it does to the very character of society. It divides society and implies that there is a group of persons that are not fully human and who might be properly thought of as a species of property or animals that can be traded and auctioned. Of course, such a division has profound implications for the welfare of individuals living within that society, but our objection to the division is not necessarily dependent on our estimate of the consequences for individual welfare. We can object to slavery simply because of its impact on the character of the community of which we are a part. It disfigures society. The concern for this disfigurement need not be reducible to a concern for individual welfare, for it might be bedrock, as is the claim that individuals should be treated with equal concern and respect. On this view, the Constitution should be viewed not as an instrument for maximizing individual welfare, as the otherwise differing arguments of Professors Alexander and Sabbagh presuppose, but as a statement of the organizing principles of the community that it governs.

The concern for the impact of various social practices upon communal structure is not confined to slavery. Any social arrangement that introduces profound cleavages or divisions might give rise to a similar offense. For example, the racial system that came into being after the Civil War – identified with the Black Codes, and later Jim Crow – was such an arrangement. Not only did it separate blacks in places of public accommodations, schools, and employment, but it denied them the vote, severely limited their employment opportunities, and restricted where they might live. It also denied them the opportunity to participate in the ordinary governing structures of the community, like the jury and other aspects of the criminal justice system. Jim Crow can thus be seen as an effort to keep blacks in the same social position that they occupied under slavery – as an underclass. It is important to understand, however, that the wrong of Jim Crow arises not from the fact that it perpetuates the subjugation entailed in the master-slave relationship, and thus is a vestige of slavery. Rather it arises from the fact of subordination itself. History is not the wrong, though it helps explain why this group is being wronged. While coming to terms with this history is critical, it is not what drives equal protection. So in the Plyler case, the Supreme Court quite properly struck down a Texas law denying public education to children who are illegal immigrants on the ground that the law was likely to create a caste of illiterates. No claim was made that the Texas law perpetuated slavery or any prior injustice. What was of concern was the future of American society and what the creation of a class of illiterate, illegal immigrants would mean for the country.

To some extent, a choice need not be made between the individualistic and communal justifications for the concern for the status of groups. In large part, both seem to point in the same direction. They warrant a rule condemning practices that systematically and without ample justification disadvantage or subordinate groups. A difference between these two justifications may arise, however, in the inventory of protected groups. The individualist insists on a tight connection – what I call interdependence – between the status of the group and the individual. This condition is met in the paradigmatic case of blacks, and probably other groups, such as Hispanics and women, that have received a generous amount of protection under the Equal Protection Clause and various civil rights statutes. As Mark Tushnet recognizes, however, this condition might not be satisfied in the case of the poor.

Persons who are poor are at a disadvantage in the competitive scramble of life; they do not have the advantages that come, for example, from private schools or being able to draw on elite social networks. Yet they are not disadvantaged because they are members of a group called “the poor.” Their status is not dependent on the status of the group in the way that the status of blacks is determined by their group status. This is why, as Professor Tushnet detected, I was reluctant to extend the group-disadvantaging principle from my paradigmatic case – blacks – to the poor. On reflection, however, it seems that if one grounds the antisubordination or group-disadvantaging principle on a proper regard for communal values, the absence of interdependence should not be decisive. The very existence of a group of persons in society who are desperately poor may introduce the kind of division that, as we said of slavery and Jim Crow, disfigures society: This would be true even if individual members of the group could, in a way not true of blacks or women, sometimes exit from the group. Of course, as Christopher Kutz

illustrates, antisubordination is not the only basis for extending constitutional protection to the poor. He argues that the state denies equal protection whenever it treats the interests of some in state benefits as less important than the interests of others. Still, it is important to acknowledge Professor Tushnet's point: freed of the interdependence requirement, antisubordination may also forge equal protection into a powerful tool for the protection of the poor and for requiring a system of welfare rights.

At the time of Brown, almost all blacks were poor. Race may have been the initial cause of their poverty, but their economic status reinforced and aggravated the forces responsible for their subordination. Even those who would not distance themselves from blacks because of the color of their skin would do so because of their economic condition, or more precisely, the social characteristics associated with poverty. Race and poverty were part of a self-perpetuating dynamic. Over the course of the Second Reconstruction, and in part as a result of policies and programs initiated in that period, poverty among blacks has been reduced. Almost a third of blacks can be considered members of the middle class, defined in terms of income, occupational status, or educational achievement. I regard this development as a remarkable accomplishment of the Second Reconstruction, perhaps of world-historic proportions, and contrary to the suggestion of Professor Schuck, a tribute to the theory – antisubordination – that gave coherence to the many policies and programs of the Second Reconstruction. When, in "Groups," I spoke about the subordination of blacks as perpetual, I was speaking of their past, not of their future, which, I argued, might be changed if more robust strategies such as affirmative action could be sustained, and a whole host of seemingly innocent criteria (standardized employment tests or the neighborhood school plan) could be properly modified to avoid blacks' continued subordination.

