

2002

## Owen Fiss, Equality Theory, and Judicial Role

Susan P. Sturm

*Columbia Law School*, [ssurm@law.columbia.edu](mailto:ssurm@law.columbia.edu)

Follow this and additional works at: [https://scholarship.law.columbia.edu/faculty\\_scholarship](https://scholarship.law.columbia.edu/faculty_scholarship)



Part of the [Jurisprudence Commons](#)

---

### Recommended Citation

Susan P. Sturm, *Owen Fiss, Equality Theory, and Judicial Role*, 2(1) ISSUES LEGAL SCHOLARSHIP i (2002).  
Available at: [https://scholarship.law.columbia.edu/faculty\\_scholarship/3487](https://scholarship.law.columbia.edu/faculty_scholarship/3487)

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact [scholarshiparchive@law.columbia.edu](mailto:scholarshiparchive@law.columbia.edu), [rwitt@law.columbia.edu](mailto:rwitt@law.columbia.edu).

# *Issues in Legal Scholarship*

---

THE ORIGINS AND FATE OF ANTISUBORDINATION THEORY

2003

*Article 18*

---

## Owen Fiss, Equality Theory, and Judicial Role

Susan Sturm\*

\*Columbia University Law School,

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

Copyright ©2003 by the authors.

All rights reserved.

# Owen Fiss, Equality Theory, and Judicial Role

Susan Sturm

## **Abstract**

This essay uses Owen Fiss' treatment of equality doctrine in "Groups and the Equal Protection Clause" to demonstrate the influence of judicial role conceptions on equality jurisprudence. Fiss' conception of the judiciary's role in elaborating and enforcing public norms profoundly shapes his articulation of the anti-subordination principle. More specifically, Fiss looks to the federal judiciary unilaterally to declare public law truths and to impose those truths on noncompliant bureaucrats. This static, almost imperial role places great pressure on the judiciary to adopt unitary equality norms that can be implemented, at least in theory, through top-down imposition. Fiss' commitment to a top-down view of norm elaboration, with the judiciary at the top, prevents him from taking advantage of the potential suppleness of the anti-subordination principle. This essay shows how Fiss' top-down-ness ultimately infects his elaboration of the anti-subordination principle itself, making it vulnerable to Fiss' own criticisms of the anti-discrimination principle. It then suggests the promise of developing equality theory in light of a more dynamic, less jurocentric conception of the judiciary.

Owen Fiss has devoted a substantial part of his academic career to the question of federal courts' role in pursuing equality for black Americans. He does this in two veins of scholarship—one focused on developing equality theory and its implications for doctrine, and the other focusing on the jurisprudential and remedial role of the judge in the pursuit of these public norms.<sup>1</sup> These two lines of scholarship are usually treated as distinct and unrelated. Yet, Fiss's equality theory is profoundly influenced by his conception of the judiciary's role in elaborating and enforcing public norms. More specifically, Fiss looks to the federal judiciary unilaterally to declare public law truths and to impose those truths on noncompliant bureaucrats. This static, almost imperial role places great pressure on the judiciary to adopt single-minded and relatively clear equality norms that can be implemented, at least in theory, through top-down imposition. However, any resulting grand theory of discrimination, including Fiss's eloquent and bold anti-subordination theory, cannot deal adequately with the complex and shifting dynamics and normative meaning of group-based discrimination.

Choices about judicial role often seem to be taken for granted in the discussions about legal doctrine of and remedies for workplace discrimination. Yet, they shape the content of legal norms, the judicial strategies used to address complex problems, and the perceived legitimacy of these choices. Equality jurisprudence would benefit in its subtlety, legitimacy, and effectiveness if it were developed with a fuller and more dynamic and structural role as part of the judicial repertoire. This would enable the judiciary to take account of the patterns of interaction that produce group-based exclusion. It would also build on the many occasions beyond formal adjudication after trial in which courts prompt elaboration of equality norms under conditions of uncertainty, including summary judgment, class certification, and settlement of class actions.

