

Beyond *Brown*: Opportunity Versus Equality as an Empowerment Norm: An Essay for Owen Fiss

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I. AN INTRODUCTORY NOTE

I became a student of Owen Fiss in 1969 during my first year of law school at the University of Chicago. He was then, and remains, the most exciting teacher I have ever known or experienced. Each of his classes is dominated by constant tension: not tension between instructor and student, though that was a prevalent pedagogic method of the time, but an intellectual tension that derives — as I have later learned from teaching with him — from Owen's careful effort to construct from the materials for that day's class the most important and striking contrasts in ideas from which the student can learn. The discussion and debate that ensue put students — class after class — on the edge of their chairs, at once intellectually exhilarating and deeply instructive.

For those most unfortunate readers who have not experienced a Fiss class, a flavor of the style can be seen from a passage I came across in rereading Owen's great article *The Forms of Justice*.¹ The passage perfectly captures the form of opening statement with which he begins each class or seminar. In the article, Owen is describing the difficulties some courts — and, in particular, the Burger Court — were having in conceptualizing structural reform, such as the reform of prisons or school systems, as a form of adjudication. His introduction describes the importance of the issue, how structural reform derived from the Warren Court's *Brown* decision,² was extended in the early Burger Court years, but was then under attack. He frames the issue in the article just as he frames issues in each of his classes:

[W]e are at a historic moment, a turning point in the history of procedure — not because we are in the midst of an intellectual revolution, but because we are in the midst of a counterrevolution; not because we are at the verge of a new discovery, but because the discovery of an earlier era is now in jeopardy.³

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1. Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

2. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). (It might be thought that everything in Owen's oeuvre derives from *Brown*, an issue that I discuss in more detail below.)

3. Fiss, *supra* note 1, at 5.

This style is not merely rhetorical, though it obviously possesses great rhetorical force. In each class, the student is shown that the issues being discussed are of crucial importance to our understanding of modern life. Those who do not know him may doubt that this passage is typical or that anyone could maintain such a sense of drama week-in and week-out throughout a course. But I assure you having taken every course he offered at the University of Chicago, and having taught with him continuously over the past decade, that he does.

Some years after Chicago, I had the great fortune of joining the Yale Law School faculty and becoming one of Owen's colleagues. He is not only a wonderful colleague, but my closest friend on the faculty. This, however, is not a unique position. I have no doubt that half of the Yale faculty regard him as their closest friend. Since 1991, we have taught a seminar together frequently entitled "Capitalism or Democracy?"⁴ in which we attempt to make sense of the great transformation in world affairs following the fall of the Berlin Wall and the dissolution of the Soviet Union in the context of the extension of democracy and capitalism. This seminar with Owen has been the high point of my academic career as a teacher and — in the seminar, still — as one of his students.

This essay addresses some of the unresolved issues of that seminar and some matters that I view as problematic in Owen's work.⁵ No one who has read Owen's writings can fail to see that central to it is the normative value of equality. Equality, of course, is the moral underpinning of *Brown* and of the civil rights movement, the understanding of which has been important to his career, both before entering the academy and since. Much of his work represents an explanation of the broader social meaning of *Brown*. Our seminar discusses both democracy — which Owen regards as based upon the moral principle of equality of citizens — and the market. Owen is generally critical of the market — perhaps less critical in recent years — but critical. It is the significance of the equality norm and the government's role in securing it, I believe, that generates this market criticism, a source of continuing debate between us.

Owen, however, appears to increasingly concede that there are limits to equality as a constitutional and social norm. It is subject to different interpretations, and there are many contexts in which the equality norm alone is insufficient to achieve the ends that Owen defends. But his writings continue to build upon equality and he remains skeptical of

4. Less frequently we have chosen titles that signal to students what the seminar will be about.

5. This should not be a memorial volume; he has many years left to refine his ideas in light of the criticisms of his colleagues and students — or to teach us more fully.

the achievements of institutions, like the market, in which norms of fairness are important, but in which equality is disregarded in favor of differential rewards according to the merits of one's production.