The emergence of the black middle class does not render antisubordination obsolete, any more than the variation of economic status among women rendered obsolete the various branches of feminism (for example, the work of Catherine MacKinnon) predicated on the same theory. Even rich blacks are blacks. They enjoy the privileges that wealth can buy, but they are encumbered by doubts and expectations not experienced by whites who may enjoy the same economic or social status. The gains of the high achievers are not old enough or pervasive enough to eradicate the social understanding of being black that is rooted in centuries of slavery and Jim Crow. Account must also be taken of the partiality of the success. Although we should celebrate the creation of the black middle class, we should not lose sight of the fact that two-thirds of blacks still live in abject poverty, if not locked in prisons, then concentrated and isolated in the inner city. Those who live in the ghetto are poor, without work, dependent on welfare, living in dilapidated housing, victimized by high crime rates, and with few prospects for upward mobility. While the largest number of persons who are in this condition are white, a larger percentage of blacks are in this position and that plays a crucial role in determining the status of the group as a whole. Other status groups locked in urban centers may suffer the same fate.

Although heterogeneity in the material conditions of life does not render antisubordination obsolete, it does complicate the analysis and have important policy implications. We need to continue many of the policies of the Second Reconstruction, for the position of the black middle class must be reinforced and its ranks must be

enlarged. This means, among other things, a continuation of affirmative action, as recently sustained by the Supreme Court, and a continued application of the Griggs principle. At the same time, we must recognize that these policies will not suffice. We need programs specifically geared to those who have been left behind – blacks who are desperately poor. They are not likely to be admitted to the University of Michigan Law School. True, they benefit from the University's affirmative action program because that program alters the status of the group of which they are members and thus affects how others may view them and how they may view themselves. But this benefit is remote and indirect in relation to their needs. For that reason, the Third Reconstruction must continue not only the policies of the past, but also launch initiatives that speak directly and immediately to "the most disadvantaged" (to borrow William Wilson's phrase). Such policies might include reform of education and welfare, job creation, changes in the administration of criminal justice, or as I recently argued in "A Way Out" (2003), strategies to eliminate ghettos as a feature of American society.

Some of these measures have been tried. Others will be proposed. The debate will be continued and broadened, though the standard of judgment must be clear: Eliminating subordination is required as a matter of justice, not simply as good public policy or politics. Like the last cycle of reform, the Third Reconstruction must be founded on principles of justice – not the elimination of unfairness in the treatment of individuals, but the eradication of the structures of subordination. For that very reason, antisubordination theory – the indispensable predicate for such a reform program – will have to find a more secure place in the work of the Supreme Court, as secure a place as it had in Brown and the decisions of the 1960s and early 1970s that gave life to the Second Reconstruction. Although the other branches of government have a crucial role to play – the Third Reconstruction will also require a coordination of powers – the Supreme Court, because of its commitment to public reason, has a privileged position in our political system to declare authoritatively what the dictates of justice require.

Susan Sturm imagines a place for the judiciary in what I call the Third Reconstruction, but pictures it in a different role. She criticizes me for casting the judiciary in the role of "the oracle," and insists that the function of the judiciary is not to declare what is just, but rather is "to structure public engagement with general norms in particular institutional contexts, and then to evaluate the adequacy of the norm elaboration process and its substantive outcomes." There is much wisdom in Professor Sturm's formulation of the way that the judiciary might proceed; the courts need public engagement and will respond to it. However, unless we are prepared to capitulate to the way power is actually distributed in society, the judiciary must do more than facilitate public engagement in the construction of norms by contending forces; it must sometimes lead and, if necessary, articulate the norm itself. The entitlement of the judiciary to act in the way I imagine – to be the oracle, if you will – derives not from any moral expertise judges might have, but from the norms that limit the exercise of their power. The judiciary's right to lead in the process of norm articulation and to speak with authority on issues of justice stems from its independence from the parties and politics, and its obligation to listen to the grievances of all parties, to assume responsibility for its decisions, and to justify those decisions in terms of legally acceptable reasons.

