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Equal Protection in the Key of Respect

ABSTRACT. This essay challenges the three related claims embedded within Professor Ackerman's assertion that the distinctive wisdom of Chief Justice Warren's opinion in *Brown v. Board of Education* lies in its recognition of segregation as institutionalized humiliation. Ackerman claims that *Brown* grounds the wrongness of school segregation in the fact that it humiliates black school children (the descriptive claim), that *Brown*'s distinctive contribution has been largely missed (the intellectual history claim), and that both *Brown* and the civil rights statutes that build upon it are correct that segregation violates equal protection precisely because it is humiliating (the normative claim). The essay argues that while there is something right about each of these claims, each is also flawed in important ways.

The main focus of the essay is on the normative claim. I argue that Professor Ackerman is in the right general space; that the core wrong of segregation relates to respect and recognition, to avoiding denigration and demeaning. However, the concept of humiliation doesn't quite work to capture what makes segregation and other discrimination violate equal protection. After distilling Professor Ackerman's conception of humiliation, I show that it is unable to capture central cases of wrongful discrimination. Next I argue that even a modified conception of humiliation won't capture what makes segregation problematic. I go on to offer my own account, according to which an action wrongfully discriminates when both it expresses denigration and the person or entity acting has power over the person acted upon. Bringing power into the account allows it to explain why people who defy segregation and are thus not humiliated are nevertheless wronged. Finally, I explore how my own account would handle laws and policies that lack the clear symbolic meaning of segregation. I offer a modification of my prior view that begins to sketch how a respect-based account could handle these cases.

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ESSAY CONTENTS

INTRODUCTION	3038
I. HUMILIATION	3039
A. Challenging Professor Ackerman's Conception of Humiliation	3039
B. Is Humiliation the Right Concept at All?	3042
II. CHALLENGING PROFESSOR ACKERMAN'S DESCRIPTIVE ACCOUNT OF <i>BROWN</i>	3044
III. WRONGFUL DISCRIMINATION AS DEMEANING ACTION	3046
A. Social Meaning, Sphericality, and Sociological Jurisprudence	3047
B. The Power of Demeaning	3050
IV. COMPLICATING THE ACCOUNT	3053
A. The Content of the Expressive Action	3053
B. Too Demanding	3056
C. Respect and Expression	3058
CONCLUSION: ANTI-DISCRIMINATION LAW IN THE KEY OF RESPECT	3059
	3037

INTRODUCTION

If we read Chief Justice Warren's opinion in *Brown v. Board of Education* on its own terms and take its reasoning seriously, counsels Bruce Ackerman, we will recognize its oft-neglected insight that segregating school children violates equal protection precisely because it is a form of institutionalized humiliation.¹ "There is great wisdom in Warren's opinion," Ackerman writes, "but a single master-insight will suffice for now: the Court's emphasis on the distinctive wrongness of institutionalized humiliation."² This essay will interrogate Ackerman's argument and its component claims. Ackerman claims that the *Brown* opinion grounds the wrongness of school segregation in the fact that it humiliates black school children (the descriptive claim), that *Brown's* distinctive contribution has been largely missed (the intellectual history claim), and that both *Brown* and the civil rights statutes that build on this important insight are correct that humiliation is at the core of what makes segregation a denial of equal protection (the normative claim).

In what follows, I argue that there is both something correct and something not quite right about each of these claims. While the essay may therefore seem critical in tone, let me state clearly at the start how much I admire Professor Ackerman's book and how much I learned from it. My engagement below is offered as a sort of friendly amendment to the theses he offers in Chapter 7. I will focus my discussion on the normative claim, though I will say something about the other two claims along the way. Ackerman joins a growing chorus of scholars who emphasize that treating people as equals requires recognition and respect.³ Or, to put the point in the negative, humiliation and its related cognates—demeaning, degrading, insult, shaming, etc.—may well involve a failure to treat people as equals in a manner that has normative and constitutional significance. As I am among those who agree that wrongful discrimination involves some sort of failure of respect, I think Ackerman is largely right to celebrate *Brown's* insight along these lines. But the hard work going forward lies in articulating and exploring this view. Is

1. See 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 128-29 (2014). The discussion of Ackerman's views in this essay focuses on Chapter 7, "Spheres of Humiliation."

2. *Id.* at 128.

3. See DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* (2008); AVISHAI MARGALIT, *THE DECENT SOCIETY* (1998); JEREMY WALDRON ET AL., *DIGNITY, RANK AND RIGHTS* (Meir Dan-Cohen ed., 2012); Elizabeth S. Anderson, *What is the Point of Equality?*, 109 ETHICS 287 (1999); Stephen Darwall, *Two Kinds of Respect*, 88 ETHICS 36 (1977).

humiliation the central or core wrong? If not, how might we refine the insight? Ackerman himself suggests, near the close of the chapter, that *Brown's* emphasis on humiliation is only a starting point, and that it won't get us all the way to the sort of equality aimed at by later civil rights statutes: the "civil rights revolution . . . has left us a complex legacy of anti-humiliation and more ambitious egalitarian principles requiring a sophisticated array of legal techniques for their successful realization."⁴ In this essay, I hope to take up this invitation to think more about whether humiliation does capture the distinctive wrong of both Jim Crow segregation and discrimination as it occurs today.

I. HUMILIATION

A. Challenging Professor Ackerman's Conception of Humiliation

In order to assess Professor Ackerman's claim that the distinctive wrong of school segregation is that it constitutes institutionalized humiliation, we must know what humiliation is. Ackerman provides an answer both by telling us to consult our everyday experiences of humiliation⁵ and by offering us the following definition: humiliation is a "face-to-face insult in which the victim acquiesces in the effort to impugn his standing as a minimally competent actor within a particular sphere of life."⁶ Let's therefore take this definition, isolating its component parts, and assess it with reference to our own experiences of humiliation. The definition consists of five parts.

1. Humiliation requires a face-to-face encounter.
2. Humiliation is an insult, by which I take it that Ackerman is emphasizing the expressive aspect of humiliation.

4. 3 ACKERMAN, *supra* note 1, at 152. Ironically, Ackerman critiques those scholars and jurists who see the lesson of *Brown* in terms of anti-classification or anti-subordination for inappropriately respecting its wisdom because those views require seeing *Brown* as only a way station to a grander or more overarching view. However, at the end of the chapter, Ackerman also interprets *Brown* as staking out an interim view about what the command of equal protection requires. *See id.*

5. *Id.* at 137 (stressing that "[h]umiliation is something that almost all of us have experienced. So we can consult our own personal experiences to gain a firmer grasp on the distinctive features of the concept").

6. *Id.* at 138.

