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# Why Affirmative Action Remains Essential in the Age of Obama

REGINALD T. SHUFORD\*

## INTRODUCTION

With the election of Barack Obama to the most powerful position in the world, the presidency of the United States of America, many opined that America finally conquered her racial demons,<sup>1</sup> some trumpeting the term “post-racial” as though it were a *fait accompli*.<sup>2</sup> That an African-American man—much less one with such a nontraditional name<sup>3</sup>—could ascend to the highest office in the land, they

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\* Senior Staff Attorney, Racial Justice Program, American Civil Liberties Union Foundation. I would like to thank my colleagues at the ACLU, especially those in the Racial Justice Program, for their support and wisdom, and the inspiration they provide by their unflinching commitment to ensuring that Americans in every context experience the complete measure of what it means to be fully included in society. Special thanks to Leslie Cooper for her valuable contributions to this Article and to DuJuan E. Brown, Cedric L. Brown, and Bret L. Grebe for their steadfast support throughout my writing of it. I am deeply grateful to colleagues at the African American Policy Forum, Center for Social Inclusion, Diversity Advancement Project, Equal Justice Society, Kirwan Institute, Lawyers' Committee for Civil Rights, Leadership Conference on Civil Rights, NAACP Legal Defense Fund, Opportunity Agenda, the Advancement Project, and countless others who wage battle day in and day out against discrimination and in furtherance of a society where equal opportunity and access are available to all. I dedicate this Article to all the people known or unknown to me whose lives have been so impacted—and some shortened—by the disparities and inequalities described herein.

1. See, e.g., Mark Z. Barabak, *Barack Obama Wins Presidency, Making History*, L.A. TIMES, Nov. 5, 2008, available at [http://www.latimes.com/news/politics/la-na-ledeall5-2008nov05\\_0,2076534.story](http://www.latimes.com/news/politics/la-na-ledeall5-2008nov05_0,2076534.story); Robert Barnes & Michael D. Shear, *Obama Makes History*, WASH. POST, Nov. 5, 2008, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/04/AR2008110404246.html>; Adam Nagourney, *Obama Elected President as Racial Barrier Falls*, N.Y. TIMES, Nov. 5, 2008, at A1, available at <http://www.nytimes.com/2008/11/05/us/politics/05elect.html>. Even calls to end “Black History Month” are gaining traction. Jesse Washington, *Time to End Black History Month?*, MSNBC, Feb. 6, 2009, available at <http://www.msnbc.msn.com/id/29057064/>.

2. See sources cited *supra* note 1.

3. During the campaign, opponents seized upon Barack Obama's middle name—Hussein—in an effort to promote a link between him and the Muslim faith or terrorism, hoping that voters would therefore not support him. See, e.g., Posting of Scott Conroy to From the Road, Fla. Sheriff Plays the “Hussein” Card at Palin Event; Campaign Calls Remark “Inappropriate,” <http://www.cbsnews.com/blogs/2008/10/>

argue, clearly signals that America's racist history is a thing of the past. Gone. Over. Kaput. Slate wiped clean. Concomitant with their notion of a post-racial America is the strong belief that complaints of racism lack merit, and measures to remedy past and current exclusionary practices are no longer necessary.<sup>4</sup> But saying it is so does not make it so. There can be no doubt that Obama's election represents a singular moment in American history and demonstrates significant and welcome progress in America's notoriously fraught racial relations.<sup>5</sup> That said, claims that America is truly post-racial are decidedly

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06/politics/fromtheroad/entry4504484.shtml (Oct. 6, 2008, 14:03 EST); Dana Milbank, *Unleashed, Palin Makes a Pit Bull Look Tame*, WASH. POST, Oct. 7, 2008, at A03, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/06/AR2008100602935.html> (recounting a speech in which Sarah Palin linked Obama to domestic terrorism, getting a response of "Kill him!" from a man in the audience); Sam Stein, *Another McCain-Palin Introducer Declares "Barack Hussein Obama,"* HUFFINGTON POST, Oct. 8, 2008, [http://www.huffingtonpost.com/2008/10/08/another-mccain-palin-intr\\_n\\_132996.html](http://www.huffingtonpost.com/2008/10/08/another-mccain-palin-intr_n_132996.html).

4. See, e.g., Andrea Billups & David R. Sands, *Obama Term Expected to Be Post-Racial*, WASH. TIMES, Nov. 9, 2008, <http://www.washingtontimes.com/news/2008/nov/09/obama-presidency-expected-to-be-post-racial/> ("Obama's success certainly makes the case for any race-based preferential treatment a weak argument . . . . You may still have individuals out there who will try to uphold that 1950s and '60s argument that blacks still need such treatment, but his personal story proves otherwise." (quoting Deneen Borelli, a fellow at the National Center for Public Policy Research)); *President-Elect Obama: The Voters Rebuke Republicans for Economic Failure*, WALL ST. J., Nov. 5, 2008, at A22, available at <http://online.wsj.com/article/SB122586244657800863.html> ("One promise of his victory is that perhaps we can put to rest the myth of racism as a barrier to achievement in this splendid country."). See Joseph Williams & Matt Negrin, *Affirmative Action Foes Point to Obama*, BOSTON GLOBE, Mar. 18, 2008, [http://www.boston.com/news/nation/articles/2008/03/18/affirmative\\_action\\_foes\\_point\\_to\\_obama/](http://www.boston.com/news/nation/articles/2008/03/18/affirmative_action_foes_point_to_obama/); see also Warren Richey, *U.S. Supreme Court Agrees to Hear Voting Rights Case*, CHRISTIAN SCI. MONITOR, Jan. 9, 2009, <http://www.csmonitor.com/2009/0109/p26s01-usju.html> (reporting that the United States Supreme Court granted certiorari in *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 129 S. Ct. 894 (2009), a case in which critics argued that Section 5 of the Voting Rights Act of 1965 is outdated because of Obama's election). But see *Uphold the Voting Rights Act*, N.Y. TIMES, Jan. 25, 2009, at WK9, available at <http://www.nytimes.com/2009/01/25/opinion/25sun1.html> (disputing notion of "postracial" America, given present discrimination, and urging the Court to uphold Section 5 of the Voting Rights Act).

5. Of Obama's election, John McCain said: "This is a historic election, and I recognize the special significance it has for African Americans and the special pride that must be theirs tonight." Barabak, *supra* note 1. George W. Bush also noted the significance: "No matter how they cast their ballot, all Americans can be proud of the history that was made yesterday . . ." Obama's election represents "the triumph of the American story," said Bush. He then added, "[t]his moment is especially uplifting for a generation of Americans who witnessed the struggle for civil rights with their own eyes—and four decades later see [that] dream fulfilled." Johanna Neuman, *President*

premature.<sup>6</sup> Indeed, during this very election season, some voters conceded that Obama's race was an issue impacting whether they would vote for him.<sup>7</sup>

It also bears noting, at the risk of stating the obvious, while it is true that Obama's victory shattered the ultimate political glass ceiling, he, black or otherwise, is not your "Average Political Joe." As such,

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*Bush Marks Barack Obama's Historic Election, Vows "Complete Cooperation,"* L.A. TIMES, Nov. 6, 2008, available at <http://articles.latimes.com/2008/nov/06/nation/naledeall6>.

