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Groups, Politics, and the Equal Protection Clause

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Like Owen Fiss's foundational article, *Groups and the Equal Protection Clause*,¹ this is an essay about the structure and limitations of the principles that control interpretation of the Equal Protection Clause. In some ways, what's remarkable is how much of the current debate follows the tracks Owen laid down over a quarter-century ago. *Groups and the Equal Protection Clause* identified two mediating principles that might "stand between the courts and the Constitution to give meaning and content to an ideal embodied in the text."² One, which Owen called the "antidiscrimination principle," saw the clause as primarily a limitation on the government's power to classify individuals (that is, to make discriminations among them). The other, which Owen championed, the "group-disadvantaging principle,"³ saw the clause as essentially a prohibition on the creation or perpetuation of subordinate classes. Much of the contemporary debate over affirmative action, for example, plays out along precisely these lines. Opponents of affirmative action emphasize its use of a "suspect classification" (race) to deprive individuals of the right to be judged on their own merits. Supporters stress the continuing disadvantaged condition of blacks and Hispanics and argue that race-conscious action is necessary to bring members of traditionally excluded groups into the educational and economic mainstream.

And yet, although we are certainly Owen's heirs in basing our litigation and scholarship on the group-disadvantaging principle, our professional lives have taken a very different turn from his. In *Groups and the Equal Protection Clause*, Owen left what has been a central preoccu-

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1. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

2. *Id.* at 107 (internal quotation marks and punctuation omitted).

3. As Owen's formulation, which described the equal protection clause as "giv[ing] expression to an ethical view against caste, one that would make it undesirable for any social group to occupy a position of subordination for any extended period of time," *id.* at 150-51, perhaps anticipated, this principle is sometimes referred to as an "antisubjugation," "antisubordination," or "anticaste" principle. *See, e.g.,* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1515 (2d ed. 1988) (arguing that the equal protection clause embodies an "antisubjugation principle, which aims to break down legally created or legally reinforced systems of subordination that treat some people as second-class citizens"). In this essay, we use the terms interchangeably.

pation of our work — the structures of political representation — to a footnote.⁴ His explanation of the special position blacks occupied in equal protection theory rested in substantial part on their longstanding political powerlessness⁵ and a sense that that condition would persist until they attained full economic and social equality. Blacks were “the wards of the Equal Protection Clause,”⁶ and the courts, particularly the Supreme Court, were their guardians. For Owen, *Brown v. Board of Education*⁷ was the exemplar of equal protection, not just in its condemnation of American apartheid, but also in its reinforcement of the central role of the judiciary in determining constitutional meaning and achieving equality.⁸

We, who were not yet born when *Brown* was decided, came of age as lawyers in a very different world. We entered law school in 1980, shortly before Ronald Reagan was elected president. We encountered a Supreme Court that had already embarked on its continuing enterprise of constricting both the definition of discrimination and the courts’ power to remedy it.⁹ The key equal protection decisions of our professional lives were not *Brown* or *Green v. County School Board*¹⁰ or *Swann v. Charlotte-Mecklenburg Board of Education*,¹¹ but *Washington v. Davis*¹² and *City of Mobile v. Bolden*¹³ and *Shaw v. Reno*.¹⁴

Our first sustained encounter with each other, the Equal Protection Clause, and the issues that have occupied a major part of our professional lives came in Owen’s seminar on the Supreme Court in the fall of 1981. It was an opening hint of Owen’s extraordinary intellectual gener-

4. *See id.* at 152 n.68.

5. *See id.* at 151-54.

6. *Id.* at 147.

7. 347 U.S. 483 (1954).

8. This point is made quite explicit in Owen’s volume of the Holmes Devise history of the Supreme Court, which makes clear that *Brown* was the transcendent case of his generation, coloring how he interpreted the decisions of the Fuller Court. *See OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910*, at 9-12, 392-95 (1993).

9. *See Samuel Issacharoff, Note, Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 YALE L.J. 328 (1982).

10. 391 U.S. 430, 438 (1968) (imposing an affirmative duty to dismantle previously segregated school systems “root and branch”).

11. 402 U.S. 1 (1971) (upholding a district court order requiring busing to achieve racial balance and desegregation within a previously segregated school system).

12. 426 U.S. 229 (1976) (holding that the Equal Protection Clause required that plaintiffs who challenged the government’s use of a facially neutral employment practice that disproportionately excluded black applicants prove that the practice was the product of a racially invidious motivation).

13. 446 U.S. 55 (1980) (applying the invidious purpose requirement to claims of racial vote dilution under the Equal Protection Clause).