This commentary attempts to make the relationship between Fiss's equality and public law jurisprudence explicit, focusing on his important article, "*Groups and the Equal Protection Clause*."<sup>2</sup> It then draws on my own recent work to suggest the promise of developing equality theory in light of a more dynamic, less jurocentric conception of the judiciary.

*Groups and the Equal Protection Clause* is perhaps the best known of Fiss's equality articles. It attempts to articulate a theory of equality adequate to the task of remedying the historic and legally countenanced subordination of blacks.<sup>3</sup> The article advances a critique of the anti-discrimination theory for its failure to account for (and thus discipline) judicial outcomes and for its limitations in addressing the material conditions contributing to racial inequality. It also offers an alternative mediating principle—the group-disadvantaging or anti-subordination principle—asonethat“hasasgood,ifnotbetter,claimtorepresenttheidealofequality,onethat takes a fuller account of social reality, and one that more clearly focuses the issues that must be decided in equal protection cases.”<sup>4</sup>

Fiss's emphasis on groups in defining equality theory was path-breaking in 1975, and it endures as a milestone in the on-going effort to expand discrimination jurisprudence beyond formal equality. Yet, Fiss's particular conception of group-based equality is surprisingly meager and static as a mediating principle. It has not taken hold as a framework of analysis, either by the

<sup>1</sup> See Owen Fiss, *Forward: The Forms of Justice*, 93 Harv. L. Rev. 1 (1979); *Against Settlement*, 93 Yale L.J. 1073 (1984).

<sup>2</sup> 5 *Philosophy & Pub. Aff.* 107 (1976).

<sup>3</sup> Fiss's other major articles dealing with equality theory include *A Theory of Fair Employment Laws* and Fiss, *The Jurisprudence of Bussing*, 39 *Law & Contemporary Prob* 194 (1975).

<sup>4</sup> *Groups and the Equal Protection Clause*, at 108.

courts or by subsequent scholars. It has the contradictory qualities of being both too radical to be seriously considered by the courts and too timid to have much purchase as a catalyst for normative discourse. Fiss is simultaneously romantic and timid in his articulation of equality jurisprudence.

What accounts for this contradictory character of Fiss' group disadvantaging principle?

One cannot fully understand Fiss' equality scholarship without considering it in the context of his work on the role of the courts in expounding public law values. Fiss embraces a particular conception of the judiciary, which he articulates in his writing on the forms of justice: "The task of the judge is to give meaning to constitutional values, and he does that by working with constitutional text, history, and social ideals. He searches for what is true, right, or just."<sup>5</sup>

In *Groups and the Equal Protection Clause*, Fiss exemplifies this judicial stance by use of a natural law method to search for truth in the interpretation of equal protection doctrine. He defines a particular problem to focus constitutional inquiry, charges the judiciary with defining a single, unitary mediating principle to address that problem, and then constructs a hierarchical relationship between the judiciary and other public bodies to implement those principles. The problem is that this methodology and conception of the judiciary cannot produce workable constitutional principles or relationships that can address the complex problems that drive Fiss' scholarly agenda.

Fiss begins with the character of the equal protection clause and the equality principle itself. The equal protection clause is an ideal, susceptible to a wider range of meanings. It is not dictated by either the text or the legislative history of the Clause. Yet, the anti-discrimination clause has reigned supreme as the dominant mediating principle. One of Fiss' principle goals is to dislodge the idea that the anti-discrimination principle flows inevitably from the equal protection clause. It is instead a "mediating" principle giving ambiguous constitutional principles a judicial gloss that is open to reevaluation. Fiss constructs a compelling critique of anti-discrimination jurisprudence to show that this particular conception of equality is neither inevitable nor defensible as an over-arching equality norm.