6. In his much-applauded *Speech on Race*, then-candidate Obama expressed doubt that "we can get beyond our racial divisions in a single election cycle, or with a single candidacy." Barack Obama, Address at "A More Perfect Union" Constitution Center in Philadelphia, Pennsylvania, *Speech on Race* (Mar. 18, 2008), [http://www.nytimes.com/interactive/2008/03/18/us/politics/20080318\\_OBAMA\\_GRAPHIC.html](http://www.nytimes.com/interactive/2008/03/18/us/politics/20080318_OBAMA_GRAPHIC.html). See Frank Rich, *White Like Me*, N.Y. TIMES, Jan. 18, 2009, at WK13, available at <http://www.nytimes.com/2009/01/18/opinion/18rich.html> (rejecting "post-racial" label, insisting that "[t]he world doesn't change in a day, and the racial frictions that emerged in both the Democratic primary campaign and the general election didn't end on Nov. 4"); Posting of Andrew Grant-Thomas to RaceWire, *Does Barack Obama's Victory Herald a Post-Racial America?*, [http://www.racewire.org/archives/2008/12/does\\_barack\\_obamas\\_victory\\_her\\_1.html](http://www.racewire.org/archives/2008/12/does_barack_obamas_victory_her_1.html) (Dec. 5, 2008, 6:51 EST) (rejecting the claim of a post-racial America as the result of a simplistic, "reductive either-or dualistic" approach to race matters and identifying "racially inequitable institutions and structures," not just individuals, as an important vehicle of persistent racism); MichaelFauntroy.com, *Enough of This "Post-Racial" America Stuff*, <http://www.michaelfauntroy.com/2008/12/enough-of-this-postracial-america-stuff.html> (Dec. 18, 2008) ("Celebrating a 'post-racial' America is premature and those doing so may well be unwittingly leading a dangerous new attempt to overlook and ignore America's racial history and avoid public policy approaches to the systematic racial prejudice that still pervades our society."); *Post-Racial USA? Not So Fast*, CBS NEWS, Nov. 15, 2008, <http://www.cbsnews.com/stories/2008/11/15/national/main4607062.shtml> (recounting various incidents of racialized threats, effigy hangings, property defacement, and violence in the wake of Obama's election).

7. See Ron Fournier & Trevor Thompson, *Racial Views Steer Some Dems Away From Obama*, CORNELL DAILY SUN, Sept. 20, 2008, available at <http://cornellsun.com/node/31943> ("We still don't like black people." (quoting John Clouse)); see also Sarah Kershaw, *Talk About Race? Relax, It's O.K.*, N.Y. TIMES, Jan. 15, 2009, at E1 ("In the end, [President] Obama was elected with 43 percent of the white vote and 95 percent of black voters."); Adam Nossiter, *For South, a Waning Hold on National Politics*, N.Y. TIMES, Nov. 11, 2008, at A1, available at <http://www.nytimes.com/2008/11/11/us/politics/11south.html?ei=5124&en=780317c3ebec325d&ex=1384146000&partner=facebook&exp=facebook&pagewanted=all> (noting regional differences in support for Obama, and that less than a third of Southern whites voted for him, one of whom, Joey Franks, a construction worker from Arkansas, admitted that race mattered "a little bit [to others] in my mind"); Frank Newport, *Obama's Race May Be As Much a Plus As a Minus*, GALLUP, Oct. 9, 2008, <http://www.gallup.com/poll/111049/Obamas-Race-May-Much-Plus-Minus.aspx?version=print>.

whether his election portends a future where African-American candidates, and other candidates of color, will be elected to the highest office in the land with any degree of regularity is debatable. For generations, African-American parents preparing their children for the harsh realities of racism have told them that they are required to be twice as good and work twice as hard as everybody else, just to stand a fighting chance at leading successful and productive lives.<sup>8</sup> President Obama may personify that concept better than most. Among his many notable accomplishments, Obama is the graduate of two Ivy League schools, Columbia University and Harvard Law School, where he graduated *magna cum laude*.<sup>9</sup> At Harvard, he served as the first African-American president of the *Harvard Law Review*.<sup>10</sup> Obama is also the author of two best-selling books, *Dreams from My Father* and *The Audacity of Hope*.<sup>11</sup> He was a constitutional law professor at the University of Chicago.<sup>12</sup> His well-known political successes include his career-defining delivery of the keynote address at the 2004 Democratic National Convention, which catapulted him onto the national and, perhaps, international stage. During his tenure in the Senate, Obama was the sole African-American.<sup>13</sup>

Beyond his academic and professional accomplishments, President Obama possesses a combination of personal traits—powerful oratorical skills, discipline, equanimity, self-confidence, and the ability to connect with and inspire a broad range of people—that undoubtedly have contributed to his phenomenal success and uniquely qualified him to be the right person for the job at this particular moment in our history. Even Obama's biracial background advantages him, for exam-

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8. See, e.g., MARCUS MABRY, *TWICE AS GOOD: CONDOLEEZZA RICE AND HER PATH TO POWER* (2007); John Corry, *The Black Middle Class*, N.Y. TIMES, Feb. 6, 1986, available at <http://query.nytimes.com/gst/fullpage.html?res=9A0DE0DB1130F935A35751C0A960948260&sc=3&sq=&st=nyt> (acknowledging the “dual consciousness” of blacks who face the pressure of “having to be twice as good” (quoting W.E.B. Du Bois)); see also Mike Freeman, *McNabb on the Money: Black QBs Have to Be Twice as Good*, CBSSPORTS.COM, Sept. 18, 2007, <http://www.cbssports.com/columns/story/10359541/2>; *What if Obama Had Waged a Campaign as Filthy and as Inept as McCain's?*, POLITICALARTICLES.NET, Nov. 4, 2008, <http://www.politicalarticles.net/blog/tag/blacks-have-to-be-twice-as-good-as-their-white-counterp/>.

9. Infoplease.com, Barack Obama, <http://www.infoplease.com/ipa/A0930136.html> (last visited Mar. 30, 2009); TheLadders.com, Barack Obama—Resume, [http://cdn.theladders.net/static/pdf/Senator\\_Obama\\_Resume.pdf](http://cdn.theladders.net/static/pdf/Senator_Obama_Resume.pdf) (last visited Mar. 30, 2009).

10. See sources cited *supra* note 9.

11. See sources cited *supra* note 9.

12. See sources cited *supra* note 9.

13. See sources cited *supra* note 9.

ple, with the ability, evident in his *Speech on Race*, to speak credibly from both sides of the racial divide.<sup>14</sup> His background might also have benefited him in another way: Perhaps, he was not “too black” for certain skittish voters.<sup>15</sup> In light of his eminent qualifications, many wondered whether Obama’s racial background at least partly accounted for the relative closeness of much of the race between him and John McCain.<sup>16</sup>

While just how much race played a factor in the contest for the presidency may be debated for some time to come, other election-day measures around the country were explicitly about race.<sup>17</sup> For exam-

14. See Obama, *supra* note 6.

15. See Fournier & Thompson, *supra* note 7 (reporting that one-third of white Democrats associated African-Americans with negative stereotypes like “violent,” “lazy,” or responsible for their own problems); Obama, *supra* note 6 (“At various stages in the campaign, some commentators . . . deemed [him] either ‘too black’ or ‘not black enough.’”).

