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"Groups" and the Advent of Critical Race Scholarship

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“Groups” and the Advent of Critical Race Scholarship  
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Did “Groups and the Equal Protection Clause” help to produce critical race theory? Some progressive scholars have described the article as a foundational influence for that movement.<sup>2</sup> I, too, recalled the article as a bold foray into the kind of asymmetrical, group-based interpretation of the clause that was provocative even in the ‘70s. Yet returning to the piece for this symposium, I have found the issue to be more complex, and the critical thrust of the article more ambivalent. Fiss’s approach forsakes the jurisprudential comforts of neutrality, individualism and means/ends analysis for an explicit focus on the material and dignitary circumstances of African-Americans. Yet its account of racial disadvantage is surprisingly de-contextualized: it reflects neither the contemporaneous perspectives of its African-American subjects, nor more than a fleeting sense of the agonistic, political dynamics that produced it. This reified rendering yields an account of Black disadvantage that is decoupled from a corresponding account of white supremacy. In this essay, I will explore this critical ambivalence in “Groups and the Equal Protection Clause,” and reflect on its causes. I will also consider the implications of Fiss’s ambivalence for the Court’s increasingly firm embrace of one mediating principle.

“Groups” is in many ways a daring effort: even a brief reading highlights its risky jurisprudential departures. Fiss aims to make the clause the province of a specific group – or a specific kind of group – rather than a more generalized occasion for the application of means/ends rationality. Declaring that constitutional equality means attending, first and foremost, to the well-being of a disadvantaged group confronts several powerful judicial norms. Fiss acknowledges these norms explicitly as he explains the allure, and the tenacity, of the anti-discrimination principle. Their vindication by that principle, Fiss argues, is largely illusory: for this reason he claims that this vision can safely be abandoned. Yet the implicit, widespread association of these norms with the anti-discrimination vision, and their frank tension with the group-disadvantaging principle, make endorsement of the latter a challenging proposition.

Fiss’s vision contests, first, two distinct elements of judicial objectivity: the notion that optimal rules should be clearcut, admitting of little contingency in application; and an assumption that the identity of the parties, in and of itself, cannot provide a basis for decision. Objectivity, Fiss notes, means that courts aspire to rules with “some sharpness or certainty,” that are not heavily factually or temporally contingent.<sup>3</sup> He adds that equal justice, a notion connoting objectivity or lack of partisanship in the decisionmaker, has been understood to imply that the decisionmaker is “prohibit[ed] ...

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<sup>2</sup> See Robin West, *Groups, Equal Protection and Law* (in this issue), at 1-2 (stating that the article “argues for a vision of Equality and Equal Protection law which eventually came to define the founding generation of critical race scholarship”). See also statement of Robert Post, introducing Owen Fiss at Law, Philosophy and Political Theory Workshop at UC-Berkeley (Boalt Hall) School of Law, March 7, 2002 (making related claim that Fiss helped to create “anti-subordination theory”).

<sup>3</sup> Fiss, *Groups, Groups and the Equal Protection Clause*, 5 *Philosophy and Public Affairs*, 107, 121 (1976)(hereinafter cited as “Groups”).

from taking into account certain irrelevant characteristics of the litigants – their race, wealth and so on.”<sup>4</sup> These features, as Fiss argues, may be implicated by an antidiscrimination principle that often entails judgments about the “suspect” character of particular classes. But they are more straightforwardly imperiled by a doctrinal approach that requires courts to consider whether a given enactment exacerbates the persistently subordinate status of a particular group. Its explicit assumption that such characteristics may be relevant to – may, indeed, form the primary point of – adjudication, and its explicit entwining of the role of the courts with the fate of a particular group seem more consonant with various critical legal perspectives than with the objectivism characteristic of liberal legal theory.