Fiss successfully demonstrates that the anti-discrimination principle embodies a limited conception of the judiciary that is not required by the constitutional text. He then attributes the appeal of the clause to its supposed correspondence with rule of law values such as limited judicial discretion, formality, objectivity, universality, and individualism. He questions the validity of these principles of mechanical jurisprudence, although he does not provide much help in understanding why they do not deserve the weight they are given. (In his public law scholarship, Fiss is more explicit about the overriding importance of racial equality and the adjustment of procedure "to meet felt necessities."<sup>6</sup> He characterizes the judge as an "oracle" whose job is not "to tell the people what they already believe,"<sup>7</sup> and as the "sovereign" who "sends his officers throughout the realm to speak the law and see that it is obeyed."<sup>8</sup> The central task of the judiciary is to give operative meaning to constitutional values by searching for "what is true, right or just."<sup>9</sup> At the remedial stage, Fiss casts the judge in the role of manager who, as part of the task of giving meaning to public values, undertakes the direct reconstruction of a bureaucracy: "In the course of the reconstructive process, the judge must ultimately penetrate the institutional façade, take the lid off the so-called black box, in order to locate critical

<sup>5</sup> *Forms of Justice*, at 9.

<sup>6</sup> *Id.* at 8.

<sup>7</sup> *Groups and the Equal Protection Clause*, at 173.

<sup>8</sup> Fiss, *The Forms of Justice*, 93 *Harv. L. Rev.* 1, 30 (1979).

<sup>9</sup> *Id.* at 9.

operatives within the institution to whom reconstructive directives must be issued.” His commitment to judge as oracle precludes his consideration of other approaches to judicial role that might be more responsive to concerns about judicial legitimacy and potentially more effective in elaborating equality norms. This point is elaborated below.)

Fiss also argues that “the connection between those ideals and the principle may be nothing more than an illusion.”<sup>10</sup> The anti-discrimination doctrine does require judges to make complex and discretion-laden judgments. Through the device of suspect classifications, anti-discrimination doctrine does incorporate the concept of groups, but does not justify that reliance on groups in relation to the anti-discrimination principle. It does not necessarily further the rule of law values of treating like persons the same, limiting the discretion and judgment of the judiciary, embodying objectivity, and focusing on individuals. What’s more, the anti-discrimination principle does not provide the normative or analytical tools to address several of the most pressing and difficult aspects of racial policy—preferential treatment, state inaction in the face of private racial subordination, and facially neutral criteria. The principle is both over- and under-inclusive, and it does not provide a theoretical foundation for distinguishing between different kinds of race-based categories, or can only do so by departing from the anti-discrimination principle itself.<sup>11</sup>

Having demonstrated the limitations of the anti-discrimination norm as a mediating principle, Fiss proceeds to advocate for an alternative. He advances the group-disadvantaging theory, not as a supplement but as a substitute unitary and universal theory of equality. His effort to legitimate the concept of the group in equality analysis is a crucial move if the aspirations reflected in constitutional and statutory principles are to continue to have meaning. As Fiss and many others after him have noted, inequality operates as “a social condition that threatens important constitutional values and the organizational dynamic that perpetuates that dynamic.”<sup>12</sup> But Fiss’ methodological approach and resulting doctrinal proposal do not match the dynamic and complex insight that drives his critique of the anti-discrimination principle. He proceeds using a methodology that is not grounded in the social circumstances he seeks to address. The resulting constitutional rule is difficult to defend using these methods of textual and logical analysis, and provides little guidance in addressing new and unanticipated situations. It thus fails as both a constitutional method and principle. Indeed, it suffers from many of the defects that Fiss so astutely levels at the anti-discrimination principle.

Fiss identifies the status of blacks as the model group with which the equal protection clause is concerned.<sup>13</sup> He justifies this choice through conventional doctrinal method—original

---

<sup>10</sup>Id at 129.

<sup>11</sup>To some extent, Fiss is stacking the deck against the anti-discrimination principle. The principle itself can accommodate some aspect of group analysis. Fiss’ article on a theory of employment laws introduces the idea of functional equivalence as a way of conjoining individual and group based analysis.

<sup>12</sup>Owen Fiss, *The Forms of Justice*.