In this essay, I suggest that, at this stage in the history of the country, we must move beyond *Brown* and the equality norm to achieve the ends of social justice to which Owen (and others, including myself) aspires. To do so requires embracing a norm of enhancing opportunity. As I shall explain, viewing the central ambition of the society as creating the opportunity for individuals to more fully improve their abilities and their lives will better achieve those ends and will provide guidance to the resolution of many other social issues for which the equality norm is not helpful. I believe Owen's work illustrates that, however central *Brown* and the equality norm have appeared in his writings, they are today inadequate to achieve broader ends of social justice. In my view, to achieve those ends, Owen must adopt a different underlying norm — enhancing opportunity. Adopting the opportunity norm, however, compels a different understanding and interpretation of the market than Owen and others currently accept.

II. CRITICISMS OF THE MARKET

Owen, to my knowledge, has not written directly or comprehensively on the failings of the market as an institution. There are many individual passages in his writings, however, critical of the market and there has been a consistent air, at the least, of distaste, suggesting something of an aesthetic aversion to market operations. Again, I would like to believe that this distaste has declined somewhat in recent years, subsequent to our seminar, but that may only be personal optimism. I shall explain in this essay, however, why this distaste of market activities must be amended.

What are the sources of this distaste of the market? First — as emphasized by several at this Conference — following Adam Smith,⁶ many view market activities, in contrast to politics or the behavior of the government, as motivated principally by self-interest. Owen is the least self-interested person I have ever known, and distaste for the pursuit of self-interest is entirely understandable. But the self-interest characterization of market behavior is at best incomplete. Most market activities could be explained as readily as efforts to provide the best products and services to fellow citizens. Moreover, the contrast of self-interested market behavior to idealistic political behavior is surely not watertight:

6. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776).

Much of political activity — to public choice theorists, all — is motivated by self-interest as well.

Many view the market as stimulating materialism, and Owen, as a deep humanitarian, possesses not a drop of materialistic blood. But the materialism criticism is also incomplete. Wealth can be put to many ends. In a world in which individuals earn barely enough to survive, generosity is sparing and philanthropy is non-existent. And, as we have learned from our seminar, the wealthiest countries are also those with the lowest rates of infant mortality and malnutrition, and with the highest levels of education and investment in medical care as well as the longest life expectancies.

Much of Owen's distaste for markets appears to stem from his criticisms of individualism. In one famous passage, for example, Owen described the individualistic lawsuit as representing "[t]he ethic of the market . . . transferred to the courtroom."⁷ I have extracted this quotation from a larger context, but I assure you, this was not meant as a compliment. I confess that I do not fully understand the connection between individualism and the market. Owen, surely, is critical of individualistic rather than group understandings of values for reasons I shall discuss below. Part of Owen's skepticism about individualistic accounts of welfare stems from his effort to understand and give meaning to structural reform through litigation which, almost by definition, must proceed on a group, rather than individualistic, basis.⁸ Thus, in justifying structural reform litigation, Owen thought it necessary to diminish the significance of the individual litigation paradigm.⁹ But much — perhaps most — of market activity derives from group behavior, such as the behavior of labor unions and corporations, groups that have not received sufficient attention in Owen's analysis of the relevance of groups to the analysis of advantage and disadvantage.

In an important essay, Owen conceded that markets enhance the economic wealth of a society, but complained that markets still ratify inequalities of economic power.¹⁰ I surely concede that markets do not guarantee economic equality; indeed, they are the means by which some citizens gain differentially greater incomes than other citizens. It is a different question, however, whether markets "ratify" inequalities of power. Beyond the fact that capital earns interest there is no reason to believe that they do.¹¹ To my mind, a more important matter is the

7. Fiss, *supra* note 1, at 19.

8. *Id.* at 18.