16. See Fournier & Thompson, *supra* note 7 (concluding that racist views might explain the tightness of the race between Obama and McCain). Throughout the campaign, Obama reportedly received more death threats than any presidential candidate in history. See Robert Winnett, *Fears Grow for Barack Obama’s Security*, TELEGRAPH, Nov. 10, 2008 (noting that the Secret Service reportedly investigated over 500 death threats against Obama during the campaign and that two neo-Nazi skinheads had been arrested for conspiring to assassinate him).

17. Although this Article focuses on race, given the topic at issue—whether Obama’s election in 2008 signifies a post-racial America—the 2008 Colorado and Nebraska anti-affirmative action ballot initiatives also implicate gender. The initiatives typically read: “The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” See STATE OF COLO., *Amendment 46: Discrimination and Preferential Treatment by Governments*, in 2008 STATE BALLOT INFORMATION BOOKLET 1-2, 37 (2008), available at [http://www.state.co.us/gov\\_dir/leg\\_dir/lcsstaff/bluebook/2008EnglishVersionforInternet.pdf](http://www.state.co.us/gov_dir/leg_dir/lcsstaff/bluebook/2008EnglishVersionforInternet.pdf) (failing to pass); see also NEB. CONST. art. I, § 30 (ratified in 2008 under Initiative 424). Efforts in three other states—Oklahoma, Missouri, and Arizona—failed to make it on the November 2008 ballot. KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, OHIO STATE UNIV., *ANTI-AFFIRMATIVE ACTION BALLOT INITIATIVES 3-7* (2008), available at <http://kirwaninstitute.org/publicationspresentations/publications/index.php> (follow “Affirmative Action Ballot Initiatives Report” hyperlink). Although these initiatives also seek to nullify gender-conscious programs designed to promote equal opportunity for women, much of the public debate focuses on race, feeding into the myth that affirmative action only benefits African-Americans. See AFRICAN AM. POLICY FORUM, *13 MYTHS ABOUT AFFIRMATIVE ACTION*, [http://aapf.org/tool\\_to\\_speak\\_out/focus/](http://aapf.org/tool_to_speak_out/focus/) (last visited Mar. 30, 2009) [hereinafter *13 MYTHS ABOUT AFFIRMATIVE ACTION*]; AFRICAN AM. POLICY FORUM & AM. CIVIL LIBERTIES UNION, *PROTECT FAIRNESS AND EQUALITY*, [http://www.aclu.org/images/asset\\_upload\\_file87\\_34806.pdf](http://www.aclu.org/images/asset_upload_file87_34806.pdf) (last visited Mar. 30, 2009). The desire to make African-Americans the face of affirmative action is both strategic and intentional. Kimberlé Crenshaw, *A Preference for Deception*, Ms.

ple, well in advance of the November 2008 election, Ward Connerly and his American Civil Rights Initiative launched a campaign denominated “Super Tuesday for Equal Rights,” seeking to end affirmative action in Arizona, Colorado, Missouri, Nebraska, and Oklahoma, by getting anti-affirmative action initiatives placed on the ballot in those respective states.<sup>18</sup> Although Connerly previously had enjoyed tremendous success in the states he targeted—California, Washington, and Michigan,<sup>19</sup>—this time around, he did not fare as well. Of the five states targeted for anti-affirmative action ballot initiatives, Connerly succeeded in just one, Nebraska.<sup>20</sup> His efforts failed in Arizona, Colorado, Missouri, and Oklahoma.<sup>21</sup> For supporters

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MAG., Winter 2008, at 39, available at <http://www.msomagazine.com/winter2008/WardConnerlyPart2.asp>. In truth, women are likely the principal beneficiaries of affirmative action. *Id.* at 40 (stating that women are the primary beneficiaries of affirmative action, given their number and “multiracial, multigenerational, and cross-class” status); Jessica Bassett, *Connerly and Asher Attempt Another Ban of Affirmative Action in Missouri*, ST. LOUIS AM., Dec. 24, 2008, available at [http://www.stlamerican.com/articles/2008/12/25/news/local\\_news/localnews02.txt](http://www.stlamerican.com/articles/2008/12/25/news/local_news/localnews02.txt) (“One could argue that white women have benefited more from affirmative action than any minority group.” (quoting George Curry, journalist and affirmative action expert)).

18. Harry Stein, *Super Tuesday for Equal Rights*, WALL ST. J., Apr. 23, 2008, available at [http://online.wsj.com/article/SB120889422168035625.html?mod=opinion\\_journal\\_federation](http://online.wsj.com/article/SB120889422168035625.html?mod=opinion_journal_federation).

19. *Id.* California’s Proposition 209 passed in 1996; Washington’s Initiative 200 passed in 1998; and Michigan’s Proposal 2 passed in 2006. Sam Laird, *The Colorblind Society: Are We There Yet?*, CITY ON A HILL PRESS, Jan. 18, 2007. As with Connerly’s 2008 effort, opponents of the initiatives in California, Washington, and Michigan filed legal challenges. CITIZENS RESEARCH COUNCIL OF MICH., STATEWIDE ISSUES ON THE NOVEMBER GENERAL ELECTION BALLOT PROPOSAL 2006-02: MICHIGAN CIVIL RIGHTS INITIATIVE 13-19 (2006), available at <http://www.crcmich.org/PUBLICAT/2000s/2006/rpt343.pdf>. In a Michigan federal district court, it was determined that Connerly’s Michigan Civil Rights Initiative committed fraud, though it did not violate the Voting Rights Act. *Operation King’s Dream v. Connerly*, No. 06-12773, 2006 WL 2514115 (E.D. Mich. Aug. 29, 2006), appeal dismissed, 501 F.3d 584 (6th Cir. 2007).

20. Naomi Zeveloff, *After Colorado Loss, Ward Connerly May Pull the Plug on Affirmative-Action Bans*, COLO. INDEP., Nov. 7, 2008, <http://coloradoindependent.com/14617/ward-connerly-may-pull-the-plug>.

21. See Mike Dumke, *Ward Connerly’s Agenda for ’08: From Missouri to Arizona*, NEW AM. MEDIA, Feb. 23, 2008, [http://news.newamericamedia.org/news/view\\_article.html?article\\_id=147041af381feae96065a8ea49f9ff18&from=rss](http://news.newamericamedia.org/news/view_article.html?article_id=147041af381feae96065a8ea49f9ff18&from=rss) (noting Connerly’s design to place anti-affirmative action initiatives on the ballots of five states: Arizona, Colorado, Missouri, Nebraska and Oklahoma); Zeveloff, *supra* note 20 (“Nebraska was the only state this year to approve [Connerly’s] proposal.”); see also Matthew Benson & Glenn Creno, *Affirmative-Action Initiative Fails to Make Ballot*, ARIZ. REPUBLIC, Aug. 22, 2008, <http://www.azcentral.com/arizonarepublic/local/articles/2008/08/22/20080822affirmative0822.html>; Kevin Flynn, *Colorado Voters Preserve Affirmative Action*, ROCKY MOUNTAIN NEWS, Nov. 7, 2008; Chronicle of Higher Education, Measure

of equal opportunity, his failures represented their hard-fought victories.<sup>22</sup>

The canon of literature discussing the legal pros and cons of affirmative action is voluminous.<sup>23</sup> This Article does not endeavor to revisit that literature in significant detail; rather, it focuses on the more narrow question whether, as a policy matter—particularly in light of Obama’s election and the recent ballot initiatives designed to do away with it—affirmative action continues to be a necessary social strategy. The argument is divided into two components. In Part I, this Article

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to Ban Affirmative Action in Oklahoma Fails to Make It onto the Ballot, <http://chronicle.com/news/article/4265/measure-to-ban-affirmative-action-in-oklahoma-fails-to-make-it-onto-the-ballot> (Apr. 7, 2008). Cf. Kavita Kumar, *Leaders Vow to Bring Back Affirmative Action Petition in 2010*, ST. LOUIS POST-DISPATCH, May 6, 2008, <http://www.stltoday.com/stltoday/news/stories.nsf/education/story/B3032FD6B2B216AA8625744100113F9D?OpenDocument>.