3. In order for an action or situation to be humiliating, the victim must acquiesce in, rather than defy, the humiliating treatment.
4. Humiliation requires that the humiliating treatment or situation be intentionally produced. If the victim must “acquiesce[] in the *effort* to impugn his standing” (my emphasis), this suggests that the humiliating treatment is produced by virtue of some effort or intention.
5. Humiliation requires that the actor or institution be attempting to impugn the victim’s standing as a minimally competent person in that particular sphere. In other words, if humiliation is expressive action (#2), the content of what is expressed is that the person humiliated is not even minimally competent in the particular sphere at issue.

Let’s explore this proposed definition. In this first Section, I hope to suggest that Ackerman’s definition of humiliation is too narrow to capture familiar instances of humiliation. In particular, I wonder whether an intent to humiliate is required for an action to be an instance of humiliation and whether what is expressed must be that the person humiliated is not even minimally competent in the particular sphere. Some humiliation may have quite different expressive content.

As the parent of a budding teenager, my most recent and familiar experiences with the concept of humiliation come not from examples of social injustice but rather from more prosaic events. But Professor Ackerman did instruct his readers to assess his definition by comparing it with everyday experience, and one can hardly get more everyday than the teenager’s complaint to her parent that “you’re humiliating me.” Consider, for example, a teen who asserts that her parent is humiliating her by dancing (albeit awkwardly) in front of the teen and her peers. Does this reference to humiliation fit with Ackerman’s definition? While the dancing parent presents a face-to-face encounter with the teen, and possibly expresses that the “victim” is not minimally competent in a particular sphere (i.e., not even remotely cool, given the mother’s dorky behavior), and involves acquiescence (or at least potentially so), what is decidedly missing is the effort or intent to humiliate by the perpetrator, in this case, the parent.

While this example may seem somewhat flip in the context of the important topic at hand, it raises a significant ambiguity about the relevance of intention to humiliation (and also to violations of equal protection). If we think intentions matter, do we mean the intention to do the action in question (in this case, to dance), or do we mean the intention to humiliate the child? Here, the parent clearly intends to dance, but she does not intend to humiliate

the child thereby. Ackerman appears to suggest that one must intend to humiliate, rather than simply to do the action (which happens to humiliate); the actor must make an “effort to impugn” the standing of the other person. Yet this example shows that a person can humiliate another without intending to do so.

Another familiar use of the concept of humiliation shows that no intentional action need be present at all. An older person who loses the ability to maintain continence might describe that situation as humiliating.⁷ Suppose the other people present do everything they can to lessen the embarrassment. Still, the visible loss of competence in this sphere may be humiliating to the person affected even though no intentional action by anyone brings about this result. If these points are right, then humiliation may be broader than the phenomenon Ackerman wishes to emphasize as the core wrong that Chief Justice Warren described in *Brown*.

A second reason to think that the wrong of segregation highlighted by Chief Justice Warren in *Brown* is not humiliation is that sometimes humiliation may be justified and in fact supportive of the equality concerns vindicated in *Brown*. Rachel Bayefsky makes this argument, emphasizing that Southern whites, in both the First and the Second Reconstruction, complained of the humiliation occasioned by having to associate with blacks on terms of equality.⁸ If interacting with blacks was humiliating to Southern whites by virtue of their beliefs in racial hierarchy, this humiliation was a welcome humbling that brought them down to their rightful status as moral equals with, rather than superiors to, the African-Americans with whom they resented associating.

Perhaps, then, Ackerman’s conception of humiliation does not capture the familiar conception of humiliation drawn from our common experience. However, we might revise it and develop a conception of humiliation that both accords better with common understandings of what humiliation is *and* captures the distinctive wrong highlighted by Chief Justice Warren in *Brown*. In the next Section, I offer a few reasons to think that even a revised conception of humiliation is not up to the task and thus that humiliation is not the right concept to focus our attention upon.

7. I owe this point to Rachel Bayefsky. See Rachel Bayefsky, *Humiliation and Liberal Democratic Politics* (2013) (unpublished manuscript) (on file with author). Bayefsky argues that “[a]n action or condition can, it seems, be humiliating without being intentionally humiliating . . . [as] a public episode of incontinence” clearly shows. *Id.* at 92.

8. *Id.* at 139-44.

B. Is Humiliation the Right Concept at All?

Professor Ackerman claims that humiliation requires that the victim acquiesce in her humiliation. For this reason, Rosa Parks was not humiliated when she refused to go to the back of the bus and was later arrested.⁹ While I have some doubts about whether acquiescence is necessary for humiliation (perhaps one can be humiliated even when one does not acquiesce), I would agree that Rosa Parks was not humiliated in the moment when she refused the order of the bus driver to move to the back. Writing this soon after the death of Nelson Mandela, I can't help but draw on his example as well, even though it is from outside the U.S. context. Mandela was imprisoned for twenty-seven years on Robben Island and during his imprisonment was forced, along with other black prisoners, to wear short pants, while the white, Indian and mixed-race prisoners were allowed to wear long pants. Shorts were socially understood as the garb of boys, or children, and so forcing blacks to wear shorts expressed the racial hierarchy of apartheid South Africa. In that sense, the action (forcing Mandela to wear shorts) was an insult (expressed denigration), which was intentional, in a face-to-face encounter, and had the meaning or message that blacks were not minimally competent as members of the political community. Instead, they had the status of children. Thus, the South African system of prison attire had all the other elements of humiliation identified by Ackerman. And yet, when we reflect on Mandela's words at his Rivonia trial and especially his willingness to die for the ideals for which he fought, I think we must conclude that he had not acquiesced in the attempt by the white regime to impugn his status as an equal.¹⁰ More significantly for my purposes here, Mandela was not humiliated. Rather, while he may have worn the shorts, and remained in prison, he retained his dignity.

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9. See 3 ACKERMAN, *supra* note 1, at 140 (describing how "the only thing [Parks] could 'know' [about how her refusal to move would play out] was that 'it was the very last time that I would ever ride in humiliation'").
10. At the speech at his trial, Mandela said, "During my lifetime I have dedicated my life to this struggle of the African people. I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons will live together in harmony and with equal opportunities. It is an ideal for which I hope to live for and to see realised. But, My Lord, if it needs be, it is an ideal for which I am prepared to die." Nelson Mandela, *I Am Prepared to Die*, NELSON MANDELA CTR. OF MEMORY (2012), http://db.nelsonmandela.org/speeches/pub_view.asp?pg=item&ItemID=NMS010.

If neither Rosa Parks nor Nelson Mandela was humiliated, this presents a problem for Professor Ackerman's thesis that humiliation is the core wrong of segregation. For surely the racial segregation of buses in Montgomery, Alabama and the racially defined prison garb of Robben Island are instances of wrongful discrimination of the sort that the Warren Court found morally and constitutionally problematic in *Brown*. We want to be able to say that the segregation of buses wrongfully discriminated against Parks, even though she defied the law, just as we would expect the Warren Court to so conclude about school segregation even in a district in which some parents defied the law. If this is right, then the wrong of school segregation identified by *Brown* does not lie in the fact that it is institutionalized humiliation.