9. *Id.*; Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

10. Owen M. Fiss, *Capitalism and Democracy*, 13 MICH. J. INT'L LAW 908 (1992).

11. The point is deeper: The rate of interest on money is almost always less than the return on investment in human capital.

source of differential incomes in the market. Quite in contrast to the distribution of wealth through political means, relatively greater incomes earned by some in the market do not come at the expense of the wealth of other citizens. To the contrary, greater market success comes from providing products or services that other citizens value. As a consequence, and as I shall explain below, criticism of the market as ratifying inequalities of power is largely misdirected. I believe that market activities provide the most important mechanism to achieve the ends of social justice that Owen advocates.

After substantial thought, I believe that much of the difference between Owen and myself over the characterization and moral evaluation of market versus political activity derives from a different understanding of the relationship between the market and the state. At least in his earlier writings, Owen regarded the market and the state as institutions in opposition. Thus, in his famous article, *Why the State?*, Owen describes the principal role of the state as to serve as a countervailing power to the market.¹²

I regard this view as seriously incomplete. Politics and the market can be described as alternative means of aggregating the preferences or demands of the citizenry with respect to societal resources, both designed according to rules directed by the state. The “government” and the actions that it takes directing the activities of the citizenry represent only the result, the expression, of some aggregation of citizens’ desires effected according to the rules and procedures of a political organization defined by the state.¹³ The market, similarly, is a mechanism for aggregating citizens’ demands which, in contrast to politics, operates through the interactions of individual citizens by means of trade or exchange but, similarly, according to a set of rules and procedures defined by the state. The state, thus, defines the rules and procedures both for the operation of the market and for the operation of politics.

There are important differences, however, in the substantive rules for market and for political activities. It is a common view — and one I believe that Owen shares — that politics and the governmental activities that result from it are informed by much greater ethical constraints and much greater idealism than are markets. This view, however, is highly contestable. Through the rules of contracts, property law, the criminal justice system prohibiting theft and fraud, along with some additional statutes, such as the antitrust laws preventing actions harming consumers, individual market activities are constrained to allow market

12. Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987).

13. This approach has been emphasized by James Buchanan. See JAMES BUCHANAN, *LIBERTY, MARKET AND STATE* (1986).

exchanges only where society in the aggregate and citizens individually benefit from the exchange. In non-exchange interactions, tort law constrains individual behavior so to benefit the society in the aggregate, though some individuals will inescapably suffer loss.

Our rules and procedures that define the domain of politics do not constrain ends in the same way. The effective bounds on governmental operations are quite limited. Direct resource allocation by the government can provide greater wealth to some but, in contexts other than pure public goods, always at the expense of others. In other contexts, the wide discretion given governments allows responses to particular sets of constituents with particularly focused demands without regard to the broader and longer-term impact of such policies on the populace as a whole. Jim Crow is an example. Outcomes of the political process of this nature can be changed and have been changed over time. But the great achievements of the civil rights movement represent the correction of governmental failure, not of market failure.¹⁴

In this respect, the expansion of the implications of the equality norm has been an important source for the correction of earlier decisions of political entities. With the parallel adoption of the derivative principle of one-person-one-vote, political activities have become more centrally bound to the pursuit of equal treatment. As I will attempt to explain, however, there are limitations to the extent to which the equality norm can be implemented to pursue social justice. Indeed, I believe that the direction of Owen's work itself illustrates his recognition — to date, it remains a tacit recognition — of the limitations of the equality norm toward these ends. In the remainder of this essay, I hope to show those limitations and to suggest how they might be surmounted.

