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Ackerman's Civil Rights Revolution and Modern American Racial Politics

ABSTRACT. Bruce Ackerman's *The Civil Rights Revolution* makes a signal contribution by documenting how the major civil rights statutes of the 1960s, especially the 1964 Civil Rights Act, the 1965 Voting Rights Act, and the 1968 Fair Housing Act, pragmatically employed diverse means, many facially race-neutral, some race-conscious, in order to pursue egalitarian advances in different arenas of American life. Ackerman's insistence that willingness to employ different strategies for addressing different problems requires embracing an "anti-humiliation" principle that he sees in *Brown v. Board of Education* and seeks to distinguish from "anti-subordination" approaches, and his claim that "anti-subordination" principles demand a "one-size-fits-all" approach to diverse racial inequalities, are less persuasive. His framework also focuses on the contributions of a small number of leading actors in ways that can obscure the range of perspectives and goals that found expression in the era's civil rights laws. But his analysis nonetheless recovers much wisdom that remains useful for charting progress on civil rights today.

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INTRODUCTION

Perhaps the most impressive feature of Bruce Ackerman's monumental and still-unfolding "We the People" project is that, by combining bold conceptual innovations with fresh historical research, it has consistently generated original, important, and persuasive accounts of most if not all major landmarks of American constitutional development.¹ To be sure, Ackerman's theory of discrete, discernible "constitutional moments" has long struck me as a bit too much of a lawyerly construction, designed to make the nation's unruly history amenable to disciplined (and progressive) legal advocacy.² But it has been clear from the opening pages of the first volume that Ackerman's implementation of his "dualist" theory of American constitutionalism illuminates fundamental issues that many other scholars have overlooked or unduly minimized.

These include linked questions of how and why the framers of 1787 felt entitled to violate the amending requirements of the Articles of Confederation; how and why the Fourteenth Amendment's sponsors confronted similar questions of legitimate forms of constitutional amendment; how and why New Deal reformers chose "super-statutes" instead of amendments to transform the American constitutional system; how all these political innovators saw popular sovereignty and the purposes of government; and much more.³ *We the People, Volume 3: The Civil Rights Revolution* further extends Ackerman's theoretical framework, showing how the modern civil rights revolution emerged from a deliberative process initiated by the Supreme Court and involving all three branches of the federal government. Those deliberations eventually produced a new set of super-statutes held to be worthy of constitutional status. I continue to see both strengths and limitations in this distinctive model of American constitutionalism—but they are not my concern here.

Instead, my focus is on what Ackerman's framework highlights and what it omits in modern American racial politics. I particularly stress what may be the most valuable contribution of Ackerman's work for civil rights issues in America today: his argument that the major civil rights statutes of the 1960s reject the kind of one-size-fits-all approaches to civic equality that have come to dominate political debate and constitutional jurisprudence since that era.⁴ In

1. See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); BRUCE ACKERMAN & DAVID GOLOVE, *IS NAFTA CONSTITUTIONAL?* (1995).

2. Rogers M. Smith, *Legitimizing Reconstruction: The Limits of Legalism*, 108 *YALE L.J.* 2039, 2043-47, 2052-73 (1999).

3. See *id.* at 2047-51 and sources cited *supra* note 1.

4. 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 12-15 (2014).

recent years, Desmond King and I have argued that American racial policy disputes, and to some degree American politics more generally, have been paralyzed by the framing of morally and legally appropriate racial policies as either uniformly “colorblind” or “race-conscious.”⁵ Our arguments receive and suggest confirmation in some regards, and corrections in others, when laid alongside Ackerman’s compelling account of the evolution of modern racial policymaking and jurisprudence.

As he acknowledges, because he is systematically implementing his dualist framework, Ackerman’s narrative stresses a handful of undeniably key political actors at the cost of other important modern shapers of racial policy.⁶ He features the Supreme Court and leading members of Congress, along with Martin Luther King, Jr., Presidents Johnson and Nixon, and then the Supreme Court again. But the civil rights movement began well before the Supreme Court’s 1954 *Brown v. Board of Education* decision, and its statutory achievements reflected the influence of activists like A. Philip Randolph, Bayard Rustin, and James Farmer, who had long stressed economic as well as anti-discrimination goals for black Americans. And though, like us, Ackerman argues for the importance of conceiving of racial policies in ways that pursue pragmatic alternatives to today’s polarized positions, it is not clear that his “anti-humiliation” principle either differs from or improves upon “anti-subordination” positions as much as he claims. It looks like a type of anti-subordination view, and one that risks focusing unduly on social-psychological experiences, at the expense of other, more tangible forms of economic, political, and social inequality. By insisting that the civil rights statutes were primarily aimed at anti-humiliation goals that are narrower than those of anti-subordination approaches, moreover, Ackerman risks conferring unwarranted legitimacy on those who insist that modern race-conscious reform policies betray the dominant principles of the civil rights era and its laws.

These features do not, however, undermine the signal importance of Ackerman’s book: its richly documented demonstration that the framers of the 1960s civil rights statutes were in fact able and willing to imagine a range of policy strategies, some explicitly race-conscious, many not, that were skillfully tailored to promote greater racial equality in different policy arenas, from employment to public accommodations to housing to voting and more.⁷ No existing work makes this crucial case so clearly or convincingly.

5. See, e.g., DESMOND S. KING & ROGERS M. SMITH, *STILL A HOUSE DIVIDED: RACE AND POLITICS IN OBAMA’S AMERICA* 253-92 (2011).

6. 3 ACKERMAN, *supra* note 4, at 311.

7. Ackerman terms this “spherical equality,” which is reasonable enough, so long as we

Ackerman treats this case-by-case approach and his anti-humiliation principle as if they logically entail each other, but here his argument is less developed and persuasive. My work with King suggests that it is not the eclipse of an anti-humiliation jurisprudence, but the decline of energetic searches for diverse administrative and political remedies, adapted to different contextual challenges, that must be remedied if America's long journey toward meaningful racial equality is to be reinvigorated. That goal—meaningful racial equality—will remain distant so long as race is a reliable predictor not only of whether persons experience psychologically humiliating treatment in America but of whether they will or will not have practical opportunities roughly comparable to those of most white Americans for employment in all trades and professions, for ownership of wealth, for public office-holding, for high-quality education, nutrition, health care, housing, and more.

I. ACKERMAN'S PORTRAIT OF MODERN CIVIL RIGHTS POLICY- MAKING

It will help to summarize the most salient features of Ackerman's account. He portrays the civil rights revolution as a "constitutional moment" in which a racially inclusive understanding of equal rights grounded on human dignity became more fundamental to American constitutionalism than ever before.⁸ It did so as a result of a process of high constitutional politics that proceeded across the national separation of powers, beginning with Chief Justice Earl Warren's articulation of an "anti-institutionalized humiliation" interpretation of the Fourteenth Amendment's Equal Protection Clause in the Supreme Court's 1954 *Brown v. Board of Education* decision, and continuing through the passage of the 1964 Civil Rights Act, the 1965 Voting Rights Act, and the 1968 Fair Housing Act, among others. Ackerman views the primary architects of those statutes—including Minnesota Senators Hubert Humphrey and Walter Mondale, and President Lyndon Johnson—as pursuing the more "qualitative"

understand that the concern is for equality *within* spheres rather than equality *of* spheres. In American constitutionalism, the governmental sphere claims juridical primacy over others. Ackerman's theory of American constitutional development has as one of its central threads the accumulation of popular authorizations for the national government to order the other spheres of American life, and many elements within the governmental sphere, to promote values of equal human dignity and welfare. This message is sometimes obscured in *We the People: The Civil Rights Revolution* when Ackerman repeatedly refers to "public education" as one of the "spheres of social life." *Id.* at 133, 300. Public education shapes social experiences, but it is a set of governmental institutions, placed under new national mandates in the civil rights era.

8. 3 ACKERMAN, *supra* note 4, at 137.

anti-humiliation objectives defined in *Brown*, though they found they needed to include the New Deal's regulatory reliance on "government by numbers" in order to do so. Their core concern, Ackerman stresses repeatedly, was to combat institutionalized practices that humiliated African Americans by disparaging their competence as actors in particular spheres of American life.⁹

To that end, the 1964 Civil Rights Act banned racial discrimination in places of public accommodation that significantly affect interstate commerce. It thereby extended *Brown's* ban on state-imposed humiliating practices to private economic actors. The 1965 Voting Rights Act banned racially discriminatory election practices, and it required jurisdictions that had less than 50% voter registration or turnout in the 1964 presidential election to gain "pre-clearance" from the U.S. Justice Department or a federal court before introducing new voting practices to replace those deemed discriminatory. The 1968 Fair Housing Act also banned racial and other forms of discrimination in housing, including facially race-neutral policies that had the effect of limiting minority access to housing. For Ackerman, all these statutes sought to combat particular forms of institutionalized humiliation imposed on African Americans in these varied spheres of American life—public accommodations, voting, and housing—just as *Brown* did, and as the courts for a time continued to do, in the sphere of education.¹⁰

In keeping with his influential theory of "constitutional moments," Ackerman also contends that the victories that "we the people" gave to candidates supporting these policies in the elections of 1964 and 1968—especially the presidential elections of the southern Democrat Lyndon Johnson and the moderate-to-conservative Republican Richard Nixon—gave these statutes, and the understanding of constitutional rights and human dignity they embodied, legal authority equal to constitutional amendments.¹¹ Especially in regard to voting rights, the Court accepted the assertion of the President and Congress, backed by civil rights activists, that in passing legislation, the elected branches had the power to interpret the Fourteenth Amendment's mandate for racial equality in cooperation with the judiciary. The Court accepted that assertion especially in regard to voting rights, finding poll taxes in particular to be constitutional wrongs.¹² The national government as a whole was construed to have expansive powers to fulfill the constitutional promise of equal protection for all.