14. 509 U.S. 630 (1993) (recognizing a claim under the Equal Protection Clause that, without regard to whether there was any racial vote dilution, race could not play too great a role in the creation of majority nonwhite electoral districts).

osity that although the seminar sessions focused on the turn-of-the-twentieth century Fuller Court — the subject of his contribution to the Oliver Wendell Holmes Devise history of the Supreme Court¹⁵ — we were free to write our papers about virtually anything.

As it happened, both of us wrote about race and the Supreme Court, and both of us looked at periods of judicial retrenchment. One paper looked backward, at a Fuller Court decision, *Hodges v. United States*.¹⁶ In *Hodges* (a decision later overruled by the Warren Court¹⁷), the Court threw out a federal civil rights prosecution on the ground that Congress lacked the power, under the Thirteenth Amendment, to protect blacks against threats of private violence that interfered with their exercise of the then-fundamental liberty of contract.¹⁸ The Reconstruction Amendments, the Court explained, had “declined to constitute [blacks as] wards of the Nation . . . but gave them citizenship, doubtless believing that thereby in the long run their best interests would be subserved, they taking their chances with other citizens in the States where they should make their homes.”¹⁹

The other paper examined the Burger Court and the discriminatory purpose requirement set out in *Washington v. Davis*²⁰ and applied to claims of racial vote dilution in *City of Mobile v. Bolden*.²¹ That paper argued that the discriminatory purpose requirement rested on the substantive view that “Reconstruction is over,”²² and therefore that the courts should no longer be “responsible for the affirmative advancement of blacks and other disadvantaged minorities.”²³ Each paper harshly criticized the Supreme Court for its failure to read the Reconstruction Amendments in their historical context and for its arid and cramped notion of equality.

While we were students, each of us spent hours in Owen’s office discussing our papers, his articles, and the law. Although our discussions usually focused on the role of courts, our eyes were inevitably drawn to a wall-size reproduction of the famous photograph of fire hoses being turned on demonstrators in Birmingham. Those demonstrators –

15. See Fiss, *supra* note 8.

16. 203 U.S. 1 (1906).

17. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968).

18. Pamela S. Karlan, *Crisis and Continuity: Hodges v. United States* (1984) (unpublished manuscript) (on file with authors); see Pamela S. Karlan, *Contracting the Thirteenth Amendment: Lochner and Hodges v. United States*, ___ B.U.L. REV. ___ (2005). *Hodges* is the final Fuller Court case Fiss discusses in his Holmes Devise history. See Fiss, *supra* note 8, at 379-85.

19. *Hodges*, 203 U.S. at 20.

20. 426 U.S. 229 (1976).

21. 446 U.S. 55 (1980).

22. Issacharoff, *supra* note 9, at 350 (quoting Justice Potter Stewart).

23. *Id.* at 349-50.

and their compatriots in Selma, Alabama; Oxford, Mississippi; and Albany, Georgia²⁴ – did far more to “give meaning and content to the ideal embodied in the text”²⁵ of the Equal Protection Clause and to embed the group-disadvantaging principle in federal law than any judicial decision during our lifetimes. Ironically, that history suggests that ultimately Felix Frankfurter might have been right to argue that “[i]n a democratic society like ours,” the most complete relief for inequality may “come through an aroused popular conscience that sears the conscience of the people’s representatives.”²⁶ The civil rights movement did precisely that: It seared the consciences of the nation and its representatives and produced the statutes that have framed much of our professional life — the Civil Rights Act of 1964²⁷ and the Voting Rights Act of 1965.²⁸ In those statutes, Congress required (and achieved) levels of equality substantially beyond anything the courts had required on their own initiative.²⁹

Of course, both the Civil Rights Act and the Voting Rights Act spawned a great deal of litigation: they can hardly be seen as self-executing. But in that litigation, courts were asked to enforce a *politically* derived definition of equality and not to articulate a *judicially* created one. Both Title VII of the Civil Rights Act and sections 2 and 5 of the Voting Rights Act clearly forbid government conduct that would not violate the Equal Protection Clause or the Fifteenth Amendment as construed by the Burger or Rehnquist Courts. Each statute rejected the discriminatory purpose requirement that largely gutted enforcement of the group-disadvantaging principle. Each statute resulted in a substantial amount of race-conscious government action that has dramatically benefited traditionally excluded racial and ethnic groups. By contrast, in the generation since we graduated from law school, the Supreme Court’s enforcement of the Equal Protection Clause in race cases has done virtually nothing for African-Americans or Hispanics outside a limited aspect of criminal adjudication.³⁰

24. Owen’s close colleague and co-author, Bob Cover, worked in Albany for SNCC and later spent a summer there as a legal intern to the veteran civil rights lawyer C.B. King.