22. The initiatives generated substantial opposition, including community mobilization, public education efforts, and significant litigation. See, e.g., *Asher v. Carnahan*, 268 S.W.3d 427 (Mo. Ct. App. 2008); *In re Initiative Petition No. 384*, 164 P.3d 125 (Okla. 2007).

23. Much has been written about the landmark case of *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) and the more recent cases of *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). In *Bakke*, in a fractured plurality decision delivered by Justice Powell, the Court held that race could be one of several factors considered in the admissions process at the University of Davis Medical School, but that quotas were impermissible. *Bakke*, 438 U.S. at 311, 314. In *Gratz*, the Court rejected Michigan’s undergraduate admissions program, finding its automatic allocation of twenty points to every “underrepresented minority” not sufficiently tailored to achieve the compelling governmental interest of educational diversity. *Gratz*, 539 U.S. at 275. However, in *Grutter*, announced the same day as *Gratz*, the Court upheld Michigan Law School’s admissions program, holding that student diversity is a compelling government interest, and that the program was narrowly tailored to achieve that interest. *Grutter*, 539 U.S. at 343. See also *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200 (1995) (holding that a federal affirmative action program is constitutional when narrowly tailored to support a compelling government interest, like remedying discrimination); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (striking down Richmond’s minority contacting program as unconstitutional on the basis that it was not sufficiently narrowly tailored to further a compelling state interest). This Term, the Supreme Court is set to hear another case involving equal opportunity, having recently granted certiorari in *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008), *cert. granted*, 129 S. Ct. 894 (2009). Referred to in the popular press as concerning “reverse discrimination,” the case was brought by seventeen white firefighters and one Hispanic firefighter, who alleged that their rights were violated when the City of New Haven tossed out test results qualifying them for promotion because no African-American and only two Hispanic firefighters passed the test. See Warren Richey, *U.S. Supreme Court Takes Up “Reverse Discrimination” Case*, CHRISTIAN SCI. MONITOR, Jan. 9, 2009, <http://www.csmonitor.com/2009/0109/p25s30-usju.html>.



argues that, significant progress notwithstanding, racial disparities and structural inequality persist. In Part II, this Article argues that affirmative action is a justified and essential tool for eliminating these disparities and expanding opportunity.

### I. UNEQUAL OPPORTUNITY IS A FACT OF LIFE FOR MANY AMERICANS

It is more than a little ironic that many of those proclaiming a post-racial America actually opposed Barack Obama's candidacy and, indeed, accorded America that status well before his election as America's forty-fourth President.<sup>24</sup> Post-racialists—whatever their nomenclature over the years—have for decades argued that the playing field is level for all Americans, and that race-conscious policies are no longer necessary as there are no racial inequities left to remedy.<sup>25</sup> It is not so much that they have been equal opportunity warriors, who can now pack up and go home after having waged and procured equal opportunity for all after an extended but successful battle. Rather, post-racialists fail to recognize and even deny the existence of racial inequality in the first place.<sup>26</sup> Despite their vehement denials, inequality remains a fact of life for many Americans, greatly undermining their ability to be fully included in society and depriving them of the myriad opportunities that such inclusion permits.

In his strenuous opposition to affirmative action, Justice Clarence Thomas, like Ward Connerly, endorses a “color-blind” approach to the issue of race.<sup>27</sup> Such a perspective seems possible only when turning a

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24. See, e.g., Ward Connerly, *Obama Is No “Post-Racial” Candidate*, WALL ST. J., June 13, 2008 (criticizing Obama for opposing the anti-affirmative action ballot initiatives he sponsored and for peddling the “same tired . . . arguments about ‘institutional racism’”); see also Editorial, *President-Elect Obama*, WALL ST. J., Nov. 5, 2008, at A22, available at <http://online.wsj.com/article/SB122586244657800863.html> (“One promise of his victory is that perhaps we can put to rest the myth of racism as a barrier to achievement . . .”).

25. See generally TERRY H. ANDERSON, *THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION* (2005) (discussing history of affirmative action in America and the backlash against it).

26. Billups & Sands, *supra* note 4; Richey, *supra* note 23. See Dave Hill, *Obama and Post-Racial Society*, GUARDIAN, Nov. 8, 2008, <http://www.guardian.co.uk/commentisfree/2008/nov/08/race-usa> (referring to “deniers of racism”).

27. *Grutter*, 539 U.S. at 372-73 (Thomas, J., concurring in part and dissenting in part). See Keith R. Walsh, Book Review, *Color-Blind Racism in Grutter and Gratz*, 24 B.C. THIRD WORLD L.J. 443 (2004) (reviewing EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* (2003)) (arguing that Justice Thomas’s “style of color-blind racism allows individuals to maintain a color-blind image as they advance positions that perpetuate racial inequality and white privilege”); George Curry, *Part I—a Lost Cause:*

blind eye to the current state of racial disparity and unequal opportunity confronting millions of Americans. In virtually every major category, disparate treatment and limited access continue to define the lives of African-Americans and other minorities. In *Reviving the Goal of an Integrated Society: A 21st Century Challenge*, Gary Orfield paints a bleak picture:

Last month the National Commission on Fair Housing reported, based on hearings across the country during the 40th Anniversary of the Fair Housing Act, that there has been virtually no enforcement of the laws against housing discrimination despite the fact that this discrimination and segregation are rampant even in subsidized housing and is spreading steadily into growing sectors of suburbia.

In employment, the Bureau of Labor Statistics reports the month President Obama was elected, only 62% of black men, 20 and over, had jobs as did only 17% of black teens. Among white men it was 72% with jobs and among white teens, 33%. In terms of the reported unemployment rate, the black male rate was well over twice the white rate.

In education, the No Child Left Behind Act has clearly failed in its goal of ending the racial and ethnic achievement gap in test scores. Its provisions that were supposed to alleviate the nation's massive dropout crisis have been almost completely ignored. The gap in college completion, which is the key to secure middle class status in the contemporary U.S., remains massive. In 2006, 28.4% of white adults reported graduating from college, compared to 18.5% of blacks and just 12.4% of Latinos, including only 8.5% of Mexican-Americans, by far the largest Latino population.

Gaps in wealth and in health care remain massive and both are strongly related to educational attainment.<sup>28</sup>

More than mere numbers, the real-world impact on the lives of millions of people in their pursuit of meaningful opportunity is hard to over-

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Clarence Thomas, *STUDENT OPERATED PRESS*, July 17, 2007 ("My view of the Constitution is Justice Harlan's view in *Plessy*: 'Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.' . . . . And my view was the rallying cry for the lawyers who litigated *Brown*." (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Thomas, J., concurring))); Clarence Page, *Colorblind in His Own Mind*, WASH. TIMES, Mar. 13, 2007; see also *Adarand Constructors*, 515 U.S. at 239 (Scalia, J., concurring) (rejecting notion of a creditor or a debtor race under the Constitution).