Abandoning the anti-discrimination principle for a concern with preventing status harms to blacks also requires that the Court forsake a technocratic focus on means/ends rationality. This privileging of rationality is a form of “value neutrality”<sup>5</sup> that is also characteristic of liberal legalism: courts may remain more or less agnostic about governmental goals yet require that enactments passed in the name of those goals bear some relation to their achievement.<sup>6</sup> The anti-discrimination principle, according to Fiss, “seems to ask no more of the judiciary than that it engage in which might at first seem to be the near mathematical task of determining whether there is ... “overinclusiveness” or “underinclusiveness.””<sup>7</sup> This quantitative or technocratic feature of anti-discrimination adjudication is, as Fiss explains, illusory: a court must ultimately engage in a normative enterprise in order to determine which classifications are suspect, and which governmental interest compelling. Yet this approach embodies a conceptual correspondence to technocratic rationality that is, in fact, Fiss’s specific target when he finds means/ends inquiry relates too obliquely to the kind of normative judgment that should animate the equal protection clause.<sup>8</sup> The group-disadvantaging principle – which asks the court to ally itself with certain groups and specific social goals -- cannot make even a facial claim to this kind of technocratic neutrality.

A decision to foreground the well-being of a particular kind of group finally contests the underlying individualism of the American legal system. It suggests that for purposes of giving meaning to equality, we should consider certain kinds of groups, rather than unmarked individuals, to be the “basic societal units.”<sup>9</sup> Though Fiss argues that, in application, the anti-discrimination principle must have reference to “suspect classes” and other groups, he acknowledges that its broader logic moves the courts and the public toward individualism.<sup>10</sup> “The anti-discrimination principle,” Fiss notes “is individualistic in a negative sense ... [in its focus on means/ends rationality] it avoids the

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<sup>4</sup> Fiss, *Groups*, supra note 3, at 119.

<sup>5</sup> Fiss, *Groups*, supra note 3, at 120.

<sup>6</sup> Although this technocratic focus also helped to shore up the legitimacy of adjudication at a time when judicial involvement in issues from school desegregation to reapportionment made a distinction between politics and adjudication particularly important, Fiss notes that the “aspiration for a ‘mechanical jurisprudence’ ... by making the predicate of intervention appear technocratic,” *Groups*, supra note 3, at 120, predated the legitimacy dilemmas of the Warren Court.

<sup>7</sup> Fiss, *Groups*, supra note 3, at 120.

<sup>8</sup> Fiss, *Groups*, supra note 3, at 108 (contrasting antidiscrimination principle, which is “confined to assessing the rationality of means” with group-disadvantaging principle, which “takes a fuller account of social reality and more clearly focuses the issues that must be decided”).

<sup>9</sup> Fiss, *Groups*, supra note 3, at 123.

<sup>10</sup> See Fiss, *Groups*, supra note 3, at 125-27.

need of making any statement about the basic societal units.”<sup>11</sup> Moreover, by making classification, rather than class, the focus of the equal protection inquiry, it “furthers the ideal of individualism more subtly.”<sup>12</sup> By “disqualifying one classification after another,” the approach “furthers the ideal of treating people as ‘individuals’ – recognizing each person’s unique position in time and space, his unique combination of talent, ability and character and his particular conduct.”<sup>13</sup> The group-disadvantaging principle, on the other hand, pays no tribute to the illimitable potential inherent in the unmarked individual. It requires judges to consider claimants on the basis group of membership, which is assumed to endow them with certain historically contingent, but highly salient characteristics.

Fiss’s challenge to these central norms of liberal legalism, and his embrace of a mediating principle that is particularistic and group-oriented might seem to ally “Groups” with later-emerging strands of critical legal theory. It may seem to preview, or provide the predicate for, those forms of race theory that have asked courts to forego objectivism and abstraction for a focus on the material realities of victimized groups. Yet when one reads “Groups” against the backdrop of the work that it purportedly spawned, one is equally struck by the absences, the critical elements that are *not* present in Fiss’s work.

Many readers will notice that Fiss invokes the condition of African-Americans as a group, without invoking their perspectives. The position from which this condition is sketched is almost exclusively external to the group; it entails no effort to depict African-Americans’ subjectivity. While this choice in and of itself may distinguish Fiss’s account from substantial portions of the critical race literature, which are concerned at least in part with illuminating that subjectivity and the vantage point that it provides,<sup>14</sup> this decision is also related to two additional features of Fiss’s account, which produce further disparities between this account and much of the succeeding critical race work.

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<sup>11</sup> Fiss, *Groups*, supra note 3, at 123.

<sup>12</sup> Fiss, *Groups*, supra note 3, at 126.

<sup>13</sup> Fiss, *Groups*, supra note 3, at 126-27.