25. Fiss, *supra* note 1, at 107.

26. *Baker v. Carr*, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting).

27. 42 U.S.C. §§ 2000e-2000e-17 (1994).

28. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994)).

29. For descriptions of the effects of Title VII and the Voting Rights Act, see John J. Donohue III, *Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner*, 136 U. PA. L. REV. 523, 534-37 (1987), and *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990* (Chandler Davidson & Bernard Grofman eds., 1994), respectively.

30. See, e.g., *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Batson v. Kentucky*, 476 U.S. 79 (1986). And even there, the Court’s interpretation of the requirements of equal protection has

In this essay, we discuss how our understanding of *Groups and the Equal Protection Clause* has been influenced by our lives as voting rights litigators and scholars. Put simply, it has led us to decouple the question whether the Fourteenth and Fifteenth Amendments embody a group-disadvantaging principle from the process of constitutional adjudication. In a sense, we take our inspiration from the framers of the Reconstruction Amendments — mindful of a Supreme Court that had all too recently produced *Dred Scott v. Sandford*³¹ — who “were not content to leave the specification of protected rights to judicial decision.”³² We see the choice between the two principles identified in *Groups and the Equal Protection Clause* not as a matter of top-down judicial interpretation, but as the result of bottom-up political negotiation. For us, the key question is not whether the Supreme Court should adopt a group-disadvantaging principle for assessing voting rights claims. Rather, it is whether the Court should reject that democratically arrived-at mediating principle in favor of a judicially imposed, highly individualistic interpretation of political equality.

THE EVOLUTION OF THE VOTING RIGHTS ACT

The Voting Rights Act of 1965, which President Johnson rightly called “one of the most monumental laws in the entire history of American freedom,”³³ was the product of a sustained political effort by black Americans to sear the conscience of the American people, an effort that struck a national chord with the televised beating of black marchers on the Edmund Pettus Bridge outside Selma, Alabama.³⁴ The Act’s ambi-

been exceptionally cramped. See, e.g., *United States v. Armstrong*, 517 U.S. 456 (1996); *McCleskey v. Kemp*, 481 U.S. 279 (1987). See generally Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001 (1998).

31. 60 U.S. (19 How.) 393 (1857). The central purpose of the Fourteenth Amendment’s first sentence — “All persons born or naturalized within the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside” — was to overturn *Dred Scott*’s holding that blacks could not be citizens.

32. Michael McConnell, Comment, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 182, 176 (1997). For other recent discussions of the understandings of the framers of the Fourteenth Amendment regarding Congress’s power under the enforcement clauses, see WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 122 (1988); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 152 (1993).

33. DAVID J. GARROW, *PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965*, at 132 (1978).

34. See HOWELL RAINES, *MY SOUL IS RESTED: MOVEMENT DAYS IN THE DEEP SOUTH REMEMBERED* 215 (1977) (reporting a conversation in which Attorney General Nicholas Katzenbach responded to a question from the Selma Director of Public Safety about what would happen if a Voting Rights Act were to pass by declaring “What do you mean if it passes. You people passed that on that bridge. . . . You can be sure it will pass, and because of that, if nothing else”).

tion separated it from preceding civil rights laws: It sought to transform black Southerners into active participants in the governance process rather than simply recipients of congressionally conferred fair treatment in some discrete arena.³⁵

Originally, the Act was directed primarily at what Owen has called the “first-order situation” of outright exclusion of “blacks from public institutions,”³⁶ in this case, the voting rolls.³⁷ But even here, the Act elevated political definitions of equality over judicial ones: Its central provisions involved congressional *abandonment* of constitutional litigation as the central mechanism for enforcing the commands of the Fourteenth and Fifteenth Amendments.³⁸ The key provisions of the Act were its automatic (and judicially unreviewable) suspension of literacy, interpretation, and good character tests in “covered” jurisdictions with a history of massive disenfranchisement, its provision for the executive-branch appointment of federal registrars to add black voters to the rolls, and its requirement that covered jurisdictions receive approval (“preclearance”) from either the Department of Justice or the federal district court in Washington, D.C., before they made any change to their election laws.³⁹

These provisions transformed the political landscape of the South and — after 1975, when they were extended to protect members of “lan-

35. Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 316 (1997); see also Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1719 (1993) (distinguishing “self-governance, in which groups participate through their representatives in the formation of policy, from civic republican charity, in which individuals depend on the kindness of Platonic guardians”).

36. Fiss, *supra* note 1, at 170.

37. This is not to say that the Act was limited only to complete exclusion. Even at its inception, the Act’s sponsors were concerned about the dilution of black voting strength. See Pamela S. Karlan & Peyton McCrary, *Without Fear and Without Research: Abigail Thernstrom on the Voting Rights Act*, 4 J.L. & POL. 751 (1988) (book review) (describing the legislative history of the 1965 Act).