9. *Id.* at 13-14, 128, 136-38, 145, 154-55, 205, 208.

10. *Id.* at 139-42, 154-55.

11. *Id.* at 5-6, 10-11, 33-34, 51-78.

12. *Id.* at 89; *see also id.* at 92-123.

But those statutes' authors chose to leave unanswered some politically explosive questions concerning the racial policy implications of human dignity, especially the means of desegregating public education and lifting bans on interracial marriage. It is the later efforts of judges to resolve those questions that, according to Ackerman, generated a modern jurisprudence that defines constitutionally requisite racial equality either in terms of an "anti-classification" principle mandating colorblind public policies (the dominant view on the current Supreme Court) or an "anti-subordination" principle propelling pervasive race-conscious "government by numbers" programs aimed at alleviating group disadvantages (the view widely held by left-leaning legal academics).

Ackerman argues that in the school cases of the late 1960s and early 1970s, the Court's awareness of mounting opposition to court-ordered busing for racial integration led it to abandon *Brown's* anti-humiliation jurisprudence beginning with the case of *Green v. New Kent County School Board* (1968), and especially in the first northern "de facto" segregation cases of *Keyes v. Denver School District* (1973) and *Milliken v. Bradley* (1974). Because it moved jurisprudence in an anti-classification direction, Ackerman sees that turn as a major loss, even though he maintains that at first, the Court's stance forced President Nixon into supporting aggressive and substantially successful efforts to desegregate southern schools.¹³

Similarly, Ackerman argues that the Court turned to the "suspect classifications" doctrine of the Japanese Internment cases, rather than *Brown's* anti-humiliation principle, in the interracial marriage cases of the 1960s, especially *McLaughlin v. Florida* (1964) and *Loving v. Virginia* (1967).¹⁴ Again Ackerman sees this turn as regrettable. He perceptively delineates the political pressures that pushed the majority of the Court toward analysis of constitutional issues of racial inequalities in terms of an anti-classification approach, even as others turned to an anti-subordination approach in these and later cases. But he believes neither anti-classification nor anti-subordination does justice to the moral commitments and policy strategies embodied in *Brown* and the major 1960s civil rights statutes.¹⁵ He repeatedly expresses the hope that constitutional lawyers will return to interpreting the 1960s civil rights statutes and constitutional guarantees of equal protection as instead expressive of Warren's "anti-institutionalized humiliation" principle.¹⁶

13. *Id.* at 236-56, 284-91.

14. *Id.* at 298, 303, 318-19.

15. *Id.* at 15, 127-33, 140-41, 230, 236, 289-91, 298-303.

16. *Id.* at 128-29, 223-24, 322, 328.

II. INTERNAL TENSIONS

As is perhaps inevitable in an analysis of such sweep, Ackerman's narrative encounters some problems on its own terms. Though he is persuasive that *Brown's* reasoning focused on the humiliation that Jim Crow schools imposed on African Americans, he does not make a compelling case either that this approach is analytically distinguishable from a more general concern with African American subordination, or that it, unlike anti-subordination approaches, is distinctively associated with opposition to one-size-fits-all racial policy-making. He is also unclear about whether the major 1960s civil rights statutes should be read as *exclusively* embodying *Brown's* fundamentally qualitative anti-humiliation principle, because he contends that they also incorporated a potentially clashing quantitative, government-by-numbers approach that sought to achieve measurable progress toward more equal results in the distribution of education, accommodations, employment, votes and housing.¹⁷ This last point is particularly important for current racial policy debates, because many critics of modern race-conscious measures contend that they betray a mandate for colorblind policies imposed by the 1960s statutes as well as the Constitution. The ambiguities in Ackerman's account may permit him to be cited on both sides of this debate, instead of being understood as guiding us on how to transcend it.

Ackerman's effort to distinguish what he sees as the "lost" anti-humiliation logic of *Brown* from later anti-subordination approaches turns on his contention that "anti-subordination interrogates *all* pervasive forms of status inferiority," while "anti-humiliation," for better or worse, is more limited.¹⁸ He correctly notes that Chief Justice Warren's *Brown* opinion focused only on public education, portraying schooling as "crucial" because it prepared children to fulfill "basic public responsibilities" and to "succeed in life," including "professional" life.¹⁹ Black students were hampered in these regards by a "feeling of inferiority," of humiliation, generated in their "hearts and minds" through their awareness that their society was segregating them because of widespread beliefs that they were inferior to whites. Ackerman convincingly interprets Warren's opinion as appealing more to how school segregation was "usually interpreted" in this regard than to the social-psychological studies that

17. *Id.* at 14, 154-56, 218, 275.

18. *Id.* at 129.

19. *Id.* at 131.

the Chief Justice also cited to buttress claims that these prevailing understandings harmed black school children.²⁰

Ackerman goes on to define “humiliation” as a specific sort of harm: the experience of having one’s standing as a minimally competent actor in a public sphere impugned.²¹ Though Ackerman initially speaks of humiliation in terms of personal face-to-face interactions, he soon clarifies that blunt face-to-face denigration is not necessary, and that the “institutionalized” humiliation that most concerns him need not include such direct encounters.²² He stresses that the “humiliation” with which *Brown* was concerned was “institutionalized by social practices” of many sorts in which African Americans “were obliged—in word and deed—to show that they ‘knew their place’”; and he adds that this message can still be conveyed “in subtler form” in various social spheres even without explicit racial restrictions.²³ Ackerman then maintains that the proponents of the 1960s civil rights laws were similarly focused on “the evil of systematic humiliation,” prompting them to pass statutes combating humiliation in several spheres of American life.²⁴

Ackerman resists equating either *Brown* or those statutes with modern anti-subordination principles because he thinks an anti-subordination approach condemns “systematic efforts to keep groups ‘in their place’ *across* spheres, and not only *within* spheres.”²⁵ He notes that it is possible to be treated in humiliating fashion in one sphere and not another, and concludes that even if institutionalized humiliation can be found in numerous spheres, it can only be accurately detected and combated on a sphere-by-sphere basis.²⁶ Even within spheres, its reach has limits. Ackerman observes that Hubert Humphrey contended the 1964 Civil Rights Act would not reach discrimination by the owner of “Mrs. Murphy’s boardinghouse” because her actions represented only personal prejudice, not the systemic discrimination of a restaurant policy officially serving “whites only.”²⁷

In contrast, Ackerman argues, the anti-subordination principle is more ambitious. It would regulate Mrs. Murphy because it is concerned with any conduct that in the aggregate imposes “substantial burden[s]” on certain

20. *Id.* at 132–33.

21. *Id.* at 139.

22. *Id.* at 139, 141, 145.

23. *Id.* at 140.

24. *Id.* at 316.

25. *Id.* at 327.

26. *Id.* at 23, 142–43.

27. *Id.* at 142.

groups and not others.²⁸ It also requires attention to unjust inequalities across spheres, not just within spheres, because its aim is to achieve “real equality of opportunity,” including overcoming “deep-seated forms of economic injustice,” something that “eliminating humiliation,” important as that is, “hardly guarantees.”²⁹

Though the distinctions Ackerman wants to draw in regard to Warren’s reasoning in *Brown* are clear enough, it is hard to see how they are logically mandated or even logically consistent. He is surely right to say that African American students and their parents showed “common sense” in interpreting school segregation as a sign that many in their society regarded them as inferior. Yet it is unlikely that anyone ever reached that conclusion by focusing on segregation in the sphere of public education alone. As Ackerman acknowledges, in the Jim Crow era, institutionalized discrimination was pervasive in many spheres.³⁰ African Americans therefore surely perceived de jure school segregation as part of the “systemic humiliation” they experienced whenever they failed to show that they “knew their place” in any of the many other spheres of life—economic, political, legal, residential, religious, cultural, recreational, romantic, and more—also shaped by Jim Crow laws and practices.³¹

And not only was the humiliation of black school children that *Brown* acted against commonly seen as inextricably linked to larger patterns of “systemic humiliation” that existed across spheres, not just within them. Their humiliation *had* to be seen as linked in those ways to grasp its full constitutional significance. The stress in Chief Justice Warren’s opinion on how inadequate education poorly prepared students for citizenship and professional life shows that these cross-sphere relationships, especially links to political and economic opportunities, were central to the Court’s concerns. It was not simply the consequences for educational experiences in themselves that warranted the Court’s demand that education be provide equally, which meant in non-humiliating fashion.