Professor Ackerman could respond to these objections to his humiliation-based conception of the equal protection guarantee by modestly modifying his view.¹¹ He might say that while Parks herself wasn't humiliated, the *practice* of segregating public buses was humiliating, as others certainly did acquiesce in the treatment. Or perhaps he might say that the bus driver's order to Parks to move to the back of the bus was an *attempt* to humiliate her, and thus its constitutional infirmity follows from the constitutional problem with state action that actually humiliates—in much the same way that attempts to commit crimes are wrongful in a way that is derivative of the wrongfulness of the completed crime.¹² Thirdly, Ackerman might say that the Parks and Mandela examples are non-standard instances of humiliation but nevertheless explained by reference to the common or usual case in which actions of this kind are acquiesced in by the victim and thus do produce humiliation.¹³

The first of these attempted revisions of Ackerman's account is promising in that the practice of segregation certainly is humiliating to most African-Americans. But by focusing on the practice rather than on the treatment of Parks herself, this modification loses the ability to capture the individual wrong done to Parks herself. The second two modifications are more promising in this regard. But both the view that the law segregating buses is a violation of

11. These possible modifications were suggested to me by Ben Eidelson.
12. This way of conceiving of the constitutional violation is analogous to the view of some criminal law scholars who argue that the wrongfulness of attempts can be derived from the wrongfulness of the completed action. See, e.g., GIDEON YAFFE, ATTEMPTS: IN THE PHILOSOPHY OF ACTION AND THE CRIMINAL LAW (2010).
13. This sort of account is analogous to the account that John Finnis provides to explain how the existence of unjust laws can be accounted for by natural law theory. See John Finnis, *Natural Law Theory: Its Past and Its Present*, in THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 16, 26 (Andrei Marmor ed., 2012).

equal protection because it attempts to humiliate Parks and the view that it is a non-standard case of humiliation are unsatisfying precisely because they see the application of segregation laws to Parks as non-paradigmatic cases. While the segregation law may only attempt to humiliate Parks, it certainly succeeds in doing something morally and constitutionally troubling to her that we want to capture. Similarly, it may be a non-standard case of humiliation, but it is a central case of something that seems important to what is going on. In my view, Ackerman is on the right track in articulating what makes segregation of public schools in the American South a violation of equal protection. Humiliation is in the right general space; the wrong relates to a lack of respect or recognition or dignity, a degrading or demeaning. Yet, if it isn't humiliation, what is it exactly? Following Ackerman's method, we might return to *Brown* itself, together with the collective insight embodied in the canonical statutes of the civil rights movement, to help us refine these thoughts.

II. CHALLENGING PROFESSOR ACKERMAN'S DESCRIPTIVE ACCOUNT OF BROWN

I will begin with *Brown*. In this Part, I first challenge Professor Ackerman's descriptive claim—that the *Brown* opinion grounds the wrongness of segregation in the humiliation of black school children (as Ackerman defines humiliation). I will then provide a diagnosis for the descriptive confusion and go on to suggest that Professor Ackerman's reading of *Brown*, more than *Brown* itself, provides a good place to start in developing an account of when and why racial segregation violates equal protection.

Oddly, when Professor Ackerman describes the core wrong of *Brown* as institutionalized humiliation, which he sees as comprised of the five parts already mentioned, he leaves out the actual *psychological effect* on the victim—how she or he experiences the humiliation or how it feels. This is somewhat mysterious given the focus on the specific contribution of Chief Justice Warren's opinion in *Brown*, which emphasizes—in language familiar to us all—how segregation “generates a feeling of inferiority” that “may affect . . . [the] hearts and minds”¹⁴ of the black school children. Ackerman stresses the expressive component of the stigmatizing policy (that it expresses that black children are not fit to go school with white children) and the acquiescence by the victims (that they go along with this policy rather than defy it), but what

14. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

he ignores—in his definition of humiliation at any rate—is the psychological effect of this stigmatizing policy that Chief Justice Warren found so central. I suspect this is because it is easy to conflate the fact that an action expresses a denigrating message with the psychological experience likely to be produced, the feeling of being denigrated.¹⁵ But, nevertheless, it is important to note that Ackerman and Warren emphasize different things: Ackerman, the meaning; Warren, its effect.

The second point I take issue with in Ackerman's characterization of *Brown* is his claim that Chief Justice Warren applied what Karl Llewellyn called “situation sense.” Ackerman describes: “[f]or Warren, judges must move beyond the language ‘found in the act’ to explore the social meaning of real-world practices.”¹⁶ While I would agree that judges should interpret the social meaning of acts or policies, and that to do so they must draw on their general knowledge of our culture and its interpretive practices (and am happy to call that “situation sense”), I think it is less clear than Ackerman acknowledges that this is what Chief Justice Warren thought was called for. If the judge is to interpret social practices, like segregation, using his common understanding of our culture, why is the new psychological knowledge in 1954 so central to his finding? Right after stressing the psychological effect of segregation on black school children and the findings of the lower court that these effects were present, Chief Justice Warren concludes, “[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding [that segregation negatively affects the self-esteem and motivation to learn of black children] is amply supported by modern authority.”¹⁷ The fact that segregation stigmatizes black children is established, in large part, by social science rather than situation sense.

Segregation *is* stigmatizing. That is clear. But what is not so clear is whether what matters, morally and legally, is the *action* of stigmatizing, which

^{15.} Chief Justice Warren puts scare quotes around the word “tangible” when he notes that the schools are equal in “tangible” ways. *Id.* at 492. He contrasts this equality with the emphasis in *Sweatt v. Painter*, 339 U.S. 629 (1950), and *McLaurin v. Oklahoma State Regents*, 339 U.S. 673 (1950), on “intangible considerations.” *Brown*, 347 U.S. at 493. Together, these references create the impression that Chief Justice Warren believes the schools are not equal in ways that also are intangible, but that go beyond the intangibles of reputation and alumni network, etc., highlighted in *Sweatt* and *McLaurin*. These intangible inequalities could refer to the fact that segregation expresses denigration or that it generates feelings of inferiority. The concept of stigma captures both of these meanings, as is discussed below.

^{16.} 3 ACKERMAN, *supra* note 1, at 132.

^{17.} *Brown*, 347 U.S. at 494.

is brought about at least in part by expressing that blacks are inferior, or instead the *effect* thereby produced, the feelings of inferiority. If what matters is what segregation expresses—its meaning or message—judges can employ situation sense to read the culture and social practice in order to conclude that segregation clearly is a social practice that expresses racial hierarchy. If what matters is the effect produced by this practice, i.e., whether black children suffer psychological harm as a result, then situation sense will not suffice. We need data to show that black children are indeed harmed. The result of the empirical inquiry is unsurprising to be sure but that does not make the question any less factual in nature.

Therefore, while I agree with Professor Ackerman that meaning and situation sense are normatively important to how a judge *ought* to decide whether school segregation violates equal protection, I do not think he correctly reads *Brown* when he asserts that Chief Justice Warren grounded his opinion on these claims. Rather I think that for Warren, it was the effect produced by the message that was central: how the denigrating meaning of segregation affected the hearts and minds of black school children. And in order to know what this effect was, social science, rather than interpretive judgment, was the tool.