<sup>14</sup> Fiss’s choice in this regard may have been conditioned in part by the fact that as a white man, he was not a member of the group of African-Americans and lacked direct access to the subjective experience of members of that group. However, it is not clear that Fiss’s subject position, or identity, was in this regard determinative. A number of critical scholars of race who are not themselves people of color have produced work that is informed by their efforts to study and learn from internal perspectives. See e.g., Martha Mahoney, *Women and Whiteness in Practice and Theory: A Reply to Professor MacKinnon*, 5 *Yale J. of L. & Feminism* 217 (1993); Gary Peller, *Race Consciousness*, 1990 *Duke L. J.* 758; Alan Freeman, *Legitimizing Discrimination Through Anti-Discrimination Law*, supra. Although much of this work in law (and its attendant emphasis on the importance of perspectivity), flowed from a critique of legal objectivity that postdated “Groups,” elements of that critique date back to Legal Realism, making it possible (though perhaps more unusual) to recognize perspectivity and incorporate perspectives at the time that Fiss wrote. I suspect that Fiss’s decision not to illuminate or underscore features of black subjectivity stemmed less from his lack of group membership, or even from the more marginal status of critiques of objectivity at the time, than from elements of Fiss’s own vision of adjudication. As I argue below, Fiss believed that it was possible – indeed imperative – for courts to discover and articulate shared “public values”: values that transcended the perspectives of particular groups. Thus to associate a substantive position with perspectival specificity would probably seem to Fiss to be an unnecessary, indeed counterproductive, argumentative move. In fact, when such perspectives began to emerge with the flourishing of Critical Legal Studies, Fiss challenged them on the ground that they failed to acknowledge the centrality to the adjudicative function of divining and articulating shared public values. See Fiss, *The Death of Law?* 72 *Cornell L. Rev.* 1, 14-16 (1984).

First, Fiss provides no account of either the perceptions or the agency of African-Americans in relation to the disadvantaging treatment he records. African-Americans, in this essay, embody disadvantage. They are “very badly off, perhaps our worst-off class,”<sup>15</sup> whether in their material impoverishment<sup>16</sup> or in their exile from the governing legislative coalitions.<sup>17</sup> There is no sense, in this account, of African-Americans’ perception or negotiation of this treatment, or their often-resistant response. This characterization contrasts starkly with that made possible by the ‘inside’ perspective of much critical race theory: to understand the experience of minority oppression is not simply to understand the operation and effects of oppression, but to understand the ways that African-Americans and others encounter, negotiate and move against them. These movements are vividly conveyed, for example, in works such as Devon Carbado and Mitu Gulati’s *Working Identity*,<sup>18</sup> Gary Peller’s *Race Consciousness*,<sup>19</sup> or the narratives of disorientation and self-assertion in the work of Patricia Williams.<sup>20</sup> In Fiss’s account, in contrast, African Americans become the focus, without also becoming the subjects, of this description of disadvantage. Readers, in consequence, see only a part of the operation of race-based oppression.

Second, because black disadvantage is rendered from an external perspective, Fiss offers an almost naturalistic definition of the “group-ness” that should be the object of judicial attention. Fiss’s use of the term ‘natural’ groups is intended in part to distinguish such groups from those created by statute.<sup>21</sup> However, his understanding also conveys a sense of determinacy or stasis to group boundaries, and neglects the contingent, inevitably social processes by which group membership is articulated, imposed, altered and resisted. This understanding has been the subject of considerable, often experiential, analysis in critical race theory, where, as Angela Harris notes, race is conceived “not as a fixed quality that can be judged as creating ‘difference’ or not, but rather as a dynamic relational process.”<sup>22</sup> These features of group-ness are easier to glimpse from the

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<sup>15</sup> Fiss, *Groups*, supra note 3, at 150.

<sup>16</sup> This impoverishment tends to be defined in very general terms. See e.g., Fiss, *Groups*, supra note 3, at 150 (“in terms of material well-being second only to the American Indians ... in a sense, they are American’s perpetual underclass...”).