Yet Ackerman insists *Brown*’s anti-humiliation focus somehow differed from the view stated by Judge John Minor Wisdom in *United States v. Jefferson County Board of Education* that “school segregation was an integral element in the southern state’s general program to restrict Negroes as a class from participation in the life of the community, the affairs of the State, and the

28. *Id.* at 143.

29. *Id.* at 152, 219.

30. *Id.* at 141.

31. *Id.*

mainstream of American life: *Negroes must keep their place.*"³² Ackerman calls Wisdom's opinion "a great statement of the anti-subordination principle, condemning systematic efforts to keep groups 'in their place' across spheres."³³ His contrast between the Warren and Wisdom opinions seems workable only if we read Warren as suggesting, implausibly, that African Americans did *not* see school segregation as humiliating because it was an integral element in programs to keep blacks "in their place" across spheres, and if we also minimize Warren's explicit insistence that education must be seen as fundamental to the spheres of political citizenship and economic professions. Otherwise, Warren's anti-humiliation approach seems *on its own terms* to imply as much concern with invidious racial discrimination "across spheres" as Wisdom's anti-subordination principle.

It is, moreover, hard to understand just what it could mean for blacks to be systematically "humiliated" by requirements that they show they "knew their place" if that place was not a *subordinate* place in virtually every important sphere of American life, and a place that amounted to denial of "real equality of opportunity." It is more likely that for most participants in the civil rights movement, being anti-humiliation meant being anti-subordination and vice-versa. And if humiliation was harmful in part because it limited political and economic opportunities, as Warren explicitly argued, then it is hard to see how being anti-humiliation did not logically imply being concerned about limited opportunities to overcome political and economic subordination more broadly.

Yet if concern for humiliation inevitably leads to attention to humiliating patterns across spheres, and if concern for humiliation also inevitably leads to concern about racial barriers to political and economic opportunities, then it is hard to see why the anti-humiliation principle is more tied to a case-by-case approach to racial inequalities than the anti-subordination principle. Conversely, it is also hard to see why the anti-subordination principle is necessarily strongly tied to a one-size-fits-all approach. There is no obvious reason why concern to combat subordination in many spheres precludes proceeding sphere by sphere to do so.

For good reason, Ackerman regards the case-by-case approach he seeks to attach exclusively to anti-humiliation as more likely to produce contextually sensitive, appropriately tailored, and politically astute policy proposals. But he presumes more than argues that anti-humiliation efforts must involve case-by-

32. *Id.* at 237 (quoting *United States v. Jefferson Cnty. Bd. of Ed.*, 372 F.2d 836 (5th Cir. 1966) (emphasis added)).

33. *Id.* at 237.

case policies and anti-subordination efforts cannot.³⁴ In fact, it is only the anti-classification principle's demand for universally "colorblind" laws that applies in unalterable fashion across all spheres.

Indeed, if the anti-humiliation principle is distinguishable from anti-subordination at all, it must be because, against the implications of Warren's emphasis on the links between education, citizenship, and professional life, we treat anti-humiliation as *solely* concerned with the traumatic psychological experiences of being treated as inferior. This reading would justify Ackerman's contention that anti-humiliation concerns do not reach to "real equality of opportunity." But they would do so while severely damaging his claim that the 1960s civil rights statutes also predominantly or exclusively embody anti-humiliation concerns.

In fairness, although Ackerman urges us to interpret those statutes in light of the anti-humiliation principle, his narrative only insists that its proponents began with that concern. He repeatedly and effectively cites stirring language from Hubert Humphrey, Martin Luther King, Jr., Lyndon Johnson, Rosa Parks, and other proponents of the 1960s laws to show how central anti-humiliation concerns were to them.³⁵ Ackerman also expresses disappointment that the Court did not embrace the anti-humiliation principle of protecting dignity against violations from any source, and instead interpreted Title II of the 1964 Civil Rights Act as resting primarily on the commerce power in its 1964 decision, *Heart of Atlanta Motel v. Katzenbach*. More generally, he calls for making anti-humiliation our guiding light today in civil rights legal interpretation and policy-making.³⁶

But Ackerman recognizes repeatedly that the framers of the 1960s civil rights laws placed New Deal-inspired "government by numbers" elements in their legislation that he considers at best "relatively harmonious" with qualitative anti-humiliation aims. He says these elements pushed the statutes "beyond anti-humiliation to more ambitious goals" in important regards, "most notably the pursuit of real equality of opportunity."³⁷ He also acknowledges that Congress itself chose to stress the Commerce Clause

34. In his response to my critique, Professor Ackerman stresses that a sphere-by-sphere approach is logically coherent. I agree. My argument is first, that the *Brown* opinion explicitly calls attention to the links between spheres, so that *it* cannot be coherently read as denying concern for them; and second, that there is nothing in the anti-subordination approach that prevents it from being pursued sphere-by-sphere, if that is judged the most practical way to proceed. Professor Ackerman's reply does not address these points.

35. See, e.g., *id.* at 135-43.

36. *Id.* at 147-53, 175-76, 224, 322.

37. *Id.* at 15, 154, 276.

rationale for its Title II ban on discrimination in places of public accommodation, rather than its Fourteenth Amendment enforcement powers.³⁸ These points mean that the 1964 Civil Rights Act and the later civil rights statutes did not embody the constitutional understanding that Ackerman wishes the Court had attributed to them as explicitly and unequivocally as his arguments sometimes suggest. Instead, the pursuit of “real equality” authorized by the statutes and then elaborated via administrative agencies gave increasing prominence to a “distinctive administrative style” of results-oriented reliance on quantitative performance measures, just as many scholars who do not interpret the statutes in fundamentally anti-humiliation terms have maintained.³⁹

Whether Ackerman thinks this pursuit of “more ambitious goals” went beyond what the authors of the 1960s civil rights laws consciously enacted, or whether it was ultimately consistent with their anti-humiliation concerns, is unclear. He stresses that civil rights “government-by-numbers” had “deep roots,” because many supporters of the civil rights statutes clearly expected that statistical measures of racial results would be required to pursue the aims of the statutes effectively.⁴⁰ He also contends that when the Supreme Court later upheld the use of racial statistics to judge if employment tests were needlessly discriminatory in *Griggs v. Duke Power*, its ruling represented a “brilliant” blending of the civil rights era’s racially egalitarian goals with the New Deal’s ideal of expertise-based governance—but not a departure from established constitutional understandings. And he emphasizes that in an interactive process, Congress and the President in the 1970s came to embrace explicitly the need to have experts employing numbers to achieve many of their already legislated civil rights goals.⁴¹ All these points suggest that despite differences in emphasis, there may be little if any logical gap between the anti-humiliation principles Ackerman sees as central to the civil rights statutes and the use of racial statistics to measure—and motivate—policy compliance.

But perhaps because Ackerman wants to insist that anti-humiliation is distinct from anti-subordination, he often suggests there is such a gap, and that the statutes’ many proponents really were most concerned with anti-humiliation. He calls attention to how in the mid to late 1960s, the NAACP’s Washington lobbyist Clarence Mitchell opposed the collection of racial employment statistics; and he insists that the rise of “government by numbers”

38. *Id.* at 147-48.

39. *Id.* at 155.

40. *Id.* at 155, 160, 177-79.

41. *Id.* at 188-92.

in that “sphere” was due chiefly to “EEOC staffers,” not “civil rights ideologues”—including those supporting anti-discrimination statutes.⁴² Consequently, Ackerman’s account may still reinforce an at best half-true argument that many other scholars (including King and me) have made—that the logistics of enforcement prompted mostly “white male elites” in government bureaucracies and large corporations to reinterpret the 1960s civil rights statutes as mandating racial egalitarian outcomes rather than simply banning racial discrimination, contrary to their original intent.⁴³

Though such figures did contribute to the development of modern racial policies, that narrative obscures much of what is most valuable in Ackerman’s portrayal of what he calls “the landmark statutes of the Second Reconstruction”: its account of how the “constitutional pragmatism” of the reformist policymakers of the 1960s generated a “pluralism” of policy approaches to racial inequalities in different spheres of American life. This pragmatism, Ackerman rightly observes, always had as its “overriding objective” a quest “to bridge the gap between law and life and *actually achieve* egalitarian advances in the real world.”⁴⁴ Again, that “overriding objective” appears to encompass the goals of both the anti-humiliation and the anti-subordination approaches to racial inequality and suggests there is no deep difference between them. But Ackerman’s unconvincing claims that only the anti-humiliation principle permits case-by-case policy strategies, and that it does not support efforts to address barriers to equal opportunities that go across cases and beyond humiliation, work to detach it from the “overriding objective” he attributes to the statutes, even as he insists they should be interpreted as grounded on anti-humiliation. The upshot of his work may then seem to support contentions that modern efforts to use the civil rights statutes and judicial rulings as weapons to combat a plethora of persisting racial inequalities that go beyond humiliation are illegitimate. Those who believe a different conclusion is justified may therefore find it advisable to supplement Ackerman’s constitutional theory-centered analysis with other perspectives on the modern civil rights revolution.

42. *Id.* at 352.

43. See, e.g., KING & SMITH, *supra* note 5, at 102-03, 111-12; JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA* 3, 5 (1996); Robert C. Lieberman, *Ideas, Institutions, and Political Order: Explaining Political Change*, 96 *AM. POL. SCI. REV.* 697, 708 (2002).