So far, I have argued that Professor Ackerman's account of what humiliation is doesn't capture many familiar instances of humiliation. Second, I have argued that even a revised conception of humiliation would not capture the wrong of segregation. Third, I have argued that *Brown* itself isn't really grounded in humiliation—a concept that stresses the expressive aspect of action—but rather focuses on the psychological effect of segregation. However, I have suggested that Professor Ackerman is on the right track normatively to pick a concept like humiliation that has an expressive dimension. In the next Part, I present my own view (developed elsewhere) that segregation and other instances of wrongful discrimination are wrong because they are demeaning.

III. WRONGFUL DISCRIMINATION AS DemeANING ACTION

In my view, discrimination is wrong when it is demeaning. I proposed this account of discrimination in *When Is Discrimination Wrong?*¹⁸ Demeaning has two parts, which I call the expressive dimension and the power dimension. An action, policy, or practice demeans if it expresses that the person or people

¹⁸. HELLMAN, *supra* note 3.

affected are less worthy of equal concern or respect *and* if it is the action, policy, or practice of a person or entity that has the power or capacity to put the other down. As I argued in this prior work, “[t]o demean is to put down—to debase or degrade. To demean thus requires not only that one express disrespect for the equal humanity of the other but also that one be in a position such that this expression can subordinate the other.”¹⁹

Like Professor Ackerman, then, I too think that what makes segregation violate equal protection lies, at least in part, in what it *expresses*. In Section III.A below, I will explore in more detail what is entailed by the view that what an action expresses matters to its constitutional permissibility. The second aspect of demeaning—its power dimension—adds something different to Ackerman’s thesis that the wrong of segregation has something to do with a lack of respect. In Section III.B, I argue that this power dimension makes especially good sense of the “Mrs. Murphy” exception to the public accommodations section of the Civil Rights Act of 1964.

A. Social Meaning, Sphericality, and Sociological Jurisprudence

Demeaning is an expressive action that, like humiliation, is related to respect. Of course, which actions or expressions show respect or disrespect varies from culture to culture and from context to context. As Justice Marshall observed, “A sign that says ‘men only’ looks very different on a bathroom door than on a courthouse door.”²⁰ Segregation of school children on the basis of race in the American South in the 1950s clearly expressed disrespect and denigration of blacks. It expressed or symbolized the inferiority of black children in the educational sphere, thereby suggesting an intellectual deficiency. The requirement that blacks ride in the back of buses expressed that blacks were the social inferiors of whites, and thus had to walk further to their seat, to the lower or lesser section of the bus. The fact that context and culture determine the meaning of these policies is easy to see when we compare them to related variations. Suppose a small school district that runs one bus service for children in grades K-12 has a policy of requiring the high school students to sit in the back of the bus, the middle school students in the middle, and the elementary school students in the front near the driver. This policy—teens in the back—expresses something quite different from the “blacks in the back”

^{19.} *Id.* at 35.

^{20.} *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 468-69 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part).

policy of the Jim Crow South. It expresses no disrespect of teens, primarily because there is no larger social context in which teens are denied all sorts of opportunities and rights, as there was for blacks in the segregated South. Moreover, while the back of the bus takes on a particular meaning of being lesser in the context of segregation, it takes on no such meaning when applied to teens. This is in part because everyone knows that teenagers love to sit in the back of the bus. The hypothetical school bus seating policy therefore simply seems to reasonably accommodate the preferences of teens and the needs of young children, thereby expressing respect for all involved.

Similarly, racial segregation of public schools in the 1950s and today expresses something quite different than would gender segregation of public schools. While people may disagree about whether gender segregation has an insulting or denigrating meaning, few could disagree that the meaning is either less denigrating or less clear than that expressed by racial segregation. The continued existence of private all-girls schools at the K-12 level demonstrates that many parents find a school's decision to open its doors only to girls to show appropriate respect for their daughters. When and whether sex segregation denigrates is an issue about which people continue to disagree.²¹ My point here is not to argue for the view that single sex education does not denigrate girls or women but merely to argue that what it expresses is different than what racial segregation of schools expresses. In this sense, Chief Justice Warren was wrong to claim that segregation is "inherently unequal."²² Rather, segregation is contingently unequal because its inequality lies, at least in part, in what it expresses, which, contingently, depends on the context and culture in which it is practiced. The idea that the expressive dimension of action matters legally thus requires the sort of "sociological jurisprudence" Professor Ackerman highlights.

Professor Ackerman and Charles Black before him praise *Brown* for rejecting the view, articulated in *Plessy v. Ferguson*,²³ that segregation has a non-denigrating meaning.²⁴ For Ackerman "only a Martian would have trouble

21. For example, voluntary sex segregation at extracurricular events sponsored by Islamic groups at universities in the U.K. have engendered debate. See Conal Urquhart, *UCL Investigating After Islamic Group Debate Segregated Seating by Gender*, GUARDIAN, Mar. 10, 2013, <http://www.theguardian.com/education/2013/mar/10/ucl-debate-segregating-seating-gender>.

22. *Brown*, 347 U.S. at 495.

23. 163 U.S. 527 (1896).

24. 3 ACKERMAN, *supra* note 1, at 132-33.

figuring out”²⁵ the meaning of segregation; for Black, if anyone were to deny this was so, one should “exercise one of the sovereign prerogatives of philosophers—that of laughter.”²⁶ How do we *know* that this is the meaning? While Professor Ackerman doesn’t say so explicitly, the fact that the judge applies her “situation sense” in reaching the conclusion that this is the meaning of segregation suggests that social meaning is objective. It is not a matter of what particular people, white or black, take it to be at any particular time. Rather, I would say, and I think Professor Ackerman would agree, that we determine the social meaning of segregation, or any law, policy or practice, by making an interpretive judgment of its objective meaning.

As context matters generally in determining the social meaning of a practice, it is unsurprising that it matters whether the racial classification is used to determine which school a child should attend versus, say, which person an individual would like to date. Remember, sex segregation of the bar is different than sex segregation of bathrooms, though recently that practice too has engendered criticism.²⁷ Professor Ackerman emphasizes what he calls the spherical approach taken by the Civil Rights Act—looking at each context on its own terms: schools, employment, public accommodations, voting. The segregation of school children is a particularly clear example of a policy that demeans black school children because of the importance of education to a child’s opportunity for success in many other spheres of life. If education were not so important, then the message expressed by the segregation would be less strong.²⁸

²⁵. *Id.* at 132.

²⁶. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

²⁷. See HELLMAN, *supra* note 3, at 68-69.