<sup>17</sup> Here Fiss describes black disenfranchisement prior to the passage of the Voting Rights Act, and the continuing “structural limitations on political power” that arise from being a numerical minority and being “the object of prejudice – that is the subject of fear, hatred and distaste that make it particularly difficult for them to form coalitions with others and that make it advantageous for the dominant political parties ... to use them as a scapegoat.” Fiss, *Groups*, supra note 3, at 152.

<sup>18</sup> Devon Carbado and Mitu Gulati, *Working Identity*, 85 *Cornell L. Rev.* 1259 (2000).

<sup>19</sup> Gary Peller, *Race Consciousness*, 1990 *Duke L. J.* 758.

<sup>20</sup> Patricia Williams, *The Alchemy of Race and Rights* (1991).

<sup>21</sup> Fiss, *Groups*, supra note 3, at 156 n.72.

<sup>22</sup> Angela Harris, *Foreword: The Jurisprudence of Reconciliation*, 82 *Calif. L. Rev.* 741, 770 (1994). One thinks here of Patricia Williams’ report of a debate among her colleagues about whether she is “really black,” see Patricia Williams, *The Alchemy of Race and Rights* (1991); or Judy Scales-Trent’s musings on the assumptions, errors and repeated “comings out” occasioned by her experience as a “white black woman,” see Judy Scales-Trent, *Commonalities: On Being Black and White, Different and the Same*, 11 *Yale J of L & Feminism* 305 (1990); or Ian Haney Lopez’s reflections on the contribution of self-perception and choice to the formation of racial identity, see Ian Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice*, 29 *Harv. C.R.-C.L. L. Rev.* 1 (1994). Nor is this perception of the social formation of racial categories unique to contemporary scholarship: Zora Neale Hurston’s “What It Means to be Colored Me,” which Harris so tellingly evokes in her own work, explored

perspective of those who must negotiate the variability and social imposition of stigmatized group membership, than from the perspective of the dominant group, who tend to see difference more clearly than the process by which it is produced, and their absence distinguishes Fiss's account from critical race accounts that have followed.

If Fiss declines to uncover the subjectivity that underlies black disadvantage, he is also reluctant to explore the ongoing processes through which it is produced. In most of Fiss's discussions,<sup>23</sup> African-American disadvantage is presented simply as an empirical fact, not as a circumstance that emerged from a sequence of historical events or a pattern of oppressive treatment. Fiss's reluctance to emphasize the historical or contextual emergence of black disadvantage is clear in his justification of the group disadvantaging principle. Fiss specifically declines to make compensation for patterns of past discrimination the distinctive, normative basis for the principle.<sup>24</sup> That principle can rest just as appropriately, he explains, on "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."<sup>25</sup> But the effects of this choice are perhaps more salient in the descriptive portions of his theory. Though readers learn of the severity and persistence of black disadvantage, they learn almost nothing about the institutional patterns, social practices and self-understandings of those who have generated and perpetuated it. Fiss's statement about what makes blacks a disadvantaged group is typical: African-Americans as a group, he states, have "been in a position of perpetual subordination" and their "political power ... is severely circumscribed."<sup>26</sup> The absence of active subjects or transitive verbs in this summation is striking: Fiss says of blacks that they have "been in a position" – he does not state, nor does he encourage courts to ask, how they arrived at that position, who placed them in that position, or what ideological or conceptual system produced that coercive placement. Similarly, with respect to political power, Fiss offers the passive construction "is severely circumscribed" with only a brief nod toward the perpetrators or dynamics of that circumscription. Fiss's approach, in this regard, contrasts sharply with that of critical race theorists, whose goal has been not only to focus the attention of the legal system on minority disadvantage, but to describe the system -- many aspects of which may be less than fully visible to those who perpetuate it -- through which it is achieved and perpetuated. One find this effort in any number of critical race works—Charles Lawrence's, "The Id, the Ego and Equal Protection: Reckoning with

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the malleability and social character of group membership decades before either critical race theory or Fiss's essay. See Zora Neale Hurston, "What It Means to be Colored Me," in *I Love Myself When I am Laughing ... And Then Again When I am Looking Mean and Impressive* 152 (A. Walker, ed., 1979), discussed in Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *Stan. L. Rev.* 581, 611(1990).

