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The American Civil Rights Tradition: Anticlassification or Antisubordination

Jack M. Balkin / Reva B. Siegel

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A fairly standard story about the development of antidiscrimination jurisprudence argues that, during the 1970s, the United States Supreme Court decisively rejected the views of

Owen Fiss and other antisubordination theorists, and adopted a contrary and inconsistent theory of equality-the anticlassification principle-which holds that the government may not classify people either overtly or surreptitiously on the basis of a forbidden category like race. In this essay, we challenge this standard account, on analytical and historical grounds.

On the standard view, American antidiscrimination law reflects anticlassification principles. But as we show in the analytical section of the essay, the anticlassification principle does not itself do the work of deciding many important issues of antidiscrimination law. Courts must make a variety of implementing decisions in order to apply the anticlassification principle; and, as we demonstrate through a variety of examples, courts do not make such implementing decisions in any consistent manner. Inconsistency in the ways that courts have implemented the anticlassification principle, over time and in different parts of the law, suggests that the discourse of anticlassification conceals other values that do much of the work in determining which practices antidiscrimination law will enjoin. In other words, application of the anticlassification principle is not fixed, nor is the principle is self-implementing. It may be invoked to legitimate traditional status arrangements, or to challenge them. The nation's understanding of what it means to "discriminate on the basis of race" or to "discriminate on the basis of sex" is a social construction that shifts over time in response to social movement protest. As social protest delegitimates certain practices, courts are often moved, consciously or unconsciously, by perceptions of status harm, to find violations of the anticlassification principle where they saw none before. Considered from this historical vantage point, American civil rights jurisprudence vindicates both anticlassification and antisubordination commitments.

If the discourse of anticlassification at times vindicates values that we associate with antisubordination, what was at stake in the rise of antisubordination scholarship as a distinct body of legal theory in the 1970s, beginning with Owen Fiss' pathbreaking Groups and the Equal Protection Clause? In the historical section of our essay, we argue that antisubordination theory was a response to the political retrenchment that began in the decade after the 1968 election. As nation and Court began to retreat from the social-justice commitments of the Second Reconstruction-now using the indeterminacy of anticlassification discourse to rationalize rather than to disrupt status-enforcing relations-Fiss and others sought to restate the principles at the heart of the civil rights struggle. Fiss well appreciated that the way in which the nation understood the principles animating the fight against Jim Crow would shape the way the nation faced debates about questions of racial justice in the future.

This problem of collective memory is no less burning in our own day. While it is true that the Court and country refused the path that Fiss and other advocates of racial justice urged in the 1970s, it is deeply false that, in virtue of these choices, the antisubordination

principle is some alien discredited Other in American constitutional tradition. As this essay demonstrates, the antisubordination principle lives by multiple names, deep in the American Civil Rights Tradition, remaining its core and its conscience-even if, as history amply attests, it is the kind of principle the nation has often honored in the breach.

About the article

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