III. THE SIGNIFICANCE OF THE EQUALITY NORM

Any who have read Owen's work will appreciate the centrality to his thought of the value of equality. The deep moral force of *Brown*, of the civil rights movement, and of the expansion of the role of the courts in achieving social justice all stem from the primacy of the equality

14. I accept entirely that the market alone was insufficient to correct the social and governmental failure that resulted in slavery and Jim Crow. Some economists have argued that market processes do penalize unmerited discrimination (*see* GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (1971)), but the effects were marginal and largely insignificant with respect to slavery and Jim Crow given the magnitude of the societal investment in those practices. I also concede that the institution of slavery operated through the market, though the existence of market forces probably lessened individual harms. *See* ROBERT FOGEL, *TIME ON THE CROSS* (1974). But, again, markets are not self-defining; they are defined by the state. The existence of a market in slaves was the consequence of the failure of the state to prohibit slavery.

value.¹⁵ By Owen's interpretation, *Brown*

reshaped the Constitution by granting equality a place in the American constitutional order as prominent as that given to liberty and by acknowledging the state's affirmative role in securing that value. . . . Now there is virtually no public activity of any significance that is beyond the reach of the equality principle.¹⁶

As Owen has described, the equality principle extends beyond simply an effect on a set of cases and serves as the organizing normative basis for the most central institutions of our society. The moral basis of the institution of democracy and its principle of one person-one vote, for example, is the recognition of the moral and political equality of each citizen.¹⁷ The legacy of *Brown* is the aspiration of eradicating the caste system that derived from slavery, reinforced by continued racism.¹⁸

The centrality of the equality principle to our social fabric explains and justifies the expansive role that Owen sees for courts. Owen has been a persistent critic of the view that courts serve merely as impartial arbiters of private disputes. To the contrary, he vigorously advocates courts as coordinate branches of government charged independently with giving meaning to public values.¹⁹ This role for courts can be defended, however, only where a powerful moral principle — such as equality — can guide judicial decisions and distinguish the judicial role from the legislative or executive branches influenced by public opinion.²⁰

I see, however, a great but unresolved tension in Owen's work deriving from his concerns about the effectiveness of the equality norm as a foundation to achieve the ends of social justice that he advocates. Despite his repeated and consistent tributes to *Brown* and to the principle of equality that it established, I interpret the heart of his work as attempting to free our society and our legal system from the constraints of the equality norm. From his great and seminal article, *Groups and the Equal Protection Clause*,²¹ to his most recent book, *A Way Out*,²² Owen has sought to move the law and social policy beyond equality,

15. See, e.g., OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978).

16. OWEN M. FISS, *The Many Faces of the State*, 6 REV. CONST. STUD. 1, 2-3 (2001).

17. OWEN M. FISS, *Money and Politics*, 97 COLUM. L. REV. 2470, 2478 (1997).

18. FISS, *supra* note 1, at 16.

19. See *id.*, *passim*; FISS, *Against Settlement*, *supra* note 9. (*Against Settlement* remains one of the most heavily cited papers of the Program in Civil Liability where it was first published. The many insurance- and corporate-related foundations that supported the Program remain grateful to Owen for the prominence that his essay gave to Program activities.)

20. FISS, *supra* note 1, at 29-30.

21. OWEN M. FISS, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

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

while nevertheless embracing the achievements of *Brown* and the many extensions of the equality principle.

This has created what I view as a tension in his work: He remains deeply committed to *Brown* and to the underlying principle of equality. But he believes that our law and our social policy must extend beyond mere equality in order to fulfill broader societal ends. As a lawyer, he has attempted this task by struggling to redefine the concept of equality. As a social activist, he has ignored legal foundations and has tried through passionate persuasion to change the status quo. As I shall try to explain, his advocacy of change in the status quo leads him to promote solutions that extend beyond the equality norm of *Brown* and involve increased reliance on the market.