38. *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (observing that “Congress exercised its authority under the Fifteenth Amendment in an inventive manner when it enacted the Voting Rights Act of 1965 . . . to prescrib[e] remedies for voting discrimination which go into effect without any need for prior adjudication”). For an example of why Congress decided to abandon case-by-case adjudication, see SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS*, 546-47 (2d rev. ed. 2002) (recounting the Justice Department’s largely unavailing efforts to enforce prior voting rights acts).

39. These provisions appeared in sections 4, 3, and 5 of the original act, respectively. The determination that a particular state or political subdivision was a covered jurisdiction for purposes of suspending literacy tests and requiring preclearance of changes in voting-related laws was not subject to judicial review “in any court.” See 42 U.S.C. § 1973b(b) (1994). The Act’s suspension of literacy tests not only went into effect without a prior adjudication, but in at least one case — Northampton County, North Carolina — suspended a literacy test that the Supreme Court had earlier upheld against constitutional challenge. See *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959).

guage minority groups” such as Hispanics⁴⁰ – the Southwest as well. Federal registrars registered as many black voters in the South during the five years following passage of the Act as had been registered in the entire preceding century.⁴¹

It soon became clear, however, that simply removing formal first-order barriers to black political participation would not, by itself, realize the civil rights movement’s broader goals of dismantling racial oppression and establishing progressive and responsive politics. Many jurisdictions responded to the influx of black voters by adopting ways of aggregating voters and votes that diluted the voting strength of the black community. They switched from ward-based to at-large elections, gerrymandered district lines, instituted majority-vote requirements, abolished elected offices altogether in black areas while vesting appointment power in officials elected by majority-white constituencies, and annexed outlying white areas to preserve white majority control.⁴² Here, the Act’s preclearance provision came to play a major role. After the Supreme Court recognized that such changes might dilute the voting power of the “members of a racial minority [group],”⁴³ it held that section 5 of the Act applied to changes in electoral structure, such as a switch from district-based to at-large elections⁴⁴ or the redistricting required after every decennial census.⁴⁵ The Department of Justice then used the preclearance process as a key tool for forcing covered jurisdictions to provide minority citizens not just with the formal right to cast a ballot and have it counted, but also with the ability to actually elect candidates of their choice.⁴⁶

In *City of Mobile v. Bolden*,⁴⁷ a plurality of the Supreme Court not only articulated a highly formal and intent-based interpretation of the constitutional provisions protecting against racial discrimination in the right to vote,⁴⁸ but also offered an equally constricted view of section 2

40. See 42 U.S.C. § 19731(c)(3) (defining “language minorities” or “language minority group” to include “persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage”).

41. Chandler Davidson, *The Voting Rights Act: A Brief History*, in *Controversies in Minority Voting: The Voting Rights Act in Twenty-Five Year Perspective* 7, 21 (Bernard Grofman & Chandler Davidson eds., 1992).

42. See, e.g., *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *City of Richmond v. United States*, 422 U.S. 358 (1975); *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff’d*, 459 U.S. 1166 (1983); *Dillard v. Crenshaw County*, 640 F. Supp. 1347 (M.D. Ala. 1986).

43. *Allen*, 393 U.S. at 569.

44. See *id.*

45. See *Georgia v. United States*, 411 U.S. 526 (1973).

46. For an empirical study of section 5’s effects, see Davidson & Grofman, *supra* note 29.

47. 446 U.S. 55 (1980).

48. The plurality interpreted the Fifteenth Amendment to protect only the right to “register and vote without hindrance,” 446 U.S. at 65; see also *Reno v. Bossier Parish Sch. Bd.*, 528 U.S.

of the Voting Rights Act, which contained a general prohibition on race discrimination in voting.⁴⁹

Congress responded to *Bolden* with an amended version of section 2 that made clear its embrace of a group-disadvantaging conception of political equality. In the 1982 amendments to section 2, which Jim Blacksher has called “[a]rguably . . . the first formal political compact in the history of the United States to which a fully enfranchised black electorate ha[d] given its consent,”⁵⁰ Congress provided that a violation of the Act would be established if

based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by *members of a class of citizens* protected by subsection (a) [which forbids denying or abridging the right to vote on account of race, color, or membership in a “language minority group”] in that *its members* have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.⁵¹

Congress’s choice of language about “class[es]” of citizens and “members” of groups was quite deliberate. Both supporters and opponents of the Act understood that it was what Justice Clarence Thomas later described it to be: “a device for regulating, rationing, and apportioning political power among racial and ethnic groups.”⁵² As Blacksher explains the process of hammering out the new language of section 2, “[i]n return for disavowing the goal of strict racial proportionality [in the so-called “Dole proviso”⁵³] African Americans won acceptance of a stat-

320, 334 n.3 (2000) (noting that “we have never held that vote dilution violates the Fifteenth Amendment,” or “even ‘suggested’ as much”). It interpreted the Fourteenth Amendment to require that plaintiffs prove that the challenged election was “conceived or operated as [a] purposeful [device] to further racial . . . discrimination . . .” *Bolden*, 446 U.S. at 66.