²⁸. One could argue that the importance of education to a child’s opportunity suggests a different rationale for the decision in *Brown*. Some scholars have recently argued that freedom (or liberty) provides the normative grounding for laws prohibiting discrimination. See Sophia Moreau, *What Is Discrimination?*, 38 PHIL. & PUB. AFF. 143, 147 (2010) (arguing that antidiscrimination laws protect a person’s “deliberative freedom” to make decisions about how to live her life “insulated from pressures stemming from extraneous traits”); Deborah Hellman, *Equality and Unconstitutional Discrimination*, in PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 51 (Deborah Hellman & Sophia Moreau eds., 2013) [hereinafter PHILOSOPHICAL FOUNDATIONS] (critiquing the liberty-based conception of anti-discrimination law); Sophia Moreau, *In Defense of a Liberty-Based Account of Discrimination*, in PHILOSOPHICAL FOUNDATIONS, *supra*, at 71 (responding to this critique and challenging the distinction between comparative and non-comparative accounts of wrongful discrimination).

To summarize, I argue that school segregation is wrongful discrimination because it is demeaning—a concept that is, in part, expressive.²⁹ School segregation demeans because it expresses that black school children are not fit to be educated with white children. While people can disagree about what particular policies or laws express, a judge must make an interpretive judgment about the best “reading” of the meaning of a particular law or policy in our culture. The Civil Rights Act’s separate approach to different contexts—what Professor Ackerman calls its *sphericality*—fits well with a view of wrongful discrimination that makes context salient.

B. *The Power of Demeaning*

To demean, the person or entity expressing the denigrating message must also have power or the capacity to put the other down. Just as a boss can order an employee to do something but an employee cannot order the boss because *ordering* requires power, so too demeaning requires that the speaker or actor have power. Note here that I do not mean to focus on the effect of the action—on whether the person purporting to order succeeds in getting the other person to do what she wants. A boss orders her employee, even if the employee does not do what the boss orders. But the employee, in most instances, cannot order the boss. Even if the boss does as the employee directs, still, the employee has not ordered but rather requested, albeit rather rudely. To order another requires some power. Similarly, to demean (rather than to insult, for example) requires power.

Moreover, just as the boss orders the employee even when the employee defies the order, so too an actor may demean another even if the person affected challenges or defies the actor. When Rosa Parks refused to sit in the back of the bus and thereby refused to ride in humiliation again, the racial segregation of the buses still demeaned Parks because the denigrating message was expressed by the city of Montgomery—an entity with power. Parks is not humiliated when she defies the city, but she is nevertheless demeaned.

29. One might wonder whether all demeaning state action violates equal protection or only some. In my view, laws and policies violate equal protection when and because they are demeaning. Whether all state action that demeans therefore violates equal protection, I am less sure about, but I am inclined to say that it does. In addition, statutory anti-discrimination laws are both explained and justified to the extent that they forbid demeaning treatment. However, not all demeaning action by non-state actors is or ought to be legally proscribed. There are other values at stake—privacy, liberty, and administrative complexity—that weigh in the balance as well.

However, she may not *feel* demeaned. Unlike the segregation of school children at issue in *Brown*, perhaps the racial segregation of the buses does not affect her heart and mind. After all, she clearly retains sufficient sense of self-worth or esteem to challenge the law. Nevertheless, the policy demeans her because it expresses denigration, whether or not she suffers as a result, and because this expression of denigration is an expression by the city of Montgomery, Alabama. When Montgomery expresses that Parks is not the social equal of white bus riders, the city demeans her. When an actor—the city of Montgomery, for example—has sufficient power, then those whom it affects with denigrating policies are demeaned. Most will likely *feel* demeaned as well, but this feeling is not relevant to whether they are demeaned. Those few who manage to keep themselves untouched by such practices still have cause for complaint. Moreover, most will comply with the directives of an actor with power (the acquiescence spoken of by Ackerman). But if they do not, if they challenge or defy this policy, the policies do not humiliate them. Still, such policies demean and thereby violate equal protection.

In order to determine whether a person or entity has power, in this sense, we focus on objective facts about the world—what the person or entity can do to the other, for example (fire her, jail her, mock her, etc.). A boss has power over the employee by virtue of the fact that he can fire the employee, whether or not the employee acquiesces or defies an employer's attempt to humiliate the employee. Similarly, the police in Montgomery have power over Parks, whether or not she acquiesces in the city's attempt to humiliate her. This emphasis on power provides a justification for the state action doctrine in that government officials generally have power.³⁰ However, while city officials generally have more power than do private individuals, sometimes private individuals have the power to demean as well. If wrongful discrimination is demeaning, then what we care about is whether the action is in fact demeaning. Demeaning requires power, which is generally held by certain sorts of entities. But when an entity or person that usually has power does not, in the particular context, then the action is not demeaning. That said, if this sort of approach is translated into a legal norm, the law must operate by general categories and so some non-demeaning actions may be prohibited and some actually demeaning action may escape legal proscription.

This emphasis on power helps explain the “Mrs. Murphy” exception to Title II of the Civil Rights Act, concerning public accommodations. Professor

³⁰. The emphasis on power also provides a justification for the Civil Rights Act's reach to large employers.

Ackerman argues that this exception is best understood as resting on what he calls the Act's emphasis on "sphericality." While the Act forbids racial discrimination in public accommodations, like hotels, the so-called Mrs. Murphy exception permits homeowners who rent out rooms in their homes to refuse to rent to people on the basis of race. Ackerman sees this exception as grounded in the idea that the home occupies a different sphere than does the commercial setting and therefore a refusal to rent by the hypothetical Mrs. Murphy carries a different social meaning than would a refusal of a commercial hotel to serve a black traveler.³¹ Is this right? Does a homeowner's refusal to rent a room in her house to a black person express something different than a hotel's refusal to do the same?

In my view, Professor Ackerman is right about this, but the point is somewhat overstated if we rely on the expressive content of the two actions on their own. Rather, the real difference lies in the significant difference in the power wielded by an individual private homeowner as compared to the larger commercial enterprise. The hotel's refusal to rent a room to a black traveler expresses denigration of him and does so on behalf of an entity with some power in the marketplace. The denial of the traveler's equal worth is thus forceful. The homeowner's similar refusal also denigrates, but more softly or quietly, if you will. I am not here emphasizing the effect—that the homeowner is likely to control a much smaller number of available rooms than the hotel owner. This is surely true. But, at the same time, if all homeowners in a region refuse to rent rooms to blacks, the effect could be quite significant. Rather, I am exploring what each merchant *does* in refusing to rent the room. The homeowner, as just one small homeowner who controls her own home, speaks her distasteful message softly and carries a small stick. The hotel owner, by contrast, expresses largely the same message but does so in a loud voice and with a larger stick. His place, as the owner of a business of some size, gives him power in our social system.