28. GARY ORFIELD, *REVIVING THE GOAL OF AN INTEGRATED SOCIETY: A 21ST CENTURY CHALLENGE* 5-6 (2009) (citations omitted); accord NAT'L URBAN LEAGUE, *THE STATE OF BLACK AMERICA 2007: PORTRAIT OF THE BLACK MALE* (2007).

state.<sup>29</sup> Below follows a general overview of the persistent and widespread nature of racial disparity in America.<sup>30</sup>

### A. Disparities in Education

Today, an overwhelming number of black and Latino students are attending segregated, underperforming schools. Indeed, black and Latino students attend more segregated schools now than at any other time during the past four decades.<sup>31</sup> Forty percent of Latinos and thirty-nine percent of African-Americans attend segregated schools, a reality made worse by the fact that almost sixty percent of the students at those schools live near or below the poverty line.<sup>32</sup> While segregated schools exist throughout the U.S., the trend has been most notable in the South and in the border states of Arizona, California, New Mexico, and Texas.<sup>33</sup> The percentage of black students in the South attending schools with a majority non-white student body increased from sixty-one percent to seventy-one percent from 1991 to 2003.<sup>34</sup> Latino students are increasingly likely to be segregated in places, including border states, where they are concentrated.<sup>35</sup> Finally, nationwide, more than one-third of African-American and Latino students attend schools where ninety percent or more of the student body is non-white.<sup>36</sup>

The problems with segregated schools are as obvious today as they were in the days of *Brown v. Board of Education*.<sup>37</sup> Separate still

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29. ALL THINGS BEING EQUAL: INSTIGATING OPPORTUNITY IN AN INEQUITABLE TIME (Brian D. Smedley & Alan Jenkins eds., 2007) (assessing the current state of opportunity in America and offering a positive vision for its achievement).

30. The discussion of discrimination and disparity in this Article is intended to be a mere snapshot of its present and wide-ranging nature. It is not intended to be exhaustive. Nor does this Article explore in great detail disparities as experienced by every racial or ethnic group. Time and space constraints do not permit such a discussion. Native Americans, in particular, Hispanics, and other ethnic groups suffer tremendously from a lack of opportunity. This Article, however, focuses on what is generally intended by the term "post-racial" as reflected in Barack Obama's election as the nation's forty-fourth President and given his African-American heritage.

31. ORFIELD, *supra* note 28, at 3.

32. *Id.* at 26.

33. AM. CIVIL LIBERTIES UNION, RACE & ETHNICITY IN AMERICA: TURNING A BLIND EYE TO INJUSTICE 144 (2007), available at [http://www.aclu.org/pdfs/humanrights/cerd\\_full\\_report.pdf](http://www.aclu.org/pdfs/humanrights/cerd_full_report.pdf).

34. *Id.*

35. *Id.*

36. *Id.*

37. 347 U.S. 483 (1954). Obama, *supra* note 6 ("Segregated schools were and are inferior schools; we still haven't fixed them, 50 years after *Brown v. Board of Education*."

means unequal. Minority children who attend segregated schools are severely disadvantaged in their quest for the full enjoyment of their citizenship. Segregated schools are more likely than non-segregated schools to have students from low-income families and to lack adequate resources.<sup>38</sup> They are more likely to have trouble attracting and keeping high-quality teachers.<sup>39</sup> Segregated schools have a greater likelihood of having “higher turnover rates among staff, larger class size, fewer advanced placement courses, poorer infrastructure, and fewer basic educational supplies.”<sup>40</sup> The graduation rates at these schools frequently hover below fifty percent, and students who actually stay to graduate are usually unprepared for the rigors of college.<sup>41</sup> As a result of this ever-worsening problem, not just individuals but entire communities are at risk.<sup>42</sup>

The lack of educational success for students, manifested in low high school and college graduation rates, directly threatens the economic and social future of communities, states, and the nation.<sup>43</sup> Not surprisingly, there is a strong correlation between low graduation rates and poverty.<sup>44</sup> In economic terms, “[d]ropouts from the Class of 2008 alone will cost the nation more than \$319 billion in lost wages over the course of their lifetimes.”<sup>45</sup> With respect to the graduating Class of 2006, “the nation could have saved more than \$17 billion in Medicaid and uninsured health care expenditures over the course of those young

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And the inferior education they provided, then and now, helps explain the pervasive achievement gap between today’s black and white students.”).

38. See AM. CIVIL LIBERTIES UNION, *supra* note 33, at 144.

39. *Id.*

40. *Id.*

41. *Id.*

42. ORFIELD, *supra* note 28, at 3. Gary Orfield opines that the ability to remedy the disparities in the educational achievement of minority children was seriously undermined by a hostile George W. Bush administration. *Id.* (arguing that the re-segregation of schools and communities is the result of “a systematic neglect of civil rights policy and related educational and community reforms” and the “active opposition” by both Bush administrations and the Reagan and Nixon administrations). He also takes aim at a conservative federal judiciary, most notably the United States Supreme Court for its decision in *Parents Involved in Community Schools v. Seattle School District Number 1*, 551 U.S. 701 (2007), which struck down desegregation plans in Seattle and Louisville.

43. ORFIELD, *supra* note 28, at 3.

44. *District 6 Graduation Rates Are Declining Despite Statewide Improvement*, GREELEY TRIB., Apr. 8, 2008, available at <http://www.greeleytribune.com/article/20080408/TRIBEDIT/671787294/1029&parentprofile=1025>.

45. ALLIANCE FOR EXCELLENT EDUC., FACT SHEET: HIGH SCHOOL DROPOUTS IN AMERICA 2 (2009), available at [http://www.all4ed.org/feiles/GraduationRates\\_FactSheet.pdf](http://www.all4ed.org/feiles/GraduationRates_FactSheet.pdf).

people's lifetimes."<sup>46</sup> Increasing the high school graduation rates of Hispanics, African-Americans, and Native Americans commensurate with that of white students by 2020 would potentially result in an increase in personal income that could add more than \$310 billion to the U.S. economy.<sup>47</sup> "Increasing the graduation rate and college matriculation of male students in the United States by just 5 percent could lead to combined savings and revenue of almost \$8 billion each year by reducing crime-related costs."<sup>48</sup>

In addition to the far-reaching and often devastating effects of segregation and low graduation rates, educational opportunities for minority children are severely compromised by the school-to-prison pipeline, a nationwide phenomenon in which students, largely those of color, are funneled out of public schools and into the juvenile and criminal justice systems.<sup>49</sup> Whether meted out discipline at a disproportionate rate, assigned to failing schools, banished to disciplinary alternative schools, over-identified as special needs, denied educational services when accurately identified as special needs, subjected to high-stakes testing, or placed under zero-tolerance policies that criminalize minor infractions, students of color are pushed out of public schools and into the eagerly awaiting arms of the juvenile and criminal justice system at an alarming rate.<sup>50</sup> While overrepresented in the

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46. *Id.*

47. *Id.*

48. *Id.*

49. See AM. CIVIL LIBERTIES UNION, *supra* note 33, at 146-47; see also AM. CIVIL LIBERTIES UNION, LOCATING THE SCHOOL-TO-PRISON PIPELINE, available at [http://www.aclu.org/images/asset\\_upload\\_file966\\_35553.pdf](http://www.aclu.org/images/asset_upload_file966_35553.pdf); NAACP LEGAL DEF. & EDUC. FUND, INC., DISMANTLING THE SCHOOL-TO-PRISON PIPELINE, available at [http://www.naacpldf.org/content/pdf/pipeline/Dismantling\\_the\\_School\\_to\\_Prison\\_Pipeline.pdf](http://www.naacpldf.org/content/pdf/pipeline/Dismantling_the_School_to_Prison_Pipeline.pdf).