<sup>23</sup> Fiss's brief reference to the history of black political disempowerment, see *supra* at n. 15, is somewhat of an exception to this general tendency in "Groups. Why he decides to take account of historical background here is an interesting question. But whether this area is intended as a paradigmatic illustration (if so, he does not explicitly treat it as such), whether he expects more resistance in this area and concludes that further documentation is necessary, or he simply finds it easier or more direct to document the exclusion that leads to disadvantage in this field, this degree of historical reference is not repeated elsewhere.

<sup>24</sup> He notes, rather vaguely, that "past discrimination might be relevant for explaining the identify and status of blacks as a social group." Fiss, *Groups*, *supra* note [], at 151.

<sup>25</sup> Fiss, *Groups*, *supra* note 3, at 151.

<sup>26</sup> Fiss, *Groups*, *supra* note 3, at p. 154-55.

Unconscious Racism”<sup>27</sup> and Ian Haney Lopez’s “Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination”<sup>28</sup> are only two salient examples. The abstraction or ahistoricity in Fiss’s account of white oppression, combined with the absence of internal narratives of negotiation or resistance, makes for a peculiarly unsituated, apolitical rendering of the condition of African-Americans. It is a phenomenon that has been drained of its agonistic or political character: it is not depicted as arising from a political struggle, readers consequently gain little sense of the constellation of perpetrators and victims, or the dynamics of perpetration and resistance.

Considered in this light, “Groups and the Equal Protection Clause” presents a combination of bold departures and surprising gaps or silences, some of which give the account an ambivalent or paradoxical aspect. Fiss urges the courts to forsake generality and abstraction, only to offer a oddly reified conception of black disadvantage as the criterion for decisionmaking. He directs courts to focus on the condition of African-Americans with a descriptive account that occludes the subjectivity of the group in question. He takes on the apparent partisanship of a group-specific approach to the Constitution, with a largely depoliticized account of that group’s trajectory. The reasons for this ambivalence merit further thought, for they help to illuminate Fiss’s objectives, his standpoint and his historical moment.

We should note first that these tensions in Fiss’s theory stand out more starkly today than they did at the time that he wrote. In the realm of politics, “Groups” emerged at a time when integrationism – with its emphasis on rationality and essential human similarity – had triumphed conclusively over separatist accounts that emphasized the formation of racial identity within specific historical conflicts and circumstances.<sup>29</sup> In the realm of legal scholarship, Fiss wrote during a period when the realist challenge to an apolitical objectivist notion of adjudication – submerged by modes of analysis such as legal process – was only beginning to be resuscitated by the first movements of critical legal studies.<sup>30</sup> These elements of political and intellectual context may have made it appear less obvious or necessary to embed group-specificity in a framework of subjectivity, historical context and political struggle. One can, of course, overstate this point. Accounts that traced the condition of African-Americans to historically-specific patterns of group interaction – for example, to the neo-colonialist impositions of a dominant white culture -- were available within various strands of black nationalist scholarship and argumentation.<sup>31</sup> Even legal scholars, such as Derrick Bell, Alan Freeman and Duncan Kennedy were beginning to identify group-specific histories and perspectives, and conflicts among such perspectives, as factors that animated, and should be explicitly acknowledged within, legal disputes.<sup>32</sup> Yet the notion that a group-specific

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<sup>27</sup> 39 *Stan. L. Rev.* 317 (1987).

<sup>28</sup> 109 *Yale L. J.* 1717 (2000).

<sup>29</sup> See e.g., Gary Peller, *Race Consciousness*, 1990 *Duke L.J.* 758.

<sup>30</sup> Some progressive or critical scholars have argued that ‘Groups’ shows some affinity with this scholarly movement as well. See Sanford Levinson, “Law,” “Philosophy” or “Politics”? Identifying the Status of the Arguments in Owen Fiss’s *Groups and the Equal Protection Clause* (in this issue).

<sup>31</sup> See e.g., Malcolm X, *By Any Means Necessary: Speeches, Interviews and a Letter* (1970); Harold Cruse, *The Crisis of the Negro Intellectual* (1967).

<sup>32</sup> See e.g., Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 *Harv. L. Rev.* 518 (1980); Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 *Buff. L. Rev.* 205 (1979); Alan Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review*

focus in equal protection law entails, or is fruitfully elaborated by, such understandings was by no means as prevalent as it has become, with the flourishing of many schools of critical legal scholarship, today.