The claim that the homeowner who rents rooms in her home is a less powerful figure in society than the owner of a commercial establishment covered by the Civil Rights Act is certainly a generalization to which there may be some exceptions—powerful individuals who also rent out rooms; hotel or motel owners with very little power. Of course this is right. The Civil Rights

^{31.} 3 ACKERMAN, *supra* note 1, at 142 ("While a tired black family might bitterly resent Mrs. Murphy's decision, they would understand themselves as victims of her *personal choice*—and this is categorically different from the institutionalized humiliation imposed by a hotel clerk who rejects them as part of his *standard operating procedures*.") (emphasis added).

Act of 1964, like any law, must rest on generalizations. My point is that the Mrs. Murphy exception to the Act is well explained by an account of wrongful discrimination in which the power of the discriminator is relevant. It is because the homeowner is less likely to demean the black traveler than is the hotel owner when she denies him a room (because she lacks the power to do more than insult or humiliate him) that the law carves out an exception.³²

IV. COMPLICATING THE ACCOUNT

I have thus far argued that the concept of demeaning does a better job of capturing the wrong of racial segregation in the Jim Crow South than does humiliation for two reasons. First, a person who defies the racially discriminatory laws or policies (like Parks) is *not* humiliated but she is demeaned. If we think the segregation of public buses wrongs Parks even when she defies the law, humiliation is an inapt concept to capture the wrong at issue. Second, to demean requires power. This emphasis on power provides a particularly apt explanation for why both governments and reasonably large commercial enterprises are covered by the non-discrimination norms found in the Constitution and the major civil rights acts of the 1960s and beyond. There is one final difference between Professor Ackerman's view that segregation wrongs blacks because it humiliates them and my view that segregation wrongs blacks because it demeans them, which I want to focus on now. Both Ackerman's view and my view locate the wrong of discrimination in what it *expresses*, at least in part. To fill out this type of account, one must say something about the content of the expression that creates moral and legal problems.

A. The Content of the Expressive Action

Let me begin with Professor Ackerman's proposal. In his view, the normatively problematic content of humiliation is that it expresses that the victim is not even a "minimally competent actor" within a particular sphere.³³ If this idea of humiliation in fact grounds the wrong of racial discrimination, then it should be the case that there is something clearly wrong about expressing

^{32.} The exception might also be based on respect for the homeowner's claim to determine who enters her house, which is stronger than the motel owner's claim to control who enters his business.

^{33.} 3 ACKERMAN, *supra* note 1, at 138.

that another is not even minimally competent (especially when it is done publicly or in face-to-face encounters). Moreover, the expression of this particular content should relate in some way to our moral concerns about discrimination. I'm wary of both of these claims. Why is there something wrong with expressing that another is not minimally competent in a particular sphere if that is in fact the case? We all lack minimal competence in some spheres. I can't sing on tune or play basketball (as well as many other things). Sometimes expressing (or exposing) these deficits in my skill may be wrong, but when that is the case, the wrongness derives from a violation of some other norm. Consider, for example, a school teacher preparing his class for the annual holiday concert, who instructs one student to mouth the words but not to sing, as the student sings so off-key that she will mar the performance. Here the teacher acts wrongly because his role as a teacher requires him to encourage students. Moreover, if he is a music teacher, he likely has a special obligation to help the students to learn to sing rather than try to hide the ones who haven't managed to do so. If the teacher gives this instruction in front of the rest of the class, he will have embarrassed and perhaps humiliated the student, and this seems both a violation of the norms of good teaching and unnecessarily cruel. Nevertheless, expressing that someone lacks a minimal level of competence isn't, by itself, problematic. That is, it isn't problematic unless we build into the situation other duties growing out of the special obligation that a teacher has to his students or unless we imagine that the expression is delivered in a cruel manner (e.g., publicly—but even that might not always be cruel).³⁴

Expressing that another lacks a minimal level of competence isn't *per se* disrespectful of the other person because it is fully consistent with showing respect for the other as a person whose rights and interests matter as much as one's own. To borrow Stephen Darwall's terminology, we might say that a person may lack "appraisal respect" for another while at the same time maintaining "recognition respect,"³⁵ where appraisal respect is the respect we have for a person's abilities and virtues,³⁶ while recognition respect, as applied to people, requires that we "take seriously and weigh appropriately the fact that

34. When my daughter tells me to sing softly when the family delivers birthday greetings to relatives over the phone, she expresses that I am not even minimally competent in this sphere. But her gentle manner makes her statement of this factual truth not cruel.

35. Darwall, *supra* note 3, at 38-39.

36. Darwall distinguishes esteem from appraisal respect in that he thinks appraisal respect should only respond to aspects of a person's character rather than abilities. *Id.* at 39. As a result, he would likely not see singing ability as grounds for appraisal respect either.

they are persons in deliberating about what to do.”³⁷ We show recognition respect by recognizing another person *as a person* who thereby has certain rights and interests that matter as much as our own. Expressing that someone is not minimally *competent* (and especially when we limit this less-than-minimal competence to one particular sphere) just does not seem the sort of failure of respect that would occasion our moral concern.

Rather than claiming that the racial segregation of schools was wrong (or violated equal protection) because it expressed that some people are less than minimally competent as students, I claim instead that racial segregation of schools was wrong (and violated equal protection) because it expressed that blacks were not people of equal moral worth as whites. On the view I articulated in my prior work, the content of the expressive action that should trouble us is something like “you aren’t worth worrying about” or “who cares about you, you’re nobody.”³⁸ As I now see it, this view has both virtues and problems.

Let me begin with what I take to be its central virtue. In trying to understand what makes an instance of discrimination wrong, it is important to realize that “discrimination”—understood non-pejoratively as distinguishing among people or things—is ubiquitous. We distinguish among people all the time, on the basis of all sorts of traits. Some of this distinction-drawing is clearly both morally and legally permissible: you have to be sixteen to drive (age discrimination); you have to pass the bar exam to practice law (discrimination on the basis of bar passage); you have to be poor to qualify for food stamps (wealth discrimination). Other instances of distinction-drawing are clearly both morally and legally impermissible: racial segregation of schools, for example. Still other instances of distinction-drawing are the subject of moral and legal controversy: a university’s use of race in its admissions decisions (affirmative action) or the restriction of marriage to opposite-sex couples, to cite two prominent examples. Laws, policies and the actions of organizations or individuals routinely distinguish among people because it is often useful and sometimes necessary to do so. And yet, it makes us nervous. Drawing distinctions among people makes us nervous because of our moral commitment to the proposition that people matter equally.³⁹ So

^{37.} *Id.* at 38.

^{38.} I develop this view in Chapter 2 of WHEN IS DISCRIMINATION WRONG?, *supra* note 3, at 34–58.

^{39.} I take this to be a bedrock moral principle which is widely shared but for which I do not provide an argument. See HELLMAN, *supra* note 3, at 6–7. One can see the Declaration of

these two facts—one pragmatic (we must distinguish among people) and one moral (people matter equally)—give rise to a question: when does treating people differently fail to treat people as moral equals?