50. RUSSELL SKIBA ET AL., AM. PSYCHOLOGICAL ASS'N ZERO TOLERANCE TASK FORCE, ARE ZERO TOLERANCE POLICIES EFFECTIVE IN SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS 6 (2006), available at <http://www.jdaihelpdesk.org/Docs/Documents/1%20BINDER%20Tab%207%20Zero%20Tolerance.pdf> ("African American students may be disciplined more severely for less serious and more subjective reasons. . . . [T]he disproportionate discipline of students of color may be due to lack of teacher preparation in classroom management or cultural competence."). See JAMIE DYCUS, AM. CIVIL LIBERTIES UNION & ACLU OF MISS., MISSING THE MARK: ALTERNATIVE SCHOOLS IN THE STATE OF MISSISSIPPI (2009), available at [http://www.aclu.org/pdfs/racialjustice/missingthemark\\_report.pdf](http://www.aclu.org/pdfs/racialjustice/missingthemark_report.pdf); Press Release, Am. Civil Liberties Union, ACLU Sues over Failed Privately-Run Alternative School in Atlanta (Mar. 11, 2008), available at <http://www.aclu.org/crimjustice/juv/34422prs20080311.html>. As in every other arena, Native Americans, children in this context, likewise bear the brunt of the school-to-prison-pipeline phenomenon. See Press Release, Am. Civil Liberties Union, ACLU Fights to End Discriminatory Prosecution of Native American Students (Mar. 28, 2006), available at <http://www.aclu.org/racialjustice/>

juvenile and criminal justice systems, black and Latino students continue to be underrepresented on college campuses.<sup>51</sup>

### B. Disparities in the Criminal Justice System

Reverend Joseph Lowery, who delivered the benediction at the inauguration of President Obama, opined that, with respect to race, “the criminal justice system of 2008 is too much like the criminal justice system of 1938” for this country to be truly post-racial.<sup>52</sup> The disparities in the criminal justice system are wide-ranging as well as harsh. For example,

[a] Black boy born in 2001 has a 1 in 3 chance of going to prison in his lifetime; a Latino boy a 1 in 6 chance; and a White boy a 1 in 17 chance. A Black girl born in 2001 has a 1 in 17 chance of going to prison in her lifetime; a Latino girl a 1 in 45 chance; and a White girl a 1 in 111 chance.<sup>53</sup>

Likewise, on the nation’s highways, African-American and Hispanic drivers stand a greater chance of being victims of racial profiling.<sup>54</sup> According to a recent government report, while being stopped at

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edu/24751prs20060328.html; see also CHRISTOPHER HARTNEY & LINH VUONG, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE US CRIMINAL JUSTICE SYSTEM (2009) (discussing the various ways in which Native Americans are harmed disproportionately by the criminal justice system).

51. ORFIELD, *supra* note 28, at 5-6.

52. Joseph Lowery, *Civil Rights Figure Rev. Joseph Lowery Reflects on a Movement*, CHI. TRIB., Jan. 19, 2009, available at <http://www.chicagotribune.com/news/nationworld/chi-lowery-essay-19-jan19,0,3593316.story> (rejecting the post-racial label as inapt); Dennis D. Parker & Susan Goering, *Discrimination Not Yet Defeated*, BALTIMORE SUN, Dec. 26, 2008 (discussing current racial disparities in the criminal justice system, housing, education, and employment).

53. CHILDREN’S DEF. FUND, CRADLE TO PRISON PIPELINE CAMPAIGN (2008), available at [http://cdf.convio.net/site/DocServer/PPP\\_fact\\_sheet\\_4.15.08.pdf?docID=6201](http://cdf.convio.net/site/DocServer/PPP_fact_sheet_4.15.08.pdf?docID=6201).

54. Reginald T. Shuford, *Any Way You Slice It: Why Racial Profiling Is Wrong*, 18 ST. LOUIS U. PUB. L. REV. 371, 371 (1999) (asserting that blacks and Latinos experience profiling in myriad contexts, including “on planes, trains, and [in] automobiles”). See Press Release, Am. Civil Liberties Union, Sheriff Arpaio Sued Over Racial Profiling of Latinos in Maricopa County (July 16, 2008), available at <http://www.aclu.org/immigrants/gen/36011prs20080716.html> (recounting complaints by Hispanics of being targeted as a result of recent anti-immigrant sentiment); see also AM. CIVIL LIBERTIES UNION, *supra* note 33, at 72 (concerning the profiling of immigrants).

Other minorities experience racial profiling, as well. Since the September 11, 2001 terrorist attacks, those perceived to be Arab, Muslim, or Middle Eastern have been subjected to racial profiling, discrimination, and bias crimes. AM.-ARAB ANTI-DISCRIMINATION COMM., 2003-2007 REPORT ON HATE CRIMES AND DISCRIMINATION AGAINST ARAB AMERICANS (Hussein Ibish ed., 2008), available at <http://www.adc.org/PDF/hcr07.pdf>; AM.-ARAB ANTI-DISCRIMINATION COMM., REPORT ON HATE CRIMES AND

roughly the same proportion, black drivers or their vehicles were searched 9.5% of the time, Hispanic motorists were searched 8.8% of the time, and white motorists were searched only 3.6% of the time.<sup>55</sup> This profiling of blacks and Hispanics persists even in the face of studies demonstrating that those ethnicities are usually found to be carrying contraband at rates the same as or lower than that of whites.<sup>56</sup> One report found that blacks were twice as likely to be arrested as whites and nearly four times more likely to experience the threat or use of force during interactions with the police.<sup>57</sup> Contact between the police and African-Americans often ends in death or serious injury.<sup>58</sup> African-Americans are nearly six times more likely than whites to be admitted to prison<sup>59</sup> and over twelve times more likely with respect to drug-related crimes, despite the fact that studies show that blacks and whites use drugs at largely similar rates.<sup>60</sup> Latinos are almost twice as likely as whites to be admitted to prison and almost 2.5 times as likely

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DISCRIMINATION AGAINST ARAB AMERICANS: THE POST-SEPTEMBER 11 BACKLASH (Hussein Ibish ed., 2003), available at [http://www.adc.org/hatecrimes/pdf/2003\\_report\\_web.pdf](http://www.adc.org/hatecrimes/pdf/2003_report_web.pdf); AM. CIVIL LIBERTIES UNION, *supra* note 33, at 69 (discussing profiling and the war on terror); Charu A. Chandrasekhar, Notes & Comments, *Flying While Brown: Federal Civil Rights Remedies to Post-9/11 Airline Racial Profiling of South Asians*, 10 ASIAN L.J. 215 (2003); Dalia Hashad, *Stolen Freedoms: Arabs, Muslims, and South Asians in the Wake of Post 9/11 Backlash*, 81 DENV. U. L. REV. 735 (2004); Deborah A. Ramirez et al., *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195 (2003); Press Release, Am. Civil Liberties Union, ACLU Sues TSA Official, JetBlue for Discriminating Against Passenger Wearing Arabic T-Shirt (Aug. 9, 2007), available at <http://www.aclu.org/racialjustice/racialprofiling/34814prs20070809.html>;

55. AM. CIVIL LIBERTIES UNION, *supra* note 33, at 58.

56. *Id.* at 62 (citation omitted). See Shuford, *supra* note 54, at 378.