Second, if some of these tensions were perceptible at the time Fiss wrote, he may have tolerated, or even cultivated, them for strategic, institutional reasons. Many of the gaps or absences in Fiss's theory may seem surprising, given his own professional exposure. For example, Fiss's legal consciousness was forged in a movement marked, in myriad ways, by the planning, negotiation, self-assertion and agency of African-Americans. It would be remarkable if a veteran of this movement actually subscribed to a view of African-Americans as "silent and suffering ..."<sup>33</sup> in the way that Fiss's characterization suggests. Fiss's experience in the civil rights movement may also have exposed him to the social dimensions of group definition, and the emergence of black disadvantage from an ongoing struggle with the forces of white supremacy. But to perceive these aspects of black disadvantage, and to incorporate them in his theory may have been two different things, given Fiss's goals in offering this account. "Groups" was not simply an academic exercise: it was an act of advocacy aimed at a very specific audience. Fiss was offering a theory *about blacks for whites* – in much the way the Ruth Bader Ginsberg, as a feminist advocate, devised a theory *about women for men*<sup>34</sup> – and his intended audience was not just any group of whites, but a group of white judges.<sup>35</sup> In approaching them, Fiss was likely to have been painfully aware of the limits imposed by what he took to be their perception of their task.

"Groups" demanded a new approach from judges whose commitment to objectivity, neutrality, individualism helped to maintain the boundary between law and politics, and from well-meaning white decisionmakers, who tended to view themselves as largely innocent of perpetrating systematic race-based oppression. Fiss was aware that the group-disadvantaging principle seemed to undermine the first characteristics; he may also have perceived the threat it posed to the second. He argued first that the antidiscrimination principle had never preserved those boundary-policing values intact, and that the group-disadvantaging principle mainly presented the inevitable compromises in more candid or explicit fashion. But he foresaw an uphill battle. Judges were likely to have persuaded themselves that the antidiscrimination principle minimized any

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of Supreme Court Doctrine, 62 Minn. L. Rev. 1049 (1978). Though these essays were published a few years after "Groups," they appeared, as did "Groups," substantially before the emergence of a cohering body of work that was identified as Critical Race Theory, and reflected some of the first efforts within what was then a more undifferentiated body of work known as Critical Legal Studies.

<sup>33</sup> This phrase is borrowed from Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581, 596 (1990), in which she critiques feminist scholar Catharine MacKinnon's treatment of black women lives, as reflecting simply an intensified or exacerbated version of the oppression that afflicts white women: "Silent and suffering" Harris notes, "we are trotted onto the page (mostly in footnotes) as the ultimate example of how bad things are."

<sup>34</sup> For an excellent account of this aspect of Ginsburg's appellate advocacy, see David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 L & Ineq 33 (1984).

<sup>35</sup> This target is underscored in Fiss's striking description of African-Americans as "very badly off – perhaps our worst-off class." See Fiss, *Groups*, supra note 3, at 150. Contemporary readers may be struck first by the somewhat proprietary "our"; but the more salient feature of this word choice may be its evocation of a "we" to whom the argument is implicitly addressed. This "we" may be the white judges who would be the ultimate decisionmakers, the legal community, or, as I argue below, the broader public whose norms that community, via adjudication, seeks to vindicate.



compromises of those values; the principle also permitted them to preserve the sense of their own innocence to a greater degree. So Fiss sought to articulate the group disadvantaging principle in ways that did no further damage to the judges' conception of their role and their task. He achieved this by characterizing black disadvantage as an extant fact that should trigger a particular kind of inquiry. This fact was decoupled – I would opine here, strategically – from both accounts of black subjectivity, that could challenge the judicial posture of neutrality and objectivity, and from historical or politicized accounts of the systematic imposition of white supremacy, that could challenge judicial presumptions of non-complicity. This decoupling, however, required Fiss to repress within his understanding many of the features that most accurately explain African-American disadvantage, and that have become hallmarks of critical race perspectives.