In ways similar to Professor Sturm, Professors Issacharoff and Karlan argue for a less robust conception of the judiciary than that envisioned in "Groups." Today, they argue, it is the task of the judiciary not so much to eradicate subordinating structures, as it is to clear the political channels – to allow the disadvantaged to participate freely and fully in the rough and tumble of politics. I am less sanguine than Issacharoff and Karlan about the political power of blacks and other disadvantaged groups; many are numerical minorities, and even those that have majorities, such as women, are hindered by inequalities of economic resources. Yet our difference is more fundamental, though I may have misled them in "Groups" when I, overly burdened by the task of reconciling strong exercises of the judicial power with our democratic ethos, mistakenly made "political powerlessness" one of the defining criteria of a disadvantaged group. For me, the duty of the judiciary is not to compensate for the deficiencies of political power, but to give concrete meaning to constitutional values, which will provide the framework within which all political struggles will take place and is needed no matter how political power is actually distributed.

Although "Groups" amply allowed a place for the political branches to operate, it largely was, as a number of commentators note, "an open letter to the Supreme Court" (Professor West's phrase). As such, it was an exercise in reasoned argument, which is not at all surprising since I consider public reason to be at the heart of the law and the source of the Court's authority. The argument was informed by history and politics, even by my lived experience, but these sources were kept in the background. The essay itself was analytic, trying to lay bare the internal structure and deficiencies of one principle (antidiscrimination) and arguing to move the law toward another (antisubordination). It was the work of a lawyer.

Kathryn Abrams remarks on my method, and notes how sharply it differs from that of a movement in the law that emerged in the late 1980s – Critical Race Theory. The scholars associated with this movement endorse antisubordination, but in contrast to the analysis "Groups" exemplified, make their point through narratives, some autobiographical, such as that contained in Mari Matsuda's comment in this symposium. Critical Race Theorists do not simply point to the role of narratives in the law, but actually write them and offer them as a substitute for the reasoned argument traditionally associated with the law. The background becomes the foreground. This, I believe, is not a matter of personal style, but a way of subverting the authority of the Court. Admittedly, such subversive tactics became especially appealing once the leadership of the Court passed from Earl Warren to Warren Burger and William Rehnquist, Griggs and Swann were cabined, the validity of affirmative action was thrown into question, and private oppression was put beyond the reach of equal protection. I too object to these developments, but believe that we should criticize the Court for what it says, not subvert its authority in a deliberate or flagrant way or mock its commitment to public reason by responding to its decisions with stories. The Third Reconstruction will need the Court.

In criticizing the antidiscrimination principle in "Groups," I acknowledged that much of its appeal arose from its seemingly nonsubstantive, almost formalistic qualities, but I insisted that such an appeal was an illusion. Sanford Levinson notes that this criticism is congenial to Critical Legal Studies (CLS), a movement that largely took shape after the publication of "Groups," and which I have criticized. He is referring

specifically to two essays I wrote in the 1980s, "Objectivity and Interpretation" and "The Death of Law?" where, with a touch of the excess that comes from the heat of battle, I described CLS as a new nihilism because it denied the possibility of a public morality that could be interpreted and actualized by the judiciary. Professor Levinson's point is not so much to accuse me of inconsistency (I do not believe there is any), but to wonder why I did not view the advent of CLS more sympathetically since, as is evident from "Groups," I too reject the formalism of the law. For me, however, there is a crucial difference between unmasking the law and debunking it; between, on the one hand, denying the instrumental logic of antidiscrimination and insisting upon the need for substantive normative judgments and, on the other hand, proclaiming that law is riddled with a fundamental contradiction that will deconstruct any normative structure upon which it can stand. The latter position – that of Critical Legal Studies – obliterates the line between politics and law, while I see critique not as an end in itself but as a preliminary stage in the construction of a law that more nearly approximates justice.

This is the task before us. We need to acknowledge law's commitment to public reason and turn back to the Court. We need to press the Court, in the most emphatic terms possible, and show the error of Moose Lodge, Milliken v. Bradley, and Washington v. Davis. We embarked on a similar endeavor in the Michigan affirmative action cases, reversing or at least stopping a trajectory that began in the Richmond case in the late 1980s and found powerful and worrisome expression just a few years ago in Adarand. No less, maybe an even grander feat was accomplished in Lawrence v. Texas, also handed down in June 2003, where the Court, in an opinion by Justice Kennedy, went out of its way to repudiate Bowers v. Hardwick (1986) and to introduce into American law a jurisprudence of human dignity. Miracles? Maybe, but they are the miracles of public reason, and as such indicate both what is possible and necessary within the law. Although we should acknowledge the achievements of the Second Reconstruction, we must also recognize that starting in the 1970s Brown was drained of its generative power and that as a result the higher purposes of the Second Reconstruction remain unfulfilled. Remnants of caste persist, sometimes taking new, perhaps even more intractable forms. The challenge ahead is to demonstrate, once again, why such subordination and the institutions that give rise to it are incompatible with the equality that the Constitution promises.