49. The original version of section 2 provided that “[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.” See 79 Stat. 437 (1965). Because this language tracked the terms of the Fifteenth Amendment, the *Bolden* plurality concluded that it was nothing more than an “elaborat[ion] upon” the Fifteenth Amendment and was therefore “intended to have an effect no different from that of the Fifteenth Amendment itself.” 446 U.S. at 60-61.

50. James U. Blacksher, *Dred Scott’s Unwon Freedom: The Redistricting Cases As Badges of Slavery*, 39 How. L.J. 633, 663 (1996).

51. 42 U.S.C. § 1973(b) (1994) (emphasis added).

52. *Holder v. Hall*, 512 U.S. 874, 893 (1994) (Thomas, J., concurring in the judgment). For diverse discussions of the legislative history of the 1982 amendments, see, e.g., S. REP. NO. 97-417 (1982); ABIGAIL THERNSTROM, WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS (1987); Blacksher, *supra* note 50; Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347 (1983); Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, in MINORITY VOTE DILUTION 161 (Chandler Davidson ed., 1984).

53. “The extent to which members of a protected class have been elected to office in the State

utory standard of voting fairness that reversed *Bolden's* attempt to turn away from the historical and social situation of blacks."⁵⁴

As we have explained elsewhere, the central mechanism of racial vote dilution involves a distinctive blend of state action and private choice; it is the interaction of electoral structures, such as district lines or the use of at-large elections, with the individual (and constitutionally protected) decisions of individual voters that results in the defeat of a minority group's preferred candidates.⁵⁵ In Owen's terms, the racial vote dilution that section 2 addressed was a "second-order situation" since it involved "nondiscriminatory state action" or "the state use of facially innocent criteria . . . that aggravate the subordinate position of the specially disadvantaged groups."⁵⁶

In its final Term, the Burger Court (through Justice Brennan) ratified Congress's adoption of a group-disadvantaging perspective. In *Thornburg v. Gingles*,⁵⁷ the Court acknowledged, and accepted, that by enacting section 2, Congress had "dispositively reject[ed] the position of the plurality in [*Bolden*] which required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters."⁵⁸ It accepted Congress's directive that courts adjudicating section 2 claims conduct a "searching practical evaluation of the past and present reality" within the defendant jurisdiction⁵⁹ focusing on factors ranging from socioeconomic disparities that might impair a minority group's ability to participate effectively in the political process to racial bloc voting to the responsiveness of elected officials to the minority group's concerns.

As with the Voting Right Act of 1965, the effects of the 1982 amendments were transformative. Between 1982 (and with increased velocity after the decision in *Gingles* laid out a clear blueprint for bringing section 2 cases) and the mid-1990s (when the Court's *Shaw* cases⁶⁰ began to cast doubt on the constitutionality of deliberately drawing majority-black and -Hispanic districts), there was a flood of litigation

or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b) (1994).

54. Blacksher, *supra* note 50, at 660.

55. See T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 634 (1993); Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833 (1992); Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201 (1996).

56. Fiss, *supra* note 1, at 171.

57. 478 U.S. 30 (1986).

58. *Id.* at 43-44.

59. *Id.* at 66, 75, 79 (quoting S. REP. NO. 97-417, at 30 (1982)).

60. See *infra* text accompanying notes 65-77.

under section 2. In 1982, the year the Act was amended, a sizeable majority of municipal elections were conducted at large⁶¹ and most Southern states elected at least some state legislators from multi-member districts. Within a decade, most jurisdictions with substantial minority populations had switched to a system with at least some single-member districts, and state legislatures were elected entirely from single-member districts, at least some of which were majority-black or -Hispanic. Perhaps the most extensive use of section 2 occurred in Alabama, where the *Dillard* litigation resulted in the abandonment of winner-take-all at-large elections in nine counties and roughly 180 municipalities. More than two hundred black elected officials in Alabama won office as a direct result of the *Dillard* litigation.⁶²

As with section 5's preclearance process, amended section 2 did more than change the nature of voting rights litigation. It changed the political context as well:

Black political leaders were able to deploy their newly won federal statutory rights to gain powerful leverage in the complex, hard-nosed negotiations with state and local legislatures over the structures of electoral systems, including the boundaries of Congressional districts

...