44. 3 ACKERMAN, *supra* note 4, at 195, 199 (emphasis added).

III. RACIAL POLICY ALLIANCES AND THE CIVIL RIGHTS REVOLUTION

In our recent work, King and I have also sought to understand the constitutional pragmatism of the civil rights era. Our focus, however, is not on what sorts of processes can justify conferring constitutional standing on particular statutes, policies, or principles. Our unit of analysis is “racial policy alliances,” which we define as “coalitions of leading political figures, governing institutions . . . and other politically active groups,” bound together by shared “ideas about appropriate racial policies.”⁴⁵ We have argued that for the first two-thirds of the twentieth century, American racial politics was structured by a clash between pro- and anti-de jure segregation racial policy alliances, with the former originally in the ascendancy, and the second eventually triumphing to achieve the modern civil rights revolution.

To understand what this framework adds to and corrects in Ackerman’s account, it is crucial to recognize that those alliances were more complex than is commonly grasped. The pro-segregation alliance included many outright white supremacists, but also some who saw segregation as a tutelary stage on the way to racial equality, and some who denied any belief in white supremacy, professing only to believe that all races thrived best when members associated primarily with their own. Similarly, the anti-segregation alliance included some who favored a colorblind society, but also many who saw segregation laws as obstacles to the economic, political and social betterment of African Americans, a racial identity they valued and sought to enhance. And some anti-segregationists were extreme black nationalists who inverted rather than rejected notions of racial inequality.

That multiplicity of goals matters because it helps to explain the mix of colorblind and race-conscious rhetorics and policy instruments that Ackerman rightly discerns in the civil rights movement’s legislative achievements—a mix that is not fully understood if one begins, as his account does, with Chief Justice Warren’s opinion in *Brown*. This racial-policy-alliances framework also makes it possible to grasp how and why, after de jure segregation was finally invalidated by an arc of judicial, executive, and legislative decisions stemming from before *Brown* through the 1968 Fair Housing Act, a transition period ensued in which, over time, different racial policy issues advanced by modified racial policy coalitions came to the fore. We argue that by the late 1970s this process generated two modern racial policy alliances, one espousing “colorblind,” the other “race-conscious” approaches, which have provided the basic structure of American racial politics ever since. Their emergence, more

45. KING & SMITH, *supra* note 5, at 8, 21.

than the Supreme Court's decision in miscegenation and later school desegregation cases, explains the ascendancy of the colorblind "anti-classification" and results-oriented "anti-subordination" schools of modern equal-protection jurisprudence.

Again, however, these alliances are internally complex, with some advocating colorblindness as a bar to laws aggressively seeking to combat extant white advantages, while others wish for real racial progress but see colorblindness as the best means, and also as required by principles of justice and concerns for civic unity. On the race-conscious side, some see their preferred measures as temporary steps toward a colorblind society, while others hold goals of integration or group prosperity or multiculturalism that require enduring race-conscious policy making—though the race-conscious policies that these advocates prefer often differ from each other. Those disagreements are a major political liability that has contributed to the ascendancy of colorblind approaches to racial policies today.

Still, while focusing on the ideas and actors comprising the evolving racial policy alliances that have been contested in modern American politics paints a different portrait of the civil rights era and its aftermath than Ackerman's, the portrait is largely complementary. Bringing more actors into view simply helps to make more explicable why Chief Justice Warren and later congressional lawmakers, litigators, administrators and advocates often spoke in anti-humiliation terms, as well as why they often endorsed colorblind principles. It also indicates that many, probably most, always did so pragmatically, as means of foregrounding what was most appealing in their cause, without ever wholly concealing, much less relinquishing, their convictions that anti-humiliation and anti-classification arguments in particular contexts were only parts of a broader agenda aimed at alleviating the nation's many forms of economic, political, and social racial inequality, by whatever politically and administratively feasible means. Most did not take either ending humiliation or achieving a colorblind society as the ultimate end. But they perceived those themes as most politically potent, even as racial conservatives felt compelled to submerge their advocacy of white supremacist arrangements under more appealing themes of individual liberties and states' rights.

Still, some civil rights advocates were raising the need for race-targeted employment and education programs by the early 1960s, even before what became the 1964 Civil Rights Act and the 1965 Voting Rights Act were introduced. Conservatives anticipated and raised alarm about such proposals beginning in the 1950s. This charged political context contributed to the case-by-case approach of the 1960s civil rights statutes and their mix of race-conscious and facially race-neutral mechanisms for achieving their goals. Their varied policy mechanisms arose as efforts to pursue many forms of racial

equality effectively in the face of both distinct logistical challenges in different contexts *and* political opposition to explicitly race-conscious policies. Consequently, the goals of the statutes cannot be confined to the anti-humiliation concerns that Ackerman stresses, at least if these are disconnected from aims at alleviating systemic racial inequalities across spheres. Nor can they credibly be identified with principles of colorblindness alone.

Our work also suggests that the prime reason for the rise of the modern opposition between colorblind and race-conscious interpretations of constitutional equality was the political discovery that conservatives could rally around championing colorblindness to oppose regulatory and redistributive efforts to improve the material conditions of non-white Americans in almost every arena. Many proponents of greater racial equality responded by insisting more strongly on the propriety of race-conscious measures in all economic, political, and social policy arenas, thereby embracing the “one size fits all” approaches predominant in the rhetoric of both the modern racial policy alliances, as well as to the eclipse of anti-humiliation principles that Ackerman laments.

He is right that those principles are now neglected parts of the story. But on the basis of our account, not only anti-humiliation advocates, but also both modern racial policy alliances—the proponents of anti-classification and those of anti-subordination approaches—all have some genuine claim to speak for views embodied in the complex 1960s civil rights statutes. For the same reason, none of these positions alone can claim to be *the* “true” meaning of those laws. Nonetheless, it is those who favor measures to extend practical opportunities for success in every sphere to all races who are most attuned to the core aims of those statutes’ proponents, even though many modern civil rights reformers have failed to sustain the innovative quests for distinct policy strategies in the different arenas those statutes embodied. Those who champion strict colorblindness adopt the stance increasingly embraced by those who, even prior to enactment of the major civil rights laws, sought to limit their impact.

A. *The Roots of Modern Racial Conservatism*

In support of these claims, it is first necessary to grasp how the rival coalitions that fought over segregation from the late nineteenth century through the 1960s had important internal differences, as summarized in Table 1.⁴⁶

46. All tables and much of the argument of this section draws on Desmond S. King & Rogers M. Smith, “Without Regard to Race”: *Critical Ideational Development and Modern American*

Table 1.
PRO-SEGREGATION ALLIANCE IDEALS

<i>Permanent White Supremacy</i> Henry Grady	<i>Tutelary White Supremacy</i> Woodrow Wilson	<i>Tutelary Supremacy + Individual Opportunity</i> Theodore Roosevelt	<i>Permanent Separate but Equal Groups</i> Sam Ervin
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They included many who maintained the permanent racial inferiority of blacks to “Anglo-Saxon” whites, as the influential southern editor Henry Grady did when championing de jure segregation.⁴⁷ But early on, the pro-segregation alliance included others who argued that segregation for a period of “tutelage” might enable African Americans to achieve equality eventually, as Booker T. Washington and Woodrow Wilson averred.⁴⁸ Some like Theodore Roosevelt endorsed doctrines of equal rights for all individuals, believing that a talented few blacks could leap ahead of their race and should be allowed to rise as high as they proved able. Roosevelt still thought that non-whites usually were inferior to persons of northern European stock, justifying segregation and disfranchisement.⁴⁹ Over time, still other segregationists stopped openly espousing white supremacy entirely. They contended, as North Carolina Senator Sam Ervin did in the 1950s, that it was simply a “law of nature” that people would always find their “greatest happiness” among people of similar “backgrounds,” making segregation appropriate.⁵⁰ In practice, all these positions favored white supremacy. Yet many proponents of “separate but equal” and “tutelary” segregation rhetorically endorsed individual rights in ways that could read like endorsements of colorblindness.

Racial Politics (2014) (unpublished manuscript) (on file with authors).

- 47. James W. Vander Zanden, *The Ideology of White Supremacy*, 20 J. HIST. IDEAS 385, 393-94 (1959).
- 48. Gary Gerstle, *Race and Nation in the Thought and Politics of Woodrow Wilson*, in RECONSIDERING WOODROW WILSON 93, 105-07 (John Milton Cooper, Jr., ed., 2008).
- 49. Seth M. Scheiner, *President Theodore Roosevelt and the Negro, 1901-1908*, 47 J. NEGRO HIST. 169, 178 (1962).
- 50. Zanden, *supra* note 47, at 389.