The contingency or social character of group definition for example, may be a salient feature in any sociologically accurate description of the lives of people of color; yet it might be viewed as an impediment in a standard that requires courts to believe that they can reliably distinguish one group – its membership, history, and current status – from another. The same may be true of his decoupling of the principle from a historicized account of the accretion of black disadvantage. Fiss may have been concerned that a focus on group status would make his approach appear “messy”<sup>36</sup> to a judiciary whose emphasis on objectivity demanded factual fastidiousness, or unduly implicating to a judiciary whose psychic needs made the exposure of systematic oppression precarious; thus, to root its application in the parsing of specific histories of exclusion or devaluation may have seemed like the wrong choice. To reach his intended audience, Fiss may have accepted – even courted – the tensions implicit in a reified account of group-specific disadvantage.

But in one final sense, the resort to an abstracted account of African-American disadvantage may have been less a strategic than an instinctive choice, based on Fiss's own view of adjudication. For much of his career, Fiss has espoused a view of constitutional adjudication as a means of divining and articulating “public values”: the shared normative commitments that underlie our form of collective life and animate our nation's struggles with different public issues and institutions.<sup>37</sup> The defense of this function was at the heart of his well-known critique of the Critical Legal Studies movement: the CLS rendering of adjudication, as implicated in explicitly political struggles, denied the role of the courts in discovering and cultivating adherence to a common substructure of understandings.<sup>38</sup> If Fiss does not endorse the “value-free” rationality of legal process, he also declines to characterize values as the subject of irreconcilable disputes among contending parties. To have associated his account of black disadvantage with the evocation of a group-specific perspective, or to have described it as the product of an agonistic, ongoing political struggle, would have enmired the courts in what he might have seen as an unjudicial taking of sides. Fiss may have endorsed the group-disadvantaging principle, not as a means of allying the court with one party to an ongoing struggle, but as a means of recognizing a commitment to the least-well-off as a

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<sup>36</sup> See Fiss, *Groups*, supra note 3, at 149.

<sup>37</sup> See Owen Fiss, *The Death of the Law?* 72 *Cornell L. Rev.* 1, 14-16 (1984)

<sup>38</sup> *Id.*

shared, public value.<sup>39</sup> Thus it was not simply Fiss's fear that *the courts* would resist the blurring of the boundary between law and politics, but *his view* that law must strive to 'do better'—by finding the common values that animated putative contenders -- that shaped the features of his theory. And the view that the search for common public values was preferable or even possible did, indeed, distinguish Fiss from the critical scholars, including critical race theorists, who followed him.<sup>40</sup>

What did these distinctive features of Fiss's theory mean for its impact on the courts, and ultimately, on the development of critical race theory? The most obvious answer might be that, in judicial terms, Fiss's resort to a reified group-disadvantaging principle had minimal payoff. Despite a range of features that would seem to make an asymmetrical, group-based theory more palatable to the judiciary, and Fiss's theory still departed from adjudicative norms to such a degree that it was decisively rejected, beginning with the Court's decision in *Washington v. Davis*.<sup>41</sup> But is there another possibility? Might Fiss's compromises have unwittingly unnerved the judiciary, or made his principle seem less compelling than it might otherwise have been, making possible the improbable claim that a more contextualized, subjectivized account of minority disadvantage might have made greater headway with the courts?

A part of me resists this line of analysis. There is something peculiar about the spectacle, already emerging in this symposium, of a group of disappointed leftist commentators castigating Owen Fiss – a scholar as fluent in, or skilled in the deployment of, dominant judicial norms and understandings as anyone writing here – on the improbable grounds that he misread the courts, and had he accommodated their understandings *less*, he might have achieved *more*. Notwithstanding this difficulty, I will follow some of my colleagues in exploring this possibility: for among the identifying features of a position on the legal academic left is a belief that it is possible to persuade courts to embrace a more explicitly political view of their role, and that normative conservatism in approaching the judiciary does not always have a positive pay-off. So might a more fully politicized account of the group-disadvantaging principle actually have worked better? Two arguments suggest an affirmative answer.

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<sup>39</sup> Although this approach may seem utopian from the contemporary perspective, Fiss's coming of age at a fleeting moment when a range of groups coalesced behind the goal of ameliorating the condition of blacks helped him view this characterization as a realistic possibility. Note Peller's description of how fleeting this moment was, not only among the biracial group of blacks and whites that supported civil rights, but among the two primary constituencies of blacks, the "integrationists" and the "black nationalists." See Peller, *Race Consciousness*, 1990 *Duke L.J.* 758.