IV. THE LIMITS OF THE EQUALITY NORM

Owen's important paper, *Groups and the Equal Protection Clause*, though much broader in scope, seeks at its core to criticize that interpretation of the Constitution that would strike down affirmative action policies on behalf of blacks. He begins the article by stating that there are two alternative modes of Constitutional interpretation: one relies upon the text of the Constitution alone; the second employs what Owen calls a "mediating principle" that serves to give meaning to the otherwise ambiguous text of the Equal Protection Clause. According to Owen, the Clause itself is subject to a wide range of meanings, thus calling for some mediating principle on which courts can rely. As described in the article, the mediating principle adopted by the Supreme Court is what Owen calls the "antidiscrimination principle" which interprets the Equal Protection Clause to prohibit, among other actions, arbitrary distinctions between blacks and whites or distinctions not justified by compelling state interests. The antidiscrimination principle is attractive to courts because, like many other judicial principles, it calls for a court to distinguish between relevant and irrelevant characteristics, appears value neutral (thus, responsive to counter-majoritarian concerns), and appears objective. Owen emphasized, however, that the principle in operation is highly individualistic (a characterization, as we know, that hints of deeper problems). Implementation of the antidiscrimination principle will not generally allow racial preferences, such as affirmative action programs, and deals problematically, in Owen's view, with other legal issues that to Owen should be easily resolved.²³

The heart of the article is the proposal that what Owen calls the

23. In retrospect, some of the examples that he gives seem quaint and hardly problematic: racial covenants; the award of liquor licenses to discriminatory clubs; the closing of city swimming pools to prevent integration.

“group disadvantaging principle” be substituted for the antidiscrimination principle in order to give meaning to the Equal Protection Clause. Through this different form of mediation, the Equal Protection Clause can serve as the legal foundation for rectifying the continued social and economic disadvantages suffered by blacks (or other groups) despite the achievements of *Brown*. Thus, the group disadvantaging principle, unlike the antidiscrimination principle, can provide a foundation for systematic efforts to improve the economic conditions of blacks within American society.

Here, Owen’s dislike for individualistic approaches to problems becomes most clear. The group disadvantaging principle focuses on groups — centrally blacks — and their social and economic position in the society. As I understand his position, focusing on individuals, rather than groups, constrains the judicial interpretation of the equality norm. I presume this is so because disadvantaged individuals are in positions equal to many others also disadvantaged. Thus, equality alone adds little to any claims they might have. Viewing the disadvantages suffered by groups, instead, exposes how serious the disadvantages are and exposes — a continuous Fiss concern — parallels to the caste system that remain in American society.

The concern for providing remedies to social disadvantage is a broader theme in Owen’s work, and he returns to it again in *A Way Out*.²⁴ The book is an essay on social policy, not on law, but its conclusions are similar. Owen proposes the adoption of social policies that will end the existence of racial ghettos in our society. The book describes movingly the deep pathologies of life in urban ghettos and proposes, as a remedy, to move blacks from the inner cities to the suburbs where they will be more likely to find jobs.²⁵

There is a deep consistency not only in both the *Groups* essay and *A Way Out*, but in Owen’s concern about improving the condition of blacks in our society and ending all features of a caste system, a consistency in thought over decades characteristic only of deep thinkers. But I believe that Owen has not fully explicated the foundation for this consistency. That foundation, I believe, is the conclusion that *Brown* and the principle of equality are, at heart, insufficient grounds for achieving the social ends that Owen desires. Perhaps because of its enormous achievement, Owen cannot break himself from *Brown*.²⁶ But the consistency in his work is his effort to go beyond *Brown* and the equality norm

24. Fiss, *supra* note 22. *A Way Out* derives from his highly noted essay, *What Should Be Done For Those Who Have Been Left Behind?*, *BOSTON REV.*, July-Aug. 2000, at 4.

25. Fiss, *supra* note 22, at 22.

26. *See supra* note 2 and accompanying text.

in order to achieve greater ends.²⁷

Owen admits that the equality norm itself is insufficient: It is subject to many interpretations, the most plausible of which cannot provide support for affirmative action.²⁸ He proposes the group disadvantaging principle of interpretation to press the Equal Protection Clause into more rigorous use.²⁹ But, twenty-seven years after the *Groups* article proposing the adoption of the group disadvantaging principle, we see that it has not been generally convincing,³⁰ and there are ready explanations for the fact: There is nothing in the content of equal protection itself that recommends a group, rather than an individualistic, approach to legal issues. This is not to say that, in our society today, we cannot identify groups of citizens that are systematically disadvantaged — blacks obviously. It is only to admit that the economic conditions of these groups cannot be enhanced through implementation of the equality norm unless one embraces a redistribution of wealth idealized by Stalinists. In our society, blacks may have (roughly) equal access to the same levels of schooling as whites, equal access to employment, equal access to housing, and equal access to government programs. But those forms of equality do not guarantee equal incomes or equal success in economic life.