Those strains in American racial conservatism gained greater prominence as the civil rights era advanced. Ervin is exemplary: in 1956 he co-drafted a version of the “Southern Manifesto” denouncing *Brown* and asserting states’ rights to operate racially segregated public institutions, in accordance with natural law.⁵¹ Later, with South Carolina Senator Strom Thurmond, Ervin worked unsuccessfully to weaken the enforceability of the 1964 Civil Rights Act before voting against it.⁵² But in 1969 Ervin became one of the first officials to assail the Nixon administration’s Philadelphia Plan because it involved hiring “on the basis of race.” Casting aside his old support for de jure segregation and no longer stressing the constitutional sanctity of state authority over education and public morals, Ervin now insisted that federal constitutional principles of individual rights, buttressed by the new civil rights statutes he had opposed, meant that state and local policies had to provide all individuals with equal rights and opportunities, “without regard to race.”⁵³ As Karl E. Campbell has noted, Ervin did have a longstanding concern for constitutional liberties, and there is no reason to doubt that his new emphasis was heartfelt. But there is also no doubt that his support for Jim Crow racial classifications in the 1950s was inconsistent with his later insistence on colorblind policies aimed at securing equal individual rights for all.⁵⁴

How could Ervin and others rapidly make this shift from support of racial distinctions in segregation laws to impassioned insistence on colorblindness? The path had long been prepared. As World War II was ending, many conservatives began trying to subsume their racial views, so similar to those of the horrific Nazi enemy, under themes of states’ rights and individual choice that were more palatable to the American public, and in some cases to the conservatives themselves.⁵⁵ Also in those years, as Lizabeth Cohen has detailed, many American leaders and activist groups increasingly embraced a vision of the nation as a “consumers’ republic,” concerned with the material welfare of all. Through boycotts and protests, African Americans insisted that their rights as consumers should be equal to those of other Americans.⁵⁶

51. Brent J. Aucoin, *The Southern Manifesto and Southern Opposition to Desegregation*, 55 *ARK. HIST. Q.* 173, 174-75 (1996).

52. SEAN FARHANG, *THE LITIGATION STATE* 114-15 (2010).

53. SKRENTNY, *supra* note 43, at 200.

54. KARL E. CAMPBELL, *SENATOR SAM ERVIN, LAST OF THE FOUNDING FATHERS 182-83* (2007).

55. See PHILIP A. KLINKNER & ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA 186-87, 194-95* (1999).

56. LIZABETH COHEN, *A CONSUMERS’ REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 52-53* (2003).

In the ensuing Cold War era, these patriotic and broadly pro-capitalist ideological currents favoring equal rights became hard to resist. So from the Dixiecrat revolt against the Democrats' civil rights platform in 1948 on, southern racial conservatives, including politicians and public intellectuals, began formulating an ideology featuring opposition to coercive central governance rather than white supremacy. They sought allies among conservatives in other regions, many most comfortable with themes of states' rights and individual rights.⁵⁷

Even so, a national alliance of conservative political and intellectual elites proved hard to forge so long as the leading racial policy issue was still *de jure* segregation—which was, after all, a coercive race-conscious governmental mandate. But in the early 1960s, libertarian presidential hopeful Barry Goldwater began courting southern conservatives afresh. Like most Republicans, Goldwater had supported civil rights laws in 1957 and 1960. But he opposed the 1964 Civil Rights Act, contending that its ban on racial discrimination in interstate commerce interfered with personal economic freedoms.⁵⁸ Goldwater's libertarian discourse dramatized how not just states' rights doctrines, but far more popular views of individual rights, could be used to challenge laws aimed at altering inegalitarian racial conditions.

This new discourse helped build an economic libertarian/racial conservative alliance among conservative activists, but through the mid-1960s its focus on property rights did not generate broadly appealing themes capable of gaining mass support nationally. Goldwater lost badly for the presidency in 1964, and conservatives could not prevent the legislative triumphs of the 1960s civil rights movement. Still, this burgeoning conservative alliance was able to impose compromises on the policies and agency powers created to combat discrimination. It also won promises from reformers like Hubert Humphrey that racial liberals were not giving the government “any power . . . to require hiring, firing, or promotion of employees in order to meet a racial ‘quota’ or to achieve a certain racial balance.”⁵⁹

Those conservative victories proved influential for subsequent racial policy developments. Because conservatives blocked efforts to add to the 1964 Civil Rights Act and the 1968 Open Housing Act administrative powers to issue

57. See JOSEPH E. LOWNDES, *FROM THE NEW DEAL TO THE NEW RIGHT: RACE AND THE SOUTHERN ORIGINS OF MODERN CONSERVATISM* 11–44 (2008).

58. KING & SMITH, *supra* note 5, at 86.

59. SKRENTNY, *supra* note 43, at 3.

“cease and desist” orders against those engaged in employment and housing discrimination, victims of discrimination had to seek federal judicial relief and demonstrate discriminatory intent, a difficult task. Bureaucrats at federal agencies—the Equal Employment Opportunity Commission (EEOC), created by the 1964 Act, and the Department of Housing and Urban Development, mandated to fight housing discrimination by the 1968 Act—felt poorly armed to combat entrenched racial inequalities.⁶⁰ And as Senator Ervin’s performance in the 1969 hearings on the Philadelphia Plan showed, conservatives realized the rhetorical weapon they had fashioned to resist anti-discrimination laws and the pursuit of racial integration in schools and jobs—their insistence that such efforts violated individual rights to choose one’s associates—could now be cast as fulfilling commitments to treating all individuals in colorblind fashion that they saw as embodied in the very civil rights statutes they had opposed.

B. The Roots of Modern Race-Conscious Advocacy

In the wake of conservative successes in excluding some enforcement mechanisms from civil rights laws and conservatives’ increasing use of colorblind terminology to oppose others, a new civil rights reform coalition that more openly embraced race-conscious measures began to form. Many scholars have noted that as the 1960s and 1970s proceeded, federal administrative officials, working with civil rights groups like the NAACP Legal Defense Fund, the ACLU, and the Lawyers’ Committee for Civil Rights Under Law, as well as with liberal judges, interpreted the compromised 1960s civil rights statutes to allow for affirmative action policies in employment, educational admissions, housing, and more.⁶¹ But it is a mistake to see these developments as a radical departure from the goals of earlier civil rights advocates. Rather, they represented in part the surfacing of positions long present among many black activists, reinforced by shifts in the views of some white liberals, especially those in the Ford Foundation and allied reform-oriented philanthropic groups.

For throughout the struggle against Jim Crow segregation, the forces opposing it were at least as diverse as those who supported it, as shown in Table 2.

60. See FARHANG, *supra* note 52, at 98-106.

61. See *e.g.*, *id.*; SKRENTNY, *supra* note 43; Lieberman, *supra* note 43.

Table 2.
ANTI-SEGREGATION ALLIANCE GOALS

<p><i>Full Colorblind Integration</i> Myrdal Liberals</p>	<p><i>Integration with Distinct Racial Identities</i> Martin Luther King, Jr.</p>	<p><i>No De Jure Segregation, with Racial Material Equality</i> A. Philip Randolph</p>	<p><i>No De Jure Segregation, with Material, Cultural Autonomy</i> Malcolm X</p>
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Particularly for some mid-twentieth century white liberals, the ultimate civil rights goal was a society so integrated that racial identities would cease to exist, creating a truly colorblind America. Gunnar Myrdal argued that as long as any sorts of racial distinctions persisted even in social customs, they would endanger equality “*in all other respects.*”⁶² In the 1950s, the NAACP and Martin Luther King, Jr., also consistently urged the desirability of an egalitarian, integrated society.⁶³ King termed “desegregation” only a “short-range goal,” a step toward the “ultimate goal” of integration.⁶⁴

But for King and others, a primary aim of integration was to improve the material as well as psychological conditions of African Americans as a community, in employment, education, housing, health care, and much more. Few African American advocates of integration suggested any intent to eradicate racial identities. And the anti-segregationist alliance also included black unionists, boycott leaders, consumer cooperative advocates, and socialists such as A. Philip Randolph, Adam Clayton Powell, Jr., Ella Baker, and, eventually, W.E.B. Du Bois, as well as black nationalists like Malcolm X. In different ways, most black socialists, boycott and cooperative organizers, and nationalists were far more concerned with improving the inferior material conditions of African Americans than winning integration. But most thought progress unlikely until de jure segregation laws were repealed.⁶⁵

62. 1 GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 642 (1944).

63. See Martin Luther King, Jr., *The Ethical Demand for Integration*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 117, 117-20 (James M. Washington ed., 1991); Steve Valocchi, *The Emergence of the Integrationist Ideology in the Civil Rights Movement*, 43 *SOC. PROBLEMS* 116, 120-21 (1996).

64. King, *supra* note 63, at 118.

65. See COHEN, *supra* note 56, at 46-50; see also MICHAEL C. DAWSON, *BLACK VISIONS: THE*

Indeed, the content of their varied but overlapping goals made combating de jure segregation the one great common aim of racial reformers. And up to the early 1960s, the power in Congress of pro-segregation southern Democrats made litigation seem the best avenue of change to many anti-segregationists, along with direct protests.⁶⁶ To persuade courts to strike down school segregation laws in particular, litigators chose to stress the claim that the psychic harms of humiliation in public education made separate schooling inherently unequal, perhaps in part to avoid the need to prove that every existing segregated school system was in fact materially separate and unequal.⁶⁷ They invoked the words of Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*, "Our Constitution is colorblind," but they did so knowing that many African-Americans were not opposed to racially homogeneous schools under all conditions.⁶⁸ And as Charles Lawrence III has noted, Thurgood Marshall and his allies saw themselves as "race men" who wished to aid, not dissolve, their racial communities.⁶⁹ Many, probably most, spoke of their efforts as aimed above all at reducing harms to African Americans, not as pursuing colorblindness pervasively.⁷⁰ Their discourse of colorblindness was only one strand in reform commitments focused on improving the lives of black Americans.