57. Press Release, Am. Civil Liberties Union, Department of Justice Statistics Show Clear Pattern of Racial Profiling (Apr. 29, 2007), available at <http://www.aclu.org/racialjustice/racialprofiling/29532prs20070429.html>.

58. E.g., Ed Lavandera, *Son of Famed Baseballer Shot in Driveway by Cop*, CNN.COM, Jan. 8, 2009, <http://www.cnn.com/2009/CRIME/01/08/baseballer.shot/> (concerning 23-year-old Robbie Tolan); see also Shuford, *supra* note 54, at 374 (identifying African-Americans who died as a result of contact with the police).

59. BUREAU OF JUSTICE, U.S. DEP'T OF JUSTICE, PRISON INMATES AT MIDYEAR 2007, at 7 (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf>.

60. HUMAN RIGHTS WATCH, TARGETING BLACKS: DRUG LAW ENFORCEMENT AND RACE IN THE UNITED STATES (2008), available at <http://www.hrw.org/en/node/62236/section/6> (concluding that black men are 11.8 times as likely as white men to be imprisoned on drug charges). See RYAN S. KING, DISPARITY BY GEOGRAPHY: THE WAR ON DRUGS IN AMERICA'S CITIES 4 (2008) (concluding that the increased drug arrests for African-Americans is not the result of higher rates of drug use among African Americans, but, instead, the decisions by local officials about where to pursue drug enforcement).

to be admitted for drug-related crimes.<sup>61</sup> Similar disparities exist for African-American and Latino youth.<sup>62</sup>

Moreover, the disparity in sentencing for crack and cocaine offenses, accounting for the current incarceration of thousands of people of color, is well-documented and has given rise to a significant amount of advocacy, including litigation.<sup>63</sup> The argument has been that African-Americans are more likely to use the less-expensive crack than cocaine, with the reverse being true for whites.<sup>64</sup> In addition, African-Americans tend to receive harsher punishment for their use of crack.<sup>65</sup> As a result of felony convictions, 1.4 million African-American men have lost their right to vote, even after having paid their debt to society.<sup>66</sup> With respect to the death penalty, blacks have long been disproportionately represented on death row.<sup>67</sup>

61. BUREAU OF JUSTICE, *supra* note 59, at 7.

62. ROBIN L. DAHLBERG, AM. CIVIL LIBERTIES UNION, LOCKING UP OUR CHILDREN: THE SECURE DETENTION OF MASSACHUSETTS YOUTH AFTER ARRAIGNMENT AND BEFORE ADJUDICATION 11 (2008), available at [http://www.aclum.org/lockingupkids/locking\\_up\\_our\\_children\\_web.pdf](http://www.aclum.org/lockingupkids/locking_up_our_children_web.pdf); ROBIN L. DAHLBERG, AM. CIVIL LIBERTIES UNION, A LOOMING CRISIS: THE SECURE DETENTION OF YOUTH AFTER ARREST AND BEFORE ARRAIGNMENT IN FACILITIES ADMINISTERED BY THE MASSACHUSETTS EXECUTIVE OFFICE OF PUBLIC SAFETY AND SECURITY (2008), available at [http://www.aclu.org/pdfs/racialjustice/aloomingcrisis\\_report.pdf](http://www.aclu.org/pdfs/racialjustice/aloomingcrisis_report.pdf); ROBIN DAHLBERG, AM CIVIL LIBERTIES UNION, DISPROPORTIONATE MINORITY CONFINEMENT IN MASSACHUSETTS (2003), available at [http://www.aclu.org/FilesPDFs/dmc\\_report.pdf](http://www.aclu.org/FilesPDFs/dmc_report.pdf); JAMIE DYCUS, AM. CIVIL LIBERTIES UNION, HARD LESSONS: SCHOOL RESOURCE OFFICER PROGRAMS AND SCHOOL-BASED ARRESTS IN THREE CONNECTICUT TOWNS (2008), available at [http://www.aclu.org/pdfs/racialjustice/hardlessons\\_november2008.pdf](http://www.aclu.org/pdfs/racialjustice/hardlessons_november2008.pdf).

63. See, e.g., *Kimbrough v. United States*, 128 S. Ct. 558 (2007) (granting district courts discretion to deviate from sentencing guidelines).

64. See AM. CIVIL LIBERTIES UNION, *supra* note 33, at 68-69; see also *Rockefeller Laws: An End in Sight*, N.Y. TIMES, Feb. 9, 2009 (acknowledging the disproportionate impact of New York drug laws on blacks and Latinos and applauding their likely repeal). Moreover, disparities in sentencing are not limited to the crack-cocaine context. Lynn D. Lu, *Prosecutorial Discretion and Racial Disparities in Federal Sentencing: Some Views of Former U.S. Attorneys*, 19 FED. SENT'G REP. 192 (2007), available at [http://brennan.3cdn.net/9690c779d812e81527\\_4km6b9j64.pdf](http://brennan.3cdn.net/9690c779d812e81527_4km6b9j64.pdf) (noting the notoriety of the federal criminal sentencing system both for its severity and disproportionate impact on people of color, for whom it is "increasingly perceived as reserving its harshest punishments").

65. See *Rockefeller Laws: An End in Sight*, *supra* note 64.

66. Parker & Goering, *supra* note 52.

67. AM. CIVIL LIBERTIES UNION, *supra* note 33, at 106-08. See AM. CIVIL LIBERTIES UNION, THE PERSISTENT PROBLEM OF RACIAL DISPARITIES IN THE FEDERAL DEATH PENALTY (2007), available at [http://www.aclu.org/pdfs/capital/racial\\_disparities\\_federal\\_deathpen.pdf](http://www.aclu.org/pdfs/capital/racial_disparities_federal_deathpen.pdf).



### C. Disparities Related to Health

African-Americans, Hispanics, and Native Americans generally report being in fair or poor health at a much greater rate than whites.<sup>68</sup> The disparities continue with respect to access to health insurance and health care, including prenatal care for women.<sup>69</sup> The life expectancy for African-Americans, Hispanics, Native Americans, and others continues to lag behind that of whites.<sup>70</sup> For example, the life expectancy of African-American men is 69.5 years and 76.3 years for black women.<sup>71</sup> The life expectancy for white men is 75.7 years and 80.8 years for white women.<sup>72</sup> The higher incidence of HIV disease, homicide, and heart disease contribute to the shorter life expectancy of blacks.<sup>73</sup> African-Americans are seven times more likely to die from HIV/AIDS than whites, and six times as likely to die from homicide.<sup>74</sup> African-Americans are also at greater risk of dying from breast and prostate cancer.<sup>75</sup> Obesity is prevalent among those with lower incomes, particularly among African-American and Mexican-American women.<sup>76</sup> Inequalities in income and educational opportunity contribute to the disparities in health and longevity.<sup>77</sup>

### D. Disparities in Employment and Wealth

As in other contexts, African-Americans and Latinos suffer disproportionately in the employment arena. As recently as November 2008, the month that Barack Obama was elected this country's forty-fourth President, only sixty-two percent of African-American men, age twenty and above, had jobs, compared to seventy-two percent of white men.<sup>78</sup>

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68. AM. CIVIL LIBERTIES UNION, *supra* note 33, at 131. See Kevin Sack, *Research Finds Wide Disparities in Health Care and Region*, N.Y. TIMES, June 5, 2008 (documenting the link between quality of health care, race, and region, including the greater likelihood that an African-American in Mississippi or South Carolina will undergo a leg amputation as compared to whites in Colorado or Nevada).