[T]he greatest victories legal action has achieved for black plaintiffs, for black and white communities, and for American democracy came not from judicial decrees, but from fairly negotiated compromises between black and white political leaders. Court involvement had its optimal effect when it struck down systematically unfair electoral structures and provided something approaching a level bargaining table. The remedial deals that were products of genuinely mutual respect and the spirit of give and take are the ones that have lasted the longest and have generated the most satisfaction. None of these deals was loved by all or intended to last forever, but that actually contributed to the sense of fairness the participants came away with. These provisional arrangements are subject to being brought back to the table at any time, either by the next census, by municipal annexations, or simply by the passage of time and the turning of the world.⁶³

By the post-1990 round of redistricting, blacks and Hispanics had progressed from being literally locked out of the room in which political deals were cut⁶⁴ to being key members of state legislative redistricting

61. See Heywood T. Sanders, *The Government of American Cities: Community and Change in Structure*, 1982 *MUN. Y.B.* 178, 180-81.

62. See Peyton McCrary et al., *Alabama*, in *QUIET REVOLUTION IN THE SOUTH*, *supra* note 29, at 38, 53-56. One of us — Pam Karlan — served as a lawyer for the *Dillard* plaintiffs.

63. Blacksher, *supra* note 50, at 660 & 686.

64. See *Major v. Treen*, 574 F. Supp. 325, 334 (E.D. La. 1983) (three-judge court) (describing a process in which Louisiana's congressional reapportionment was accomplished — splitting New

committees. Using the leverage provided by the threat of section 2 litigation and the prospect of aggressive enforcement of section 5 by the Justice Department, black and Hispanic politicians managed to obtain an unprecedented number of majority-black and -Hispanic congressional and state legislative districts, resulting in the election of substantial numbers of black or Hispanic legislators.

THE *SHAW* CASES AND THE REASSERTION OF JUDICIAL CONTROL OVER THE MEANING OF EQUALITY

In 1993, however, the Supreme Court reasserted the primacy of the anti-discrimination principle, in a particularly individualistic form. In *Shaw v. Reno*,⁶⁵ the Court held that

a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.⁶⁶

Plaintiffs in *Shaw* cases need not prove either that they were denied the right to vote or that their votes were diluted (what Owen would have called first- and second-order claims). In fact, despite the Court's citation of prior vote dilution and disenfranchisement decisions, the real character of a *Shaw* case is not a claim about voting rights at all: Plaintiffs need not show that their right to vote or otherwise to participate in the political process was impaired in any way. Rather, *Shaw* represents a categorical reassertion of the primacy of the individual in equal protection doctrine, even in a domain — redistricting — that by its very nature involves the assignment of individuals to groups: “At the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.”⁶⁷

Over the past decade, we have written a series of articles criticizing *Shaw* and its progeny,⁶⁸ which we do not propose to rehash in detail

Orleans’s large black population between two districts and thereby diluting its voting strength in violation of section 2 — in a meeting in the sub-basement of the state capitol from which black legislators were excluded).

65. 509 U.S. 630 (1993).

66. *Id.* at 649.

67. *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (internal quotation marks and citations omitted).

68. For a representative, but not exhaustive sample, see, e.g., Aleinikoff & Issacharoff, *supra* note 55; Samuel Issacharoff & Thomas C. Goldstein, *Identifying the Harm in Racial Gerrymandering Cases*, 1 MICH. J. RACE & L. 47 (1996); Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276 (1998); Pamela S.

here. Rather, we want only to point out how the Court's articulation of the anti-discrimination principle in the *Shaw* cases goes beyond repudiating an antisubordination principle to threatening to "aggravate the subordinate position"⁶⁹ of blacks and Hispanics.

All apportionment, by its very nature, involves aggregating voters into groups for the purpose of electing representatives.⁷⁰ The people who draw districts — and they are usually self-interested politicians⁷¹ — generally use prior election returns and a few easily ascertainable demographic characteristics to predict how particular citizens will vote. The politicians then allocate voters among districts with the aim of helping themselves and their party while disadvantaging their challengers. Even in *Shaw* itself, the Supreme Court reiterated the lack of any general constitutional constraints — beyond the principle of one-person, one vote — on the redistricting process. Thus, criteria such as compactness, contiguity, and respect for political subdivision boundaries are important in the *Shaw* cases "not because they are constitutionally required — they are not — but because they are objective factors that may serve to defeat a claim" that race played too great a role in the creation of the challenged district.⁷² The result is that the *Shaw* cases impose a restriction on the political aspirations of black and Hispanic voters that they impose on no one else.⁷³ The *Shaw* cases thus reduce the options black and Hispanic voters enjoy relative to nonracially defined groups of voters.