Admittedly, as battles against Jim Crow finally moved from the courts to Congress, that strand gained prominence. When anti-segregation forces grew powerful enough to pass the 1964 Civil Rights Act, the Voting Rights Act, and the Fair Housing Act, they did repeatedly disavow racial quotas.⁷¹ Since

ROOTS OF CONTEMPORARY AFRICAN-AMERICAN POLITICAL IDEOLOGIES 10-23 (2001) (listing black political movements' goals without mention of integration).

66. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 163-64 (2004).
67. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 645-46 (1976).
68. *Id.* at 558-59, 633 (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). W.E.B. Du Bois, for example, came in the 1930s and 1940s to give improvement of black schools equal or greater weight than desegregation, causing a split with "old guard" NAACP leadership—but Du Bois's views remained powerful influences for African Americans generally. See, e.g., ADOLPH L. REED, JR., W. E. B. DU BOIS AND AMERICAN POLITICAL THOUGHT: FABIANISM AND THE COLOR LINE, 74-76 (1997); VALOCCHI, *supra* note 63, 123 n.12.
69. Charles H. Lawrence III, *The Epidemiology of Color-Blindness: Learning to Think and Talk About Race, Again*, 15 B.C. THIRD WORLD L.J. 1, 5-10 (1995).
70. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1481-87 (2004).
71. SKRENTNY, *supra* note 43, at 2-4.

colorblind rhetoric had won judicial victories and been central to many protests, and since conservatives were already using the specter of quotas and threats to individual liberties to attack civil rights laws, this emphasis was understandable.

Even so, in 1961, civil rights advocates like Stanley Lowell of the New York City Human Rights Commission already called “the whole doctrine of color blind . . . outmoded.”⁷² In 1963, Martin Luther King, Jr., suggested a more race-conscious, materially-focused view of the aims of the civil rights movement when he said at the March on Washington that African Americans had come “to cash a check” – to redeem an unfulfilled “promissory note” that white Americans had sent back “marked ‘insufficient funds,’” leaving African Americans “on a lonely island of poverty in the midst of a vast ocean of material prosperity.”⁷³ That same year, in Senate testimony, the NAACP’s Roy Wilkins rejected racial quotas but argued for giving preference to blacks in hiring when they were as qualified as whites.⁷⁴ James Farmer, national director of the Congress on Racial Equality (CORE), went further, testifying before the House Judiciary Committee that cities like Philadelphia should overcome discriminatory hiring practices in the construction industries by insisting on quotas for black workers.⁷⁵ Though Farmer championed integration in opposition to black nationalists including Malcolm X, he and CORE did so far more for the purpose of breaking barriers to black economic progress than as a step toward a colorblind society.⁷⁶ Similarly, as early as the Kennedy years, white liberals began race-conscious admissions initiatives in higher education, chiefly in the former of special recruitment and funding programs like those undertaken by Cornell’s Committee on Special Education Projects (COSEP), in order to increase the presence of African Americans in their institutions.⁷⁷

72. PAUL D. MORENO, *FROM DIRECT ACTION TO AFFIRMATIVE ACTION: FAIR EMPLOYMENT LAW AND POLICY IN AMERICA, 1933-1972*, at 201 (1997).

73. Martin Luther King, Jr., *I Have a Dream* (Aug. 28, 1963), in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 217 (James M. Washington ed., 1986).

74. MORENO, *supra* note 72, at 207.

75. Thomas J. Sugrue, *Affirmative Action from Below: Civil Rights, the Building Trades, and the Politics of Racial Equality in the Urban North, 1945-1969*, 91 *J. AM. HIST.* 145, 163 (2004).

76. DONALD ALEXANDER DOWNS, *CORNELL '69: LIBERALISM AND THE CRISIS OF THE AMERICAN UNIVERSITY* 46-48 (1999); *see also* THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* 434 (2008) (discussing the aims of CORE more generally).

77. *See, e.g.*, DOWNS, *supra* note 76, at 47-52 (describing the initiatives at Cornell).

It was not only the variety of logistical challenges posed by racial inequalities in different arenas of American life that produced the statutory patterns Ackerman documents. Also influential were criticisms that opponents of race-targeted assistance had already made of efforts to promote material equality. Instead of focusing strictly on humiliation or unequivocally favoring colorblind policies, civil rights proponents' primary goal in the mid- to late-1960s was to improve conditions for African Americans in a number of economic, political, and social arenas through a variety of means, including race-conscious ones.

Legal advocacy groups and the courts therefore insisted, as Ackerman stresses, that the Equal Protection Clause required public educational institutions to be integrated sufficiently so that they did not inflict badges of humiliation on non-white students. But they also knew that integration, achieved through race-conscious assignment of students to public schools in many districts, meant that many more African Americans would attend schools to which whites would feel compelled to devote ample resources. Civil rights proponents also understood that the 1964 Civil Rights Act's ban on racial discrimination in interstate commerce meant enforcement officials would have to adopt the race-conscious practice of gathering racial statistics to determine if discrimination had really ceased—and that this would mean better service and more jobs for African Americans. Because the 1968 Fair Housing Act mandated scrutiny of measures that promoted racial inequality through facially race-neutral measures, it too fostered extensive race-conscious enforcement that promised better housing for blacks, though it explicitly eschewed housing quotas. In contrast, the quantitative measures of inadequate voter registration and turnout employed in the 1965 Voting Rights Act did not require any attention to racial voting patterns, though changes in electoral laws in covered jurisdictions would be scrutinized for discriminatory racial impact. That was enough to open the polling booths to millions more African Americans.

In sum, as Ackerman rightly stresses, the array of policy devices and enforcement measures established by these laws was broader and more imaginative than any before, and more so than many since—and they involved both race-neutral and race-conscious components. But the common denominator of their initiatives was not the colorblindness that modern racial-policy conservatives stress, nor was it simply the anti-humiliation principle Ackerman champions, if that is understood as chiefly concern for the psychic consequences of stigmatizing practices in distinct spheres. Ackerman is instead right when he resolves the ambiguities in his account of these statutes by designating their “overriding objective” as finding ways to “*actually achieve*

egalitarian advances in the real world.”⁷⁸ In a similar spirit, King and I have argued that today’s racial policy debates focus too extensively on whether measures are or should be colorblind or race-conscious. The focus should instead be, as it once was, on what combination of policy instruments can work pragmatically to move the nation toward improved economic, political, and social conditions for all, in a sustainable fashion. Sometimes that may mean race-neutral programs, sometimes race-targeted ones; but the central question should simply be whether the policies are making better opportunities more widely available.

C. *The Rise of the Modern Colorblind Racial Policy Alliance*

Our research suggests that the eclipse of this quest in modern American racial politics is probably not chiefly attributable to the Supreme Court decisions that Ackerman stresses. These decisions are part of the story, but not the main drivers of the polarization characterizing modern equal protection jurisprudence and racial policy approaches. It is primarily due to the far greater success of modern racial-policy conservatives in advancing narratives depicting colorblind principles as central to the civil rights era—narratives which, in turn, have served to assist coalition-building among different types of conservatives and broadened the popular appeal of conservative policies. The result has been electoral victories that have eventually placed more judges who favor colorblind understandings of equal protection on federal benches.

As conservatives began in the 1970s to form new think tanks and litigation groups, adding major new members to the emerging colorblind racial policy alliance, they insisted that civil rights leaders like Frederick Douglass and Martin Luther King, Jr., had always stood for “universalism, equality under the law, colorblindness, and basic individual rights.” Conservatives celebrated the passage in King’s “I Have a Dream” speech in which he envisioned a nation where children would “not be judged by the color of their skin but by the content of their character.”⁷⁹ They asserted that after his death, the modern “civil rights establishment” turned to the apostasy of race-conscious measures—a charge that, again, many later scholars have not questioned.⁸⁰

The triumph of this narrative is all the more impressive because the members of the modern colorblind policy alliance still hold a range of distinct

78. 3 ACKERMAN, *supra* note 4, at 195 (emphasis added).

79. King, Jr., I Have a Dream, *supra* note 73, at 219.

80. See CLINT BOLICK, *THE AFFIRMATIVE ACTION FRAUD: CAN WE RESTORE THE AMERICAN CIVIL RIGHTS VISION?* 36-38, 47-48 (1996).

views in other regards. For some more traditional white conservatives, from Sam Ervin to the present, colorblind advocacy has served in part as a means to block egalitarian racial initiatives. But for black conservatives like Clarence Thomas and many other Americans, universal, colorblind individual rights are matters of natural justice.⁸¹ For other opponents of de jure segregation, colorblind advocacy has expressed sincere beliefs that race-conscious policies promote racial antagonisms instead of unity. Public intellectuals Stephan and Abigail Thernstrom contend the standard guiding racial policies must be “that which brings the races together is good; that which divides us is bad”; and they insist that racial preferences widen American divisions instead of promoting national solidarity.⁸² Other opponents of race-conscious measures, such as Charles Murray in his landmark work *Losing Ground*, have criticized affirmative action policies primarily for what they regard as the counterproductive consequences of economically redistributive policies, race-based or not (though Murray later did focus on race).⁸³ Table 3 displays the diversity of the resulting modern colorblind alliance.