<sup>40</sup> The merit of Fiss's decision to decontextualize black disadvantage in order to render the group-disadvantaging principle a "public value" may depend on how one defines or assesses the public-ness of public values. If, as Fiss's work sometimes seems to suggest, the 'public' character of public values is determined by a quasi-objective judicial process of divination – courts ask whether the values in question are responsive to unequivocally shared or valued norms, more attentive to the wellbeing of the citizenry as a whole, or even more widely-shared – Fiss's strategy of submerging the partisan or agonistic features of the group-disadvantaging principle may seem more plausible. But if there is inevitably a performative aspect to the 'public' character of a public value – if a value is shown to be 'public' not through a process of divination but by its power to compel adherence or affirmation through its particular articulation – Fiss's approach may have backfired. His flattened or absent account of black subjectivity, and of the history, context and emergence of white supremacy might well have made it difficult for African-Americans and others actively engaged in resisting white supremacy to subscribe to his theory.

<sup>41</sup> See *Washington v. Davis*, 426 U.S. 229 (1976).

First, it is possible that the Court may have been unnerved by an account of a group so lacking in agency, and a form of disadvantage so undefined by historical context. African-Americans as depicted by Fiss may have appeared to be sufferers without the familiar markers of agentic subjectivity, a group whose privations had no beginning and no historical trajectory: in short, the very definition of a perpetual client population. An effort to ameliorate the condition of a group whose disadvantage was so static, and prompted so little agentic resistance, might threaten to embroil the courts in a remedial enterprise which was unmanageable. Whether a strategic effort to abet, or a genuine reflection of a belief that a more abstract account was more suitable to, the courts' role, this suppression of subjectivity, agency and history may have backfired.

But the more worrisome – indeed more haunting – possibility is that by suggesting that the group-disadvantaging principle rested on ostensibly shared, 'public values,' Fiss may have failed to alert the courts to the stakes of the choices facing them. Writing immediately after the Court's decision in *Washington v. Davis*, Alan Freeman argued that the rejection of the disparate impact, in favor of the discriminatory intent, approach to equal protection, represented a triumph of the "perpetrator perspective" over the "victim perspective."<sup>42</sup> Twenty years later David Crump supported this insight with the results of empirical research: "in polls ... whites tend to use the word 'racism' to refer to explicit and conscious belief in racial superiority. African Americans mean something different by racism: a set of practices and institutions that result in the oppression of black people."<sup>43</sup> But by presenting the group disadvantaging principle as a matter of shared normative concern, Fiss did not fully communicate the most urgent stakes of the decision. His view did not make clear that embracing discriminatory intent risked shaping equal protection law in the image of white complacency, and exiling African-Americans from the sphere of adjudication that had once been a crucial source of support. If the Court was simply being asked to choose among shared political values, the Justices might have concluded that they might as well remain with the familiar, institutionally benign features of the anti-discrimination principle. What the Court would have done with a more explicit, politicized choice is, of course difficult to predict. It would have required the Court to come to reconceptualize the processes that have produced minority disadvantage and to confront the implication or complicity of even well-meaning whites in these processes. But it would also have made clear the magnitude and complexity of the problem, and the perceptions of those whose views would, in effect, be rendered marginal by a more restrictive view of the clause. Though we cannot be sure of the judicial response, contemporaneous advocacy might better have made clear the political implications of the choices faced by the Court, than have permitted the Court to preserve the illusion that one or more of these "mediating principles" would vindicate the perspectives of all those before it.

It is, perhaps, in this broader sense that we can say that "Groups and the Equal Protection Clause" contributed to the emergence of critical race theory. It not only inaugurated the possibility of making group-specific claims about equal protection -- claims that, in fuller elaboration, have come to entail accounts of the subjectivity of

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<sup>42</sup> See Alan Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 *Minn. L. Rev.* 1049 (1978).

<sup>43</sup> David Crump, *Evidence, Race, Intent and Evil: The Paradox of Purposelessness in the Constitutional Race Discrimination Cases*, 27 *Hofstra L. Rev.* 285, 315 (1998).

people of color, and the operation of systems of white supremacy. "Groups" may also have helped to engender a view that, for better or for worse, the racialized, political stakes of doctrinal choices are too important to be left to the divination of the courts.