<sup>13</sup>“In attempting to formulate another theory of equal protection, I have viewed the Clause primarily, but not exclusively, as a protection for blacks.” Fiss, *Groups and the Equal Protection Clause*, at 147. It is important to note that Fiss intends his analysis to apply not only to constitutional interpretation but also to courts’ elaboration of statutory principles of equality. He is attempting to articulate a unified theory and role. Contrary to Fiss’ expectation, equal protection and Title VII jurisprudence have not developed in tandem. Disparate impact and affirmative action doctrine under Title VII has been more amenable to taking account of group status, although not based solely or even predominantly on the justifications Fiss offers. For this reason, I will focus on the theory of equality and the court’s role in elaborating that theory. This discussion is directed at the conception of equality and judicial role. More careful attention should be paid to the question of whether the judiciary should play a different role in elaborating constitutional as opposed to statutory principles of equality.

intent, stare decisis, and judicial practice. He builds a theory of groups by extrapolating analytically from the historical situation of blacks, and then limiting his conception of group inequality to the analytical categories thus derived. He articulates, as natural and empirical truths, a set of unchanging features of groups—an entity that also meets the condition of interdependence. This discussion is completely abstract and almost axiomatic in its method. It is also divorced from historical and social context, except as examples to illustrate the features of these “natural classes.” Thus, Fiss argues that blacks, as a group that has been “perpetually subordinated” and politically disempowered, are entitled to protection as a specially disadvantaged group.

Fiss identifies black people’s socioeconomic and political position, not as part of the process of identifying the nature of the equality problem or the particular equality values implicated by those conditions. Instead, “the socioeconomic position of the group supplies an additional reason for judicial activism and also determines the content of the intervention—improvement of the status of that group.”<sup>14</sup> As an analysis of the particular circumstances of black Americans at a particular historical moment, Fiss’ analysis is defensible. But as a universal theory of groups, it is unilluminating and thin. Fiss’ criticism (in his attack on the antidiscrimination principle that lays the foundation for the group-disadvantaging alternative) of the use of suspect classes in standard equal protection analysis is equally applicable to his proposed substitute: “It anchors the category of suspect classification in historical fact, without room for the kind of generality expected of constitutional doctrines, a generality that might be sufficient to embrace new situations....”<sup>15</sup>

Fiss grounds his embrace of the anti-subordination principle in natural law analysis, without the usual supports of text and logic that typically buttress such assertions. In the process, Fiss naturalizes groups as a fixed and predefined phenomena, thus potentially inflating the importance of groups as an entity and under-valuing the relevance of group interaction to the participation of group members as full citizens. His principle is impervious to the lessons of cognitive psychology, organizational theory, and even history outside of the particular history of black Americans. Group status may matter if it affects the capacity of the group to participate equally in the conditions of citizenship. Group status may be relevant not only as a political category (which is the aspect of groups that seems pivotal to Fiss) but also as a cognitive category shaping how decision makers treat members of different groups or as a unit of interaction. To be fair, Fiss’ article predates the recent explosion of legal scholarship taking account of the implications of sociological, psychological, and organizational research for equality jurisprudence. But his method and resulting proposal would preclude his taking account of these developments in any case.

Fiss’ version of the anti-subordination principle does not answer questions that are crucial to the principle’s legitimacy and effectiveness as a guide for future cases. How do we know what subordination is? Why should we care about group status over other forms of equality? On what basis do judges make choices about the ends and means involved in improving the status of protected groups? Fiss acknowledges that the concept of the group is “problematic” and “messy” and that “the usual material of judicial decisions—legislative history and text—provides no guidance.”<sup>16</sup> But he asserts that the text clothes the court with the authority to give specific meaning to the ideal of equity – to choose among the various subgoals contained within the

---

<sup>14</sup>Id. at 154.

<sup>15</sup>Id. at 125.

<sup>16</sup>Groups and the Equal Protection Clause at 173.

ideal.” He concedes that the group disadvantaging principle will strain the resources, imagination, and patience of the judiciary. But Fiss’ commitment to the importance of the constitutional principle of equality combines with his faith in a form of substantive rationality that comes from judges’ ability to be “distanced and detached from immediate contestants and from the body politic, and yet fully attentive to grievances.”