While it seemed at first as if the *Shaw* cases might threaten the entire enterprise of race-conscious districting, in the end the Supreme Court significantly softened the antidiscrimination principle. Recognizing that "redistricting differs from other kinds of state decision making in that the legislature always is *aware* of race when it draws district lines,"⁷⁴ the Supreme Court held that the antidiscrimination principle was violated only when race was the "predominant factor motivating the legislature's decision."⁷⁵ At the very end of its review of the post-1990

Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 Hous. L. Rev. 289 (1997); Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. Rev. 287 (1996).

69. Fiss, *supra* note 1, at 171.

70. Cf. *Davis v. Bandemer*, 478 U.S. 109, 167 (1986) (Powell, J., concurring in part and dissenting in part) (noting that the "concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not."); Aleinikoff & Issacharoff, *supra* note 55, at 588; Karlan & Levinson, *supra* note 55, at 1204-08.

71. See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002).

72. *Shaw v. Reno*, 509 U.S. 630, 646-37 (1993).

73. See *Shaw v. Hunt*, 517 U.S. 899, 950-51 (1996) (Stevens, J., dissenting); Karlan, *Just Politics*, *supra* note 68, at 309-10.

74. *Shaw v. Reno*, 509 U.S. at 646 (emphasis in original).

75. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

decennial redistricting (and just in time for the post-2000 round), the Court held, in *Easley v. Cromartie*,⁷⁶ that a somewhat revised version of the congressional district first challenged in *Shaw* failed even to trigger strict scrutiny because political considerations, rather than racial ones, offered the best explanation for the district's configuration.⁷⁷ In the post-2000 round of redistricting, courts to this point have been far less eager to strike down districts on a *Shaw*-based antidiscrimination rationale. Still, our own experience in the trenches suggests the fear of *Shaw* liability, like the fear of section 2 liability, had at least some effect on the terms of the bargains struck within the political process. There was somewhat less pressure to draw majority-black or -Hispanic districts, and certainly less pressure to draw them with the same level of minority concentrations, and the configurations of the districts were drawn with an eye to *Shaw*.

THE IRONY OF THE ANTIDISCRIMINATION PRINCIPLE

Special judicial solicitude for racial minorities was based originally on the idea that "prejudice" might "seriously . . . curtail the operation of those political processes ordinarily to be relied upon."⁷⁸ But its ossification into the principle of strict scrutiny for racial classifications did not come until the very end of the process of dismantling Jim Crow. It wasn't until 1964, in *McLaughlin v. Florida*,⁷⁹ that the Court "both articulated *and* applied a more rigorous review standard to racial classifications."⁸⁰ That same Term, in an election-law case, *Anderson v. Martin*,⁸¹ the Court used the language of rationality review to explain why requiring that a candidate's race be printed on the ballot violated the Equal Protection Clause.

Ironically, by the time the Supreme Court fully embraced strict scrutiny for all racial classifications,⁸² enforcement of the Voting Rights Act meant that blacks and Hispanics were wielding substantial political power for the first time since Reconstruction. One result of that political power was that racial minorities were able to engage in the kind of pluralist bargaining that had long benefited other ethnic and socioeconomic

76. 532 U.S. 234 (2001).

77. For a discussion of *Easley*, see Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1585-86 (2002).

78. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

79. 379 U.S. 184 (1964).

80. Michael Klarman, *An Interpretative History of Modern Equal Protection*, 90 MICH. L. REV. 213, 255 (1991).

81. 375 U.S. 399, 402 (1964).

82. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion); *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995).

groups. In Richmond, Virginia, as a result of the Voting Rights Act,⁸³ black voters were ultimately able to capture five of the nine seats on the city council. Perhaps ironically, the Supreme Court used those voters' political success as an explanation for why the city's adoption of minority set-asides for city contracting were inherently suspicious.⁸⁴ The Supreme Court did not appreciate the significance of the fact that the race-conscious government decisions of the previous twenty-five years occurred under the watchful eye of increasingly vigilant and powerful minority politicians. Oddly, it was precisely the fact that robust politics were at play in governmental decision making that could for the first time allow courts to disengage, in itself a crowning achievement of the post-*Brown* era's muscular equal protection law.