Table 3.
COLORBLIND ALLIANCE GOALS

<i>Colorblind for Individual Rights, Justice</i> Clarence Thomas	<i>Colorblind for National Unity</i> Stephan and Abigail Thernstrom	<i>Colorblind as a Barrier to Compulsory Integration</i> Sam Ervin	<i>Colorblind as a Barrier to Economic Redistribution</i> Charles Murray
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81. See, e.g., Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63 (1989) (arguing that interpreting the Privileges or Immunities Clause in light of natural rights and higher law is the best way to defend freedom, equality, property and limited government, and this means respecting the universal, identical natural rights of all individuals); Clarence Thomas, *Toward a "Plain Reading" of the Constitution – The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983 (1987) (arguing that the Constitution should be interpreted as aiming to secure the natural, equal rights of all individuals proclaimed in the Declaration of Independence).
82. STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 539-40 (1997).
83. CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980*, at 85-92 (1984); cf. RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (paperback ed. 1996).

Although these goals represent different objections to race-conscious measures that can be in tension, in practice their advocates have successfully bonded their concerns and communicated a shared policy message to the American electorate. That message is: “Treating people according to their individual character, rewarding the virtuous, punishing the vicious, is always right. Treating people according to their skin color is always wrong. The true constitutional principle is therefore colorblindness throughout every policy arena.” This focus on treatment according to character, not race, has appealed not only to racial traditionalists but also believers in religious and moral virtues, champions of economic self-reliance, and proponents of tougher criminal justice and military policies. Consequently, it helped to build a broader “New Right” coalition in American politics that drove many Republican Party electoral victories after 1980.⁸⁴ And Republican presidents then appointed federal judges who championed colorblind “anti-classification” principles. If these victories had not occurred, it is unlikely that the reasoning in the decisions Ackerman stresses would be so influential today.

D. The Emergence of the Modern Race-Conscious Policy Alliance

For those who have regarded colorblind policies as insufficient for continued racial progress, both internal unity and broader political success have proven much harder to achieve. They have been able to join in support of anti-subordination goals, but not on the policies to achieve them, because they have very different visions of what an America without systems of unjust subordination would be like.

From the late 1960s through the mid-1970s, civil rights leaders like Farmer and Bayard Rustin persuaded many, though by no means all, civil rights veterans that it was now time to shift to “achieving the fact of *equality*”⁸⁵ via new techniques that included “special treatment of a positive sort.”⁸⁶ Farmer, who served as Assistant Secretary of Health, Education and Welfare under Nixon during the Philadelphia Plan, particularly urged “compensatory

84. DESMOND S. KING & ROGERS M. SMITH, *STILL A HOUSE DIVIDED: RACE AND POLITICS IN OBAMA’S AMERICA* 122-124 (2011).

85. Bayard Rustin, *From Protest to Politics: The Future of the Civil Rights Movement*, 39 COMMENT. (1965), <http://digital.library.pitt.edu/u/ulsmanscripts/pdf/31735066227830.pdf>.

86. SUGRUE, *supra* note 76, at 434; *see also* JAMES FARMER, *LAY BARE THE HEART*, at xii, 101-03, 193-96 (1998); Sugrue, *supra* note 75, at 163.

preferential treatment” in hiring.⁸⁷ Called “the father of affirmative action,” Farmer said in 1998: “the need for affirmative action is just as great, even greater now than it was at the beginning. We need to move from color blindness to color-consciousness to eliminate color discrimination”—and to improve the economic condition of African Americans.⁸⁸

Advocacy of race-conscious reforms came to be reinforced in the late 1960s by the Ford Foundation under former National Security Adviser McGeorge Bundy, along with allied philanthropic organizations.⁸⁹ Influenced by the economic and cultural “modernization” theories of development that American policymakers and academics had elaborated for the “third world” earlier in the decade, Bundy decided that rapid, coercive measures to achieve racial integration were premature. Black Americans needed to develop further their own economic, political, and cultural institutions and capacities—which meant that “grant proposals directed at increasing the group identity and power of minorities” were often preferable to ones focused on “integration.”⁹⁰ The urban race riots in 1967 and 1968 and the rise of black power militancy in the Student Nonviolent Coordinating Committee and the Black Panthers also intensified white anxieties and made moderate reformers fear they were losing influence.⁹¹ The Ford Foundation therefore funded “black power” community organizations and also new entities such as the Mexican American Legal Defense and Education Fund and the Puerto Rican Legal Defense and Education Fund (MALDEF and PRLDEF), counterparts to the NAACP LDF, creating enduring advocacy groups for a variety of race-conscious policies.⁹² And even after Nixon began to turn against the affirmative action proponents in his administration, goal-oriented EEOC officials often cooperated with civil rights groups and business leaders concerned to show compliance with anti-discrimination laws to form key members of a nascent, internally diverse, but growing race-conscious policy alliance.

87. Charles T. Canady, *America's Struggle for Racial Equality*, 87 POL'Y REV. 45 (1998); Richard Severo, *James Farmer, Civil Rights Giant in the 50's and 60's, Is Dead at 79*, N.Y. TIMES, July 10, 1999, at A1.

88. Gail K. Beil, *Preface to JAMES FARMER, LAY BARE THE HEART*, at xii (1998).

89. KAREN FERGUSON, *TOP DOWN: THE FORD FOUNDATION, BLACK POWER, AND THE REINVENTION OF RACIAL LIBERALISM* 70-71 (2013).

90. *Id.* at 57-65, 77, 80.

91. THOMAS BYRNE EDSALL WITH MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* 58-61 (1991).

92. FERGUSON, *supra* note 89, at 81.

The alliance gained vital support from many federal judges, including the Supreme Court Justices who, as Ackerman notes, struck down employment tests that fostered racially disproportionate hiring in *Griggs v. Duke Power*.⁹³ At the same time, the new Congressional Black Caucus (CBC) presented Nixon officials with sixty-one recommendations designed to achieve “equality of results,” including “vigorous affirmative action by the government” in civil rights enforcement.⁹⁴ The CBC included Representative Parren Mitchell, Clarence Mitchell’s younger brother, who would be the leading champion of race-targeted aid to minority businesses in the next decade—symbolically embodying the transformation of the civil rights movement’s policy agenda.

By the mid-1970s, most leading civil rights advocates had reformulated their ideologies, and their interpretations of modern civil rights laws, from anti-segregation to race-conscious measures, following Farmer’s rationale.⁹⁵ And though in practice many remained more than willing to support facially race-neutral policies that promised to reduce racial inequalities, most felt compelled, in response to advocates for anti-classification, colorblind approaches, to elaborate anti-subordination views that appeared to call for race-targeted policies across all of Ackerman’s spheres—“one size fits all.” The various minority “LDFs” all argued that the 1960s civil rights statutes should be read to permit or even to require explicit race-conscious policies designed to reduce racial gaps in education, employment, housing, political representation. The laws were also interpreted as enabling non-whites and other disadvantaged groups to establish special organizations for support and representation within public institutions newly open to all, including cultural houses and ethnic studies programs on campuses and black and Latino caucuses in legislatures.

But these emerging defenses of race-conscious measures did not mask major differences in ultimate racial goals that often posed obstacles both to coordination among advocacy groups and to public persuasion. Table 4 depicts these differences.

93. 401 U.S. 424 (1971).

94. Marguerite Ross Barnett, *The Congressional Black Caucus*, 32 PROC. ACAD. POL. SCI. 34, 35-36 (1975).

95. SKRENTNY, *supra* note 43, at 154.

Table 4.
RACE-CONSCIOUS ALLIANCE GOALS

<p><i>Temporary, Remedial Race-Conscious Measures</i></p> <p>Sandra Day O'Connor, Ford Foundation</p>	<p><i>Enduring Race-Conscious Measures for Distributive "Fair Shares"</i></p> <p>Jesse Jackson</p>	<p><i>Enduring Race-Conscious Measures for Egalitarian Integration</i></p> <p>Gary Orfield, Elizabeth Anderson</p>	<p><i>Enduring Race-Conscious Measures for Egalitarian Cultural Autonomy</i></p> <p>Beverly Tatum Multiculturalist Advocacy, Consulting Groups</p>
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Justice Sandra Day O'Connor articulated the most prevalent, though most reluctant, view supporting race-conscious measures when she contended that "affirmative action should be a temporary bandage rather than a permanent cure."⁹⁶ Similarly, the proponents of racially targeted measures at the Ford Foundation always insisted that all their programs, including their support for separatist institutions, were intended to overcome what they saw, in anti-humiliation fashion, as "psychological barriers from full entry" into all parts of a fully integrated America.⁹⁷

Many political advocates for race-conscious policies, from Representative Parren Mitchell through the Reverend Jesse Jackson, have advanced a different argument. They have portrayed affirmative action measures for racial minorities and for women, the disabled, and other disadvantaged groups as ways "to get inside the big tent, where the opportunities are, where education is, where health care is, where wealth is," and get a "fair share."⁹⁸ Although Jackson's position does not suggest that any particular race-conscious measures must be permanent, it does imply enduring attention to whether all racial groups are being given a "fair share." Public policy-making, on this approach, is not likely ever to be fully colorblind.