This conception of judicial role also constructs a particular type of relationship between the judiciary and other institutions and subsystems whose conduct is implicated by legal norms. According to this conception, judges simply dictate to other actors about the details of legal norms as they apply to new circumstances. This is a purely hierarchical relationship, albeit within a circumscribed interaction defined essentially by footnote four of *Carolene Products*. Judges unilaterally formulate rules, impose these rules as legal or remedial requirements, and enforce those rules when violated. Judges thus necessarily choose between ambiguous and under-inclusive formulations of legal norms. They do not define their role as actively encouraging other institutional actors to engage with the meaning of those standards in the contexts where the problems occur, at least as part of the process of judicial deliberation and norm elaboration.

Fiss’ view of judicial role, method, and relationship places discrimination remedies involving institutional redesign in an uneasy relationship to the articulation of rights. These remedies cannot be logically deduced from an abstract, general legal norm. Without some interactive process that engages the relationship between the problematic condition that triggers legal scrutiny and the appropriate remedial response, remedies bear only an instrumental relationship to rights. If judging is only about declaring and enforcing norms, then there is “no connection between the core processes of adjudication that give the judge special claim to competence and the instrumental judgments necessarily entailed in fashioning the remedy.”<sup>17</sup>

For those of us who share Fiss’ view of the judiciary as a crucial (although more limited) participant in realizing the law’s equality aspirations in a complex world, Fiss’ failure to provide a persuasive response to these questions, and to the legitimacy challenges they invite, is troubling. I trace the problems with Fiss’ approach to his preoccupation with articulating a unitary constitutional principle capable of addressing the status of a particular group’s problems and his imperial conception of judicial role and responsibility in addressing those problems. Fiss’ project is directed toward legitimating the federal judiciary’s role in elevating the status of black Americans as an identifiable group. He is in search of an elegant limiting principle that “justifies the institutional allocations—our willingness to allow those “nine men” to substitute their judgment (about ends as well as means) for that of “the people.”<sup>18</sup> This is a futile search. No single, over-arching theory of groups can respond to the complex and varied conditions that produce exclusion and subordination. Nor can a single mediating principle, unilaterally imposed by the judiciary, provide the specificity and guidance needed to answer hard questions and still respond to the diversity and fluidity of contexts to which the principle must apply. Finally, casting the judiciary in the role of oracle or unilateral norm enforcer undercuts its legitimacy and effectiveness as a participant in defining equality norms.

Recent scholarship, including my own, urges us to think about discrimination as a set of social practices, a dynamic interaction among culture, cognition, and context. It cannot be

<sup>17</sup>Fiss, *Forms of Justice*, at 51.

<sup>18</sup>*Groups and the Equal Protection Clause*, at 154.

reduced to a single explanatory theory or rule violation.<sup>19</sup> It is often only discernible by examining patterns of interaction that produce problematic conditions or relationships. Its normative significance is itself determined through the problem identification process, which may in turn reveal limitations of the norms themselves. There is a dynamic, rather than a purely instrumental relationship between right and remedy. Elaborating the meaning of a general norm in context is crucial to formulating a remedial response, which in turn deepens and even alters the understanding of the aspirational norm.

Moreover, situated knowledge generated through reflective interaction may be more productive than detached logical consideration in identifying the normative significance of challenged practices, what sustains them, and how they can be changed. It may be important to know how particular practices affect members of identified groups, how and why those patterns persist over time, what they mean for the status of group members, and whether alternatives exist that could minimize exclusion. Identification and remediation of group based inequality requires a process of problem solving. That process identifies the structural dimensions of a problem through an insistent inquiry of tracing back to root causes. It requires participants to articulate norms in context as part of the process of determining why particular circumstances pose a problem requiring remediation. It encourages organizations to gather and share information enabling that analysis to proceed. It emphasizes developing individual and institutional capacity and incentive to respond to problems thus revealed. It encourages the design, evaluation, and comparison of solutions that involve the stakeholders who participate in the day-to-day patterns that produce bias and exclusion. It also entails reframing the aspirations motivating change to reflect these interlocking problems and constituencies. Formal legal standards and categories do not define the aims, scope and strategies of problem solving.