To my mind, this is not a fault of the principle of equality; it is simply an acknowledgement of the limitations of the equality norm. Like the Emancipation Proclamation, the enactment of the Equal Protection Clause was an important achievement. *Brown* was an achievement of even greater importance. But each of these achievements only took the society, and black citizens in particular, a certain distance. That distance has been achieved and should be admired. But to proceed further toward making blacks — even blacks as a group — full participants in American economic life, we must move beyond equality and beyond *Brown*. I read Owen's advocacy of repairing group disadvantage as a tacit confession that our society must transcend *Brown*.

27. Owen has also attempted to explain an interpretation of the First Amendment that derives from equality concerns, but it is difficult to justify his expansive notion of state involvement in creating a vibrant societal debate solely from a concern over equality. OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996).

28. Fiss, *supra* note 21, at 129.

29. *Id.*

30. To my knowledge, the distinction that Owen proposed between textual interpretation and interpretation through mediating principles has not been fully accepted. It served the purpose of supporting Owen's advocacy of the group disadvantaging principle because it characterized the antidiscrimination principle and the edifice of rules and presumptions built around it as entirely contingent. The link between the norm of equality and an implementation principle of antidiscrimination, however, seems to this reader not entirely contingent.

V. ENHANCING OPPORTUNITY AS A SUPERIOR EMPOWERMENT NORM

No one can believe that all persons are exactly equal in energy, in ability, or in the wisdom of the choices they make, among other differences. As a consequence, some level of inequality in economic condition is inevitable.

To my mind, the greatest failing of a caste system — whether in an ancient society or, to a lesser extent in the United States — is the constraints that it places on individuals that prevent them from developing the best use of their talents. I believe that all societies should embrace policies that allow, encourage, and make possible the development of the full use of each individual's talents. But our society must go beyond *Brown* and the simple norm of equality to achieve that goal.

After many years of discussion with Owen about this and related points, I do not believe that he really disagrees with this proposition, and I look forward to his comments at the conclusion of this Symposium. It will be difficult for him to abandon *Brown*. He has already described eloquently limitations of the equality principle itself. Supplanting *Brown* — which is not to say, denying *Brown's* achievement — will be more difficult. But I believe that it must be done.

I also believe that embracing an alternative norm — such as enhancing opportunity, or some alternative formulation — will also require Owen and others committed to social justice to entertain a different view of the operation of the market. There are no truly free markets. As described earlier, markets operate under a system of rules and procedures defined by the state. But where those principles are defined — as they are largely, though surely not entirely, in Western societies — to allow individuals to make the best use of their talents, they serve to implement social change. The market is the medium through which individuals can improve their lives. Governments, in contrast, constrained by norms of equality, cannot allow remotely comparable improvement.³¹

Again, I believe that Owen accepts this point over a large range. In *A Way Out*, what does he see as the principal advantage of moving blacks out of inner-city ghettos to the suburbs? To make them market participants: to get them jobs.³²

All of us have been deeply moved by the writings and the teachings of Owen Fiss now (for some of us) for many decades. I have no doubt that, as Owen further develops his ideas, especially those directed

31. For a further articulated argument of this point in the context of a comparison of government and market insurance and welfare regimes, see G.L. Priest, *Government Insurance Versus Market Insurance*, 28 GENEVA PAPERS ON RISK & INS. 71 (2003).

32. Fiss, *supra* note 22, at 28.

toward the goal of ending all features of the caste system in our country (whether through markets or not), we will continue to learn long into the future.