96. Peter Schmidt, *Sandra Day O'Connor Revisits and Revives Affirmative-Action Controversy*, CHRON. HIGHER EDUC., Jan. 14, 2010, <http://chronicle.com/article/Sandra-Day-OConnor-Revisit/63523>.

97. FERGUSON, *supra* note 89, at 175.

98. Interview by Henry Louis Gates, Jr. with Reverend Jesse Jackson, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/race/interviews/jackson.html> (last visited Mar. 24, 2014).

Many veterans of desegregation struggles contend still more explicitly that race-conscious policies are likely to be permanently needed to achieve their goal of actual racial integration. Gary Orfield, co-founder of The Civil Rights Project, has long maintained that race-conscious school attendance policies will probably always be required for Americans to “learn to live and work successfully together.”⁹⁹ The philosopher Elizabeth Anderson has written a book-length brief for “the imperative of integration.”¹⁰⁰ They and other integrationists believe, as King suggested, that whether segregation is de facto or de jure, it prevents the common experiences and understandings needed for civic harmony as well as the equal opportunities needed for all to flourish.

These three views overlap but exist uneasily with a fourth position supporting race-conscious measures that has grown prominent in recent decades: multiculturalism.¹⁰¹ A range of civil rights, business, and educational advocacy and consulting organizations emphasize the goals of promoting understanding of different groups’ “unique cultural and ethnic heritage” and building “an inclusive society that is strengthened and empowered by its diversity,” to cite the aims of the National Association for Multicultural Education and the National Multicultural Institute, respectively.¹⁰² Psychologist and Spelman College President Beverly Tatum, among others, has added that racial minorities often benefit from education in institutions in which they are majorities, such as historically black colleges, and sometimes also from social self-segregation in formally integrated schools and

99. Gary Orfield & Chungmei Lee, *Historical Reversals, Accelerating Resegregation, and the Need for New Integration Strategies*, UCLA C.R. PROJECT 4 (Aug. 29, 2007), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1/orfield-historic-reversals-accelerating.pdf>.

100. ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* (2010).

101. See BEVERLY DANIEL TATUM, “WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?”: AND OTHER CONVERSATIONS ABOUT RACE (1997) (arguing that minority students benefit educationally from institutions such as racially homogeneous cultural houses within predominantly white universities); Cedric Herring & Loren Henderson, *From Affirmative Action to Diversity: Toward a Critical Diversity Perspective*, CRITICAL SOC., 2011, at 1 (contending that multicultural diversity is desirable so long as it is associated with efforts to overcome unjust inequalities).

102. *Leading with Diversity: About NMCI*, NAT’L MULTICULTURAL INST. (2012), <http://meldi.snre.umich.edu/node/21866>; *Mission, Goals, & Objectives*, NAT’L ASSOC. FOR MULTICULTURAL EDUC. (2012), <http://nameorg.org/names-mission/goals-objectives>.

workplaces.¹⁰³ As Ackerman notes, Richard Nixon himself eloquently defended this type of view to explain his opposition to mandatory busing integration.¹⁰⁴

Though multiculturalists repudiate racial, ethnic, and cultural hierarchies, their goal is not colorblindness but mutually respectful and egalitarian recognition of evolving but enduring group identities, including racial identities. They see forms of inclusion that do not display such respect as repressively assimilationist.¹⁰⁵ At least some multiculturalists believe these forms of diversity need to be permanent. Many integrationists, in contrast, argue that significant assimilation is needed to achieve goals of personal mobility and civic solidarity. Anderson writes that her integrationism has “no truck with identity politics, understood as a kind of group-based spoils system,” though she stresses she only opposes “pervasive self-segregation.”¹⁰⁶ Jesse Jackson has also expressed concern that multiculturalists who glorify “our own unique culture” may “drop [their] buckets” where they are, in the manner of Booker T. Washington, instead of demanding their “share of the tent.”¹⁰⁷

These differences mean that, although all members of this alliance are prepared to support some race-conscious measures in many spheres of American life for what can rightly be seen as anti-subordination goals, they are far more likely to be at odds with each other in particular contexts, and far less consistent in communicating a persuasive message concerning their racial policies, goals, and values than proponents of colorblindness. Rather than assisting broader liberal coalition-building and electoral victories for Democrats, with whom most are nominally aligned, they have often fostered divisions in Democratic ranks and the relegation of racial policy issues to less visible legislative, administrative, and judicial hearing rooms instead of to the venues of electoral politics where popular support for policies must ultimately be won.¹⁰⁸ Even as they have felt compelled to unite around defenses of race-conscious measures in ways that can sound as insistent on a unitary, one-size-fits-all approach as the advocates of colorblindness, members of the modern race-conscious racial policy alliance have often found themselves in

103. TATUM, *supra* note 101, at 88-89, 131-41.

104. 3 ACKERMAN, *supra* note 4, at 259.

105. See Rogers Brubaker, *The Return of Assimilation?: Changing Perspectives on Immigration and its Sequels in France, Germany, and the United States*, 24 ETHNIC & RACIAL STUD. 531 (2001) (discussing dissatisfactions with multicultural immigration and education policies in Europe and the United States and the recent adoption of policies criticized by multiculturalists as assimilationist).

106. ANDERSON, *supra* note 100, at 110, 188-89.

107. Interview with Reverend Jesse Jackson, *supra* note 98.

108. See KING & SMITH, *supra* note 5, at 253-87.

disagreement and disarray. They have been much less successful than their civil rights-era predecessors at focusing on identifying policies that can work effectively to improve conditions for those at the lower end of America's highly unequal economic, political, and social institutions.

CONCLUSION

In sum, when Ackerman's generally compelling story of how Americans came to redefine their constitutional commitments to racial equality in the civil rights era is combined with attention to the broader struggles of America's evolving racial policy alliances, some differences in interpretation as well as some important agreements emerge. Whether or not Ackerman's anti-humiliation principle is logically distinguishable from anti-subordination approaches, it should be clear that the aims of many of the opponents of *de jure* segregation are not captured by that principle alone. Whatever may have been Chief Justice Warren's own view, it is likely that most members of the anti-segregation alliance were at least as concerned with the wide-ranging, interlinked material harms to African Americans resulting from *de jure* segregation as they were with the stigma it imposed in distinct spheres. The same is true of most proponents of the civil rights statutes of the 1960s, even though racial conservatives' increasing awareness that they could use universal individual-rights doctrines to their advantage meant that the statutes included only some race-conscious components, interwoven with race-neutral features that could be read as expressing commitments to colorblindness. Despite the undeniable presence of those elements, narratives that allege that anti-classification commitments alone defined the core aims of the civil rights era and statutes are wrong. So are the suggestions Ackerman sometimes makes, but ultimately qualifies, implying that the statutes were overwhelmingly concerned with narrowly defined, anti-humiliation goals.

Instead, civil rights statutes should be seen as expressing a constitutional pragmatism that was willing to use a mix of race-neutral and race-conscious mechanisms to pursue wide-ranging forms of racial equality in ways that varied with the administrative needs of particular spheres of American life and with political feasibility. But "pragmatic mixed measures!" has never been a resounding slogan for the core philosophy of any reform movement; still more importantly, many people in America have always been uncomfortable with strong governmental measures to alter the racial status quo, and so many have been receptive to arguments against such efforts. For that reason, among others, most Americans, and the overwhelming majority of white Americans, have in the wake of the civil rights revolution turned to colorblind, anti-classification principles that simultaneously repudiate the nation's explicitly

racist past and set limits to the means through which public institutions can seek to ameliorate the pervasive racial inequalities that are its products. The Supreme Court's decisions in school segregation and interracial marriage cases have contributed to this turn in constitutional jurisprudence, but its sources and supporters in American racial politics have been far deeper and broader. And the simplicity and popular appeal of colorblind policy approaches has in turn driven even many of those who favor only limited reliance on explicit race-targeted measures to defend anti-subordination, race-conscious policies in seemingly one-size-fits-all fashion.

The result is that instead of continuing to search for contextually appropriate and effective policies that have real promise to reduce the nation's many persisting patterns of racial inequality, American policymakers today either ignore those inequalities altogether, or else debate them in polarized, unproductive fashion, endlessly rehearsing the moral and legal arguments for colorblind, anti-classification versus race-conscious, anti-subordination approaches. Bruce Ackerman is probably wrong to suggest that this situation can be improved by treating an anti-humiliation principle as the core tenet of the civil rights era. But he is not only right, but also has made an invaluable civic contribution by showing concretely that the civil rights revolution involved pragmatic, case-by-case policymaking designed to achieve a more racially equal America. It is a lesson that probably will not be readily accepted by "the People of the United States" today – but it is a powerful reminder that, at their best, people can find ways to form a more perfect union.