A key virtue of the demeaning account of wrongful discrimination is that it ties the prohibited content of expressive action to our moral concern about differentiation. Demeaning action is action which expresses that another is of lesser worth. It thus expresses precisely the sort of disrespect that lies at the root of our worries about differentiation. When actions that distinguish among people do so in ways that demean, they express (powerfully) that the person or people demeaned are not the equals of others. The content of the expression that raises moral concern matches the worry about differentiation in the first place.

B. Too Demanding

Racial segregation of the Jim Crow South can easily be seen to express the inferiority of black school children. As Dr. King described in his letter from Birmingham, in a passage quoted by Professor Ackerman, “you are forever fighting a degenerating sense of ‘nobodiness’”⁴⁰—a sense formed in response to a myriad of laws and policies that clearly express the inferiority of blacks. The expressive content of modern examples of discrimination seems far less clear. Consider the case of laws that limit marriage to opposite-sex couples. Opponents of these laws claim they denigrate gays and lesbians. The decision of the Ninth Circuit in *Perry v. Brown*,⁴¹ which challenged the constitutionality of an amendment to the California constitution, rests specifically on the fact that the social meaning of the amendment expresses that gays and lesbians are inferior; in the court’s view, the amendment “sen[t] a message that gays and lesbians are of lesser worth as a class—that they enjoy a lesser societal status.”⁴² Supporters of the amendment disagreed. They argued that it expressed

Independence as an assertion of this claim. In claiming that “all men are created equal,” the Declaration does not claim that all are equal in ability or talent but rather that all people have an inherent worth as human beings and that each person has this worth or value equally. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

- 40. 3 ACKERMAN, *supra* note 1, at 135 (quoting Martin Luther King, Jr., *Letter from Birmingham City Jail*, reprinted in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 289, 292-93 (James M. Washington ed., 1986)).
- 41. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).
- 42. *Id.* at 1093.

something about same-sex unions, not about same-sex persons, and as such did not demean gays and lesbians.⁴³ Moreover, even if one thinks that the Ninth Circuit does a better job of reading the amendment's meaning in our culture than do the amendment's defenders, still one might worry that the Ninth Circuit put the point too strongly. A law can express denigration without expressing that the people affected are of lesser worth. Given that opposition to homosexuality and gay marriage often comes from religious conviction and that this fact is widely known, a plausible reading of such laws is that they disparage gays and lesbians but that they don't go so far as to express that gays and lesbians are not of equal moral worth as straight people. The requirement that a law, policy, or action must express that someone is of lesser moral worth is pretty demanding. Is it too demanding?⁴⁴

Secondly, some actions do not seem to express anything much at all. If an employer declines to hire a disabled worker because modifying the workplace to accommodate the worker's disability is costly, it is not clear that this action has expressive significance. At least it doesn't have the same sort of expressive content as does a law permitting gays and lesbians to form civil unions but not to marry. Does this mean that when laws, policies, or actions do not express or communicate much, they cannot violate equal protection?

In responding to these worries, I find that there are two different senses in which a law, policy, or action (an action, for short) can express that someone whom it affects is of lesser moral worth. An action can express that another is inferior in a highly symbolic way. When it does so, we speak of the social meaning of a law. Alternatively, an action can express that another is inferior by failing to adequately consider the interests of this person or group. Where the social meaning of an action does not express that those affected are of lesser moral worth *or* where the action has little expressive significance, we must still ask whether, in a different way, it expresses unequal regard.

⁴³. For example, Bishop John Steinbeck argued that “[i]t’s tragic that Proposition 8 opponents have convinced some well-intentioned people that Proposition 8, as a legitimate legislative initiative to define the institution of marriage, is somehow a condemnation of people of same sex orientation.” John Esquivel, *Priest Breaks with Church on Prop. 8*, THE RAMPAGE ONLINE (Oct. 29, 2008), <http://www.therampageonline.com/uncategorized/2008/10/29/priest-breaks-with-church-on-prop-8>.

⁴⁴. Hanoch Sheinman pressed this point with me using the example of traditional gender roles. One might think that men and women should perform different tasks within society because they have different skills and abilities without thinking that women are of lesser moral worth.

C. Respect and Expression

Demeaning is a concept that relates to respect. To demean is to show an especially strong and virulent form of disrespect: one must express that the other is of lesser moral worth and one must do so in a manner that can put the other down (in other words, the actor must have some power). Some ways of showing disrespect (like some ways of showing respect) are symbolic. If I spit on you, I show disrespect. If I hold out my hand to you, I show respect. What makes these symbols, of disrespect and respect respectively, are conventions. Manners can, as a whole, be described as respect conventions.⁴⁵ Just as holding out one's hand and spitting can express respect or disrespect, so too some laws and policies can express respect and disrespect. The requirement that black bus passengers sit in the back of the bus clearly expressed racial hierarchy. Sitting in the back was a "badge of inferiority"—a symbol of the meaning conveyed. Not all action expresses so clear a meaning, either because the action, though symbolic, carries a more diffuse meaning or because the action has little symbolic meaning at all. State laws that provide that gays and lesbians may form "civil unions" but may not marry are symbolic, to be sure. The very point of giving a different name to civil unions and marriage, especially when there is no difference in underlying rights and obligations, is to express that one union is of a different kind than the other. What is less clear is what is being said beyond that. Does this legal framework express that gays and lesbians are inferior? Or does it express a view about the nature and point of marriage? An employer's decision not to hire a disabled worker, by contrast, just doesn't seem expressive at all. So far, we have been considering the ways in which actions express disrespect symbolically. If they do so and demean, I have argued they constitute wrongful discrimination.

Now I want to suggest that there is another way that actions can express disrespect. I can express disrespect for you by failing to adequately consider your interests in reaching a decision that affects you. I begin with a prosaic example. Suppose a child, upon coming home from school, eats a snack and leaves her dishes strewn about. When the parent returns home from work, she finds a dirty kitchen in which she must now prepare dinner for the family. In such a case, we might say that the child's actions express disrespect for the parent. This isn't the disrespect of the rude comment but the disrespect of

⁴⁵. See Sarah Buss, *Appearing Respectful: The Moral Significance of Manners*, 109 ETHICS 795, 795-97 (1999) (arguing that the point of manners is to recognize the moral worth of others).

failing to adequately consider the interests of the parent and how the child's actions affect her.

Of course, this sort of failure to show respect is not that bad. Demeaning, recall, is an especially strong form of disrespect. Just as every insult does not express that the other is of lesser moral worth, so too every failure to take the other's interests into account isn't significant enough to constitute demeaning disrespect. What we are looking for here is a failure to consider the other's interests in a context or in a way that amounts to a failure to see the other as a person of equal moral status. Everyday thoughtlessness will not suffice. However, when what is at stake is not a dirty kitchen but the ability to work or marry, then the failure to take these interests sufficiently into account may well express the sort of disrespect for the person and her interests that can demean her. If so, this account helps provide the moral grounding for the anti-discrimination protections in the context of employment and as they relate to marriage.⁴⁶

CONCLUSION: ANTI-DISCRIMINATION LAW IN THE KEY OF RESPECT

Professor Ackerman's account of the constitutional significance of *Brown* and the civil rights statutes of the 1960s offers a respect-inflected view of unconstitutional discrimination. My suggestion that unconstitutional discrimination is discrimination that demeans offers an alternate, related account. In the last Part, I began to sketch how this account moves beyond highly symbolic actions to actions that express disrespect in other ways. Let me close by making one brief observation about the last of Professor Ackerman's three claims that have been the focus of this essay.