In the nearly fifty years since *Brown v. Board of Education*, equal protection law has gone through three stages. In the first, which lasted until roughly *Washington v. Davis* and *City of Mobile v. Bolden* and the imposition of a robust purpose requirement, courts aggressively attacked ongoing discrimination with a commitment to eliminating the vestiges of Jim Crow "root and branch."⁸⁵ In the second, which lasted until *Croson* and *Shaw*, courts declined to address the lingering effects of past discrimination as a matter of constitutional law, but they gave the political branches relatively free rein to continue the process of dismantling racial subordination through statutory and administrative measures. Now, in the third, the doctrinal formulae and mediating principles of the first stage are increasingly being used to cabin the legislative and executive discretion that was the hallmark of the second stage.

What emerges is not simply a miscasting of doctrine but a failure to engage with the deeper legacy of the civil rights movement. For the generation that came to the law struggling with the promise and the incomplete achievement of *Brown*, the aim of ensuring that black Americans would fully become the "wards of the Equal Protection Clause" certainly seemed lofty enough. But in terms of providing meaningful access to the benefits of integration, the political realm proved to be a decisive arena for minority advancement. From the vantage point of constitutional lawyers, it is easy to view politics only as generating laws that courts subsequently enforce, such as Title VII or even the Voting Rights Act. But there is a far different conception of political rights that operates not at the level of formal law but through the myriad quotidian decisions of governing councils deciding how to allocate municipal, county, state, and even federal resources. Across the country, these bod-

83. See *City of Richmond v. United States*, 422 U.S. 358 (1975).

84. See *Croson*, 488 U.S. at 495.

85. *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968).

ies now have their minority legislative caucuses and their minority governing officials. The avenues of black advancement since the era of the civil rights movement have largely come through the instrumentalities of governmental power. Whether it be state commitments to affirmative action in education, or minority preferences in contracting, or minority opportunity in state employment, or securing minority representation through redistricting, the steady advancement in the creation of a black middle class has depended on the vigilance of a black political class.

This brings us to Owen's most current project. In *A Way Out*,⁸⁶ Owen returns for the first time in several years to the issue of the legacy of the civil rights movement. With characteristic boldness and compassion, he looks to the plight of those the civil rights movement either left behind or failed: the millions of blacks trapped in the squalor and decay of the inner cities. His proposal is nothing less than a massive public works project to break up the ghetto and to disperse its residents among the suburbs and their superior school and social services. The book includes a number of responses, several quite critical, that we leave to the side. Instead we point out an irony that escapes attention in the volume. The book is noteworthy for its non-judicial focus and its attention to the creation of market and other social incentives to mobilize the affected populations. Unintentionally, however, and with insufficient attention to the consequences, Owen's proposal would destroy the precarious center of black political power in this country. There is a sad paradox in the fact that the black middle class is heavily protected by a black political class, which is in turn kept in power by that portion of the black population that has realized only some of the benefits of civil rights advances.

Our aim here is neither to challenge the prescriptive side of Owen's latest work, nor to champion the status quo in which the base of black political power remains inextricably tied to the exclusion and denial suffered by large portions of the black community. Rather it is to draw a limitation of the early civil rights jurisprudence into the present. The claim of the antijudgment principle was ultimately for a more robust equal protection of the law. The claim well understood and tried to derail an emerging equal protection formalism that would arrest the expansive promise of not just *Brown*, but of *Swann* and *Green* as well. What the antijudgment principle missed was the prospect that the quality of being "discrete and insular minorities" might lead not only to a claim for the special solicitude of the courts, but for the prospect of coordinated and effective political engagement. Much of contemporary equal protection law is now directed to what would have seemed

86. OWEN M. FISS, *A WAY OUT* (2003).

unimaginable thirty years ago: defending the rough and tumble world of interest-driven politics from the rights-focused intervention of constitutional law.

CONCLUSION

Owen often celebrated judges as central heroes of the struggle for racial equality⁸⁷ — can anyone who took Procedure from Owen or his colleague Burke Marshall ever forget The Icon of Coney Island? But at least in our lifetimes, rather than the group-disadvantaging principle being the proper province of courts while considerations of individual fairness “may play a larger role in determining what is right for a citizen or legislator,”⁸⁸ it has been the other way around: Only civic and legislative commitment to the group-disadvantaging principle’s capacious understanding of equality has kept it from being eclipsed altogether by the Supreme Court’s narrow focus on individual interests. It turns out that the Voting Rights Act has given minority citizens the ability — as well as the obligation — “to pull, haul, and trade to find common political ground,”⁸⁹ and that they have found themselves on a far higher ground and a far more level playing field than the Supreme Court would have provided.

87. See OWEN FISS, *THE CIVIL RIGHTS INJUNCTION* 89 (1978) (describing the judges of the Fifth Circuit as heroes because of the personal sacrifices they made to pursue desegregation). Cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) (dedicating the book to Chief Justice Earl Warren: “You don’t need many heroes if you choose carefully”).

88. Fiss, *supra* note 1, at 177.

89. *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994).