This is where expanding our conceptions of judicial role and relationships to other institutional actors becomes crucial to the project of articulating mediating principles to give meaning to general aspirations of equality. The judicial role is not limited to simply imposing a unilateral mediating principle to govern equality determinations in all situations. It may also entail identifying situations that pose a prima facie threat to equality aspirations, encouraging responsible actors to engage in a deliberative process that elaborates the meaning of those norms in a particular context, and then evaluating the results of that deliberative process in relation to comparable contexts and the general norm. Some form of judicial involvement may occur when there is reason to be concerned about the normative implications of patterns that reflect institutional dysfunction when considered in relation to general equality norms and compared to other, comparable settings. By interrogating the reasons these conditions have been identified as problems, contextually informed normative principles may develop.

This approach expands or alters one's conception of judicial role toward a more dynamic and interactive one in which judges' role 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. The courts' role in this enterprise can continue to

---

<sup>19</sup> See David Charny & G. Mitu Gulati, *Efficiency Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for "High-Level" Jobs*, 33 *Harv. C.R.-C.L. L. Rev.* 57 (1998); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *Stan. L. Rev.* 1761 (1995); Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, in *Foundations of Employment Discrimination Law* 122 (John Donahue ed. 1997); Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 *Cal. L. Rev.* 1, 30 (2000). Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 *Colum. L. Rev.* 458 (2001).

elaborate equality norms under conditions of complexity and yet operate within the bounds of legality and judicial competence. By constructing a role focused on developing the institutional competence of other actors to pursue equality norms, courts can create the circumstances permitting the kind of inquiry needed to combine general normative aspirations with necessary situated knowledge and capacity.

This approach, which I have developed at greater length elsewhere,<sup>20</sup> casts courts in a crucial but limited role in developing mediating principles to address complex problems, such as group based inequality, that implicate public norms but are insufficiently understood and/or resistant to centralized remediation. Courts in a structural regime act as a catalyst and a floor in addressing these complex questions. They encourage the formation of deliberative and participatory structures aimed at solving problems that threaten the legality of institutions, and they sanction responsible actors who refuse to correct problems that violate well-established minimum standards or that have been identified through the problem solving process. Legal norms develop not only through liability determinations, but also through legally structured occasions for deliberating about the relationship between norms and practice. Class certification, summary judgment, and consent decree approval are all worth exploring in this light. They provide occasions for raising questions and generating deliberations about the normative adequacy of complex forms of bias, short of judicial imposition of liability. The courts' jurisprudence on internal and alternative dispute resolution also merits consideration from this vantage point.

Law in this view functions not solely as a set of rules developed by external legal actors and imposed on everyone else. Legal norms play the role of opening spaces for ongoing engagement about current practice in relation to aspirations that have been identified to be of public significance. Law is elaborated through dynamic interactions on the ground. Law institutionalizes occasions for analysis, reflection, relationship building, boundary renegotiations, and institution building. It provides a normative and institutional framework for shaping who is at the table, establishing institutional priorities, constructing sites for reflection about normative significance of organizational activity, and creating opportunities for mobilization. Judicial coercion in this approach operates to induce actors to participate in the development of effective and accountable internal systems to address and prevent structural bias, and to sanction conduct that violates widely accepted, clear standards. The judiciary becomes involved when there is a clear violation of established equality rules or when there is a strong indication that particular systems and practices are failing in ways that fall within the purview of generally articulated equality aspirations. This triggers a deliberative process that teases out normative principles from identification of problematic conditions. As problems are identified, judicial actors collaborate in deliberating about the criteria of effectiveness without unilaterally imposing a uniform code of conduct. They do this by insisting that responsible actors develop and justify criteria for evaluating the effectiveness of their internal problem solving mechanisms. Courts are then in a position to assess the resulting justifications for elaborated norms and criteria in relation to general equality norms. This enables courts to function as a catalyst of norm elaboration and implementation, rather than to either defer to unaccountable private decisions or to assume direct managerial responsibility.