In touting the wisdom of *Brown*, I claimed that Ackerman made three claims: (1) that the *Brown* opinion grounds the wrongness of school segregation in the fact that it humiliates black school children (the descriptive claim); (2) that *Brown's* distinctive contribution has been largely missed (the intellectual history claim); and (3) that both *Brown* and the civil rights statutes that build on this important insight are correct that humiliation is at the core of

⁴⁶. The second way of showing disrespect will require further elaboration and here I only begin to suggest what I have in mind. It is important to note, however, that just as we assess the meaning of symbolic ways of expressing disrespect by reference to objective indicia of the meaning of actions (like spitting and shaking hands), so too we should assess whether failures to adequately consider another's interest express demeaning disrespect by reference to objective judgments about the importance in a particular society of marriage, voting, etc.

what makes segregation a denial of equal protection (the normative claim). At the start of the essay, I said that I thought there was something right and something not quite right about each of these claims. I've argued that the descriptive claim overstates the way in which *Brown* focused on the expressive dimension of segregation.⁴⁷ In the bulk of the essay, I've examined the normative claim and argued that while Professor Ackerman's focus on humiliation is in the right general space, it picks out the wrong respect-related concept. Instead, I've argued, we should see the wrong of segregation, and indeed the wrong of discrimination more generally, as located in the fact that it demeans. I want to close by addressing the intellectual history claim. Here too, I want to argue that there is something right about Professor Ackerman's claim that the wisdom of *Brown* has been neglected but something overstated about this claim as well. The way in which equal protection relates to respect may well be a minor theme in our constitutional doctrine and scholarship, but it isn't as absent as Professor Ackerman suggests.

According to Ackerman, “[s]peaking broadly, two contending camps dominate doctrinal discussion”—the anti-classification account and the anti-subordination account.⁴⁸ To support that claim, Ackerman cites his colleague Reva Siegel, who compellingly argued for this way of characterizing the debates both on and off the Court.⁴⁹ Siegel's terminology certainly captures important aspects of the ongoing debates about equal protection, but it doesn't describe the whole picture. We might begin with Charles Black, whom Ackerman cites approvingly. For Black, the question wasn't whether school segregation involved prohibited classification, nor whether it was subordinating. Rather, the question was what it expressed—its “social meaning,” to use Black's terms—and therefore Black was clearly focusing on whether the segregation shows problematic disrespect for black children.⁵⁰

As Black was writing this as a contemporary of the *Brown* decision, I take it that this evidence does not undercut Ackerman's claim about the two dominant camps. So let me adduce another example: Clarence Thomas. Justice Thomas has been arguing for some time in a respect-inflected register. For example, in

47. I do think *Brown* calls attention to the expressive dimension of segregation, and so Professor Ackerman is, in part, correct. However, I think he overstates that claim by fusing the action of stigmatizing with the effect of feeling stigmatized.

48. 3 ACKERMAN, *supra* note 1, at 128.

49. See *id.* at 241 & 362 n.1 (citing Reva Siegel, *Equality Talk: Anti-Subordination and Anti-Classification in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004)).

50. Black, *supra* note 26, at 427.

Adarand Constructors, Inc. v. Pena, Justice Thomas argued that “[s]o-called ‘benign’ discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with [whites] without their patronizing indulgence” and that therefore such affirmative action programs “stamp minorities with a badge of inferiority.”⁵¹ The use of the word “teaches” here and the use of the language from *Plessy* (but used here in a way that accords with Justice Harlan’s dissenting view that the social meaning of such practices is determined objectively rather than subjectively) emphasize that what matters in assessing the affirmative action program at issue in *Adarand* is whether the policy denigrates the minority contractors it purports to help. Justice Stevens, dissenting in *Adarand*, similarly emphasized what the law expressed when he quipped that the majority opinion failed to distinguish “between a ‘No Trespassing’ sign and a welcome mat.”⁵²

In a similar way, Justice O’Connor’s focus on whether holiday displays endorse one religion and thereby express that people who practice another religion or no religion are outsiders to the political community also exhibits a view of discrimination (albeit religious discrimination) as a matter of not expressing equal respect.⁵³ We might also mention influential scholars. Ronald Dworkin argued that affirmative action does not violate equal protection because, unlike racial segregation, it is not “public insult.”⁵⁴ John Hart Ely argued that courts should look closely at legislation that affects discrete and insular minorities in part because legislators may fail to recognize and thereby

51. 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment).

52. *Id.* at 245 (Stevens, J., dissenting).

53. See *Lynch v. Donnelly*, 465 U.S. 668, 687–94 (1984) (O’Connor, J., concurring); see also Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 25–26 (2000) (describing Justice O’Connor’s concurrence in *Lynch* and Justice Blackmun’s opinion in *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989)). The Blackmun and O’Connor opinions adopted an approach to the Establishment Clause under which a court must assess whether public displays have the effect “of communicating a message of government endorsement or disapproval of religion.” *Lynch*, 465 U.S. at 692 (O’Connor, J., concurring); see also *Cnty. of Allegheny*, 492 U.S. at 597 (Blackmun, J., concurring).

54. RONALD DWORKIN, A MATTER OF PRINCIPLE 301 (1985). Edwin Baker pursues a similar line of thought in *Outcome Equality or Equal of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 933 (1983) (arguing for an objective conception of intent in equal protection case law), as does Todd Rakoff in *Washington v. Davis and the Objective Theory of Contracts*, 29 HARV. C.R.-C.L. L. REV. 63, 63 (1994). And, of course, my article, *The Expressive Dimension of Equal Protection*, *supra* note 53, and my book, WHEN IS DISCRIMINATION WRONG?, *supra* note 3, pursue the same idea.

respect the interests of some groups affected by particular laws.⁵⁵ Dworkin's concern reflects the first way that an action can be expressive and Ely's concern is very similar to the second that I mention above.

One could go on. That said, I think there is also something right about Professor Ackerman's descriptive claim. This focus on respect and recognition has indeed been only a minor theme in our equal protection doctrine and scholarship and I laud Professor Ackerman for bringing this view to the fore.

55. JOHN HART ELY, DEMOCRACY AND DISTRUST 157 (1980) (arguing that “to disadvantage—in the perceived service of some overriding social goal—a thousand persons that a more individualized (but more costly) test or procedure would exclude, under the impression that only five hundred fit that description, is to deny the five hundred to whose existence you are oblivious *their* right to equal concern and respect, by valuing their welfare at zero”).