In recent work, I have identified the features of this jurisprudential approach in judicial doctrine involving sexual harassment and subjective employment practices.<sup>21</sup> This work focuses

<sup>20</sup>See Sturm, *supra* note 16; Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 *Wisc. L. Rev.* 277.

<sup>21</sup>See Sturm, *supra* note 16.

on the approach to complex and structural forms in equality in Title VII jurisprudence. The Supreme Court's sexual harassment and subjective employment practices jurisprudence points toward a structural judicial approach by (1) defining the underlying legal violation (inequality or discrimination) as a condition or problem that must be effectively addressed, (2) embracing contextualization (and comparing across context) as part of the process of determining the impact and legal significance of particular conduct; (3) encouraging institutional innovation within workplaces by prescribing an approach that enables employers to avoid liability by preventing or redressing problems of bias or exclusion; and (4) providing accountability and norm elaboration by evaluating the adequacy of the problem solving process in relation to the general equality norm and the effectiveness of institutional processes in eliminating the problematic conditions.<sup>22</sup>

So, for example, some courts have focused on the adequacy of employers' internal decisionmaking processes and systems as the basis for determining whether systems that disproportionately exclude members of particular groups are engaged in discrimination.<sup>23</sup> If subjective employment practices produce a disparate impact on women or people of color, this disparity operates as a signal of the possibility that the system is contributing the production or expression of bias. The emphasis is on whether the unaccountable or unstructured exercise of discretion can be justified, in relation to norms of equal participation and available alternative systems of decision making. Are there systems that will permit the exercise of discretion to pursue employers' goals, but will institute standards and processes that minimize the expression of bias? Thus, adverse impact on a group does not in and of itself constitute a violation. It instead prompts an inquiry into the adequacy, fairness, and accountability of the decisionmaking processes that produced the initially suspect outcome.

I have not yet considered the implications of these doctrinal developments for equal protection doctrine. The point here is simply to suggest new possibilities that emerge from shifting the courts' role from unilaterally imposing a mediating equality theory to that of constructing and evaluating the results of a deliberative process to aid in the development of those mediating principles in context. This form of deliberation must be distinguished from delegation of public law making to private actors. Nor is it opting for dispute settlement at the expense of public law values.<sup>24</sup> This approach reaches toward a third conception of judicial involvement that a conception of judicial role that attempts to move beyond the familiar dichotomies between private settlement and public norm articulation. It directly engages other actors in the project of elaborating the meaning of equality, and creates occasions for the judiciary to evaluate those deliberations in relation to broad equality principles and their elaboration in other contexts.

I look forward to developing the implications of rethinking judicial role for equality jurisprudence. I also look forward to continuing what continues to be an extremely rewarding and instructive dialogue with Fiss and his work.<sup>25</sup>

<sup>22</sup> Sturm, *supra*, note, at 489.

<sup>23</sup> See, e.g., *Stender v. Lucky Stores*, 803 F.Supp. 259, 335 (N/D/ Cal 1992). Interestingly, much of the legal development in this area has proceeded in the context of class certification and settlement approvals. See

<sup>24</sup> In other work, Fiss has lumped together all forms of settlement and treated them as private peace-making. See Fiss, *Against Settlement*, *supra* note. He also treats all forms of participation by stakeholders in public conflicts as cooptation. See Owen Fiss, *The Promise of Participation* 78 *Iowa L. Rev.* 965, 968 (1993). This response ignores a third form of judicial interaction, which links public deliberation to the process of defining public values.

<sup>25</sup> See Susan Sturm, *The Promise of Participation*, 78 *Iowa L. Rev.* 981 (1993) (engaging with Fiss' article on *Martin v. Wilks*).