69. AM. CIVIL LIBERTIES UNION, *supra* note 33, at 131-32.

70. U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTHY PEOPLE 2010: UNDERSTANDING AND IMPROVING HEALTH (2d ed. 2000), available at <http://www.healthypeople.gov/Document/pdf/uih/2010uih.pdf>.

71. Elizabeth Arias, *United States Life Tables, 2004*, NAT'L VITAL STAT. REP., Dec. 28, 2007, at 3, available at [http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56\\_09.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_09.pdf).

72. *Id.*

73. U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 70, at 12.

74. *Id.*

75. *Id.*

76. *Id.* at 29.

77. *Id.* at 12.

78. ORFIELD, *supra* note 28, at 5.

Likewise, only seventeen percent of black teens, as opposed to thirty-three percent of white teens, were employed.<sup>79</sup> These statistics are consistent with real-life experiences. For example, according to one study, black men without criminal records are no more likely than white men *with* criminal records to get a job.<sup>80</sup> Moreover, job applicants—men and women—with “black-sounding” names are less likely to get a favorable response to their resumes than those with “white-sounding” names.<sup>81</sup> One study found a correlation between health disparities and joblessness, finding that such disparities account for between twenty-one and thirty-nine percent of the gap in employment between blacks and whites.<sup>82</sup>

Racial disparities likewise exist with respect to wealth. As a shock to many, Hurricane Katrina exposed to the world that the face of poverty in America is a black one. While many New Orleanians were able to evacuate the city before the storm hit, the overwhelming majority of those left behind were poor people of color, who lacked the resources to evacuate.<sup>83</sup> Their plight, though extreme, is not unique. Nearly twenty-five percent of African-Americans live below the poverty line, three times the percentage of whites.<sup>84</sup> That number increases to 33.5% for blacks under the age of eighteen, as compared to ten percent of white youth.<sup>85</sup> As a general matter, blacks lag behind whites in income.<sup>86</sup> In 2006, the median income for whites was \$52,423; for blacks, it was \$31,969.<sup>87</sup> Blacks are also less likely to be the beneficiaries of intergenerational wealth than whites, which poses an even greater obstacle to achieving the American Dream.<sup>88</sup> Simply put, poor

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79. *Id.*

80. See Paul von Zielbauer, *Race a Factor in Job Offers for Ex-Convicts*, N.Y. TIMES, June 17, 2005, <http://www.nytimes.com/2005/06/17/nyregion/17felons.html>.

81. See Bill Maxwell, *Names of Pride or Labels for Stereotypes?*, ST. PETERSBURG TIMES, Feb. 12, 2003, [http://www.sptimes.com/2003/02/12/Columns/Names\\_of\\_pride\\_or\\_lab.shtml](http://www.sptimes.com/2003/02/12/Columns/Names_of_pride_or_lab.shtml).

82. Aaron Levin, *Health Disparities Between Racial Groups Affect Joblessness*, HEALTH BEHAV. NEWS SERVICE, Sept. 30, 2003, available at <http://www.scienceblog.com/community/older/2003/D/20031601.html> (“[S]imilar pattern exists for Native American men . . . and women.”).

83. AM. CIVIL LIBERTIES UNION, *supra* note 33, at 38.

84. NAT’L URBAN LEAGUE, *supra* note 28, at 4.

85. *Id.*

86. *Racial Disparities*, URB. INST., Mar. 25, 2008, available at <http://www.urban.org/decisionpoints08/archive/11racialdisparities.cfm>.

87. *Id.*

88. DALTON CONLEY & REBECCA GLAUBER, CTR. FOR AM. PROGRESS, WEALTH MOBILITY AND VOLATILITY IN BLACK AND WHITE 5-6 (2008), available at [http://www.americanprogress.org/issues/2008/07/pdf/wealth\\_mobility.pdf](http://www.americanprogress.org/issues/2008/07/pdf/wealth_mobility.pdf).

families, who, in America, are disproportionately people of color, are likely to bequeath poverty to the next generation, whereas wealthy families, largely white in America, are likely to transfer wealth.<sup>89</sup> In *The Mother of All Racial Preferences*, noted anti-racist Tim Wise sums up the issue of intergenerational wealth as follows:

[W]hite baby boomers are benefiting from the largest transfer of wealth in American history as they inherit their parents' estates. Some of that wealth dates back to the years of slavery, when Blacks were forced to work for free while their white owners and the American economy accumulated the benefits of their toil. Another large category of the transferred wealth is land, much of it stolen by the American government from Native Americans and Mexicans and sold for a pittance to white settlers. For the average white family, however, some of the largest sources of wealth are the result of racial preferences in government policies that were started in the 20th century.<sup>90</sup>

#### E. Disparities in Housing

With respect to housing, black homebuyers and renters experience continued discrimination, an increase since the 1990s, although down a bit from the 1980s.<sup>91</sup> African-Americans continue to be less likely than whites to own homes: 47.9% percent compared to 75.8%.<sup>92</sup> When they do own homes, they are likely to live in high-poverty neighborhoods with lower home values than those in comparable white neighborhoods.<sup>93</sup> This means a lower property tax for funding public

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89. See Paul Kivel, *Affirmative Action Works!*, IN MOTION MAG., Nov. 17, 1997, <http://www.inmotionmagazine.com/pkivel.html> ("Racism, rather than being self-correcting, is self perpetuating. The disadvantages to people of color and the benefits to white people are passed on to each succeeding generation unless remedial action is taken.").

90. AFRICAN AM. POLICY FORUM, MYTH 9, [http://aapf.org/tool\\_to\\_speak\\_out/focus/](http://aapf.org/tool_to_speak_out/focus/) (follow "Myth 9" hyperlink) (last visited Mar. 30, 2009) (quoting Tim Wise, *The Mother of All Racial Preferences*, Z SPACE, May 26, 2003, <http://www.zmag.org/zspace/commentaries/1528>) (identifying past legalized discriminatory practices in the Federal Housing Administration's G.I. program after World War II and in the availability of social security benefits); Obama, *supra* note 6. In addition to the substance of Tim Wise's positions, the fact that he holds such positions as a white man and espouses them in such strong terms has made people stop and listen. See, e.g., Tim Wise, *This Is Your Nation on White Privilege*, RED ROOM, Sept. 13, 2008, <http://www.redroom.com/blog/tim-wise/this-your-nation-white-privilege-updated>; see also Frank Rich, *White Like Me*, N.Y. TIMES, Jan. 18, 2009, at WK13, available at <http://www.nytimes.com/2009/01/18/opinion/18rich.html> (discussing experiences growing up as a "privileged" white kid in a majority-black Washington, D.C., in the 1960s).

91. *Racial Disparities*, *supra* note 86.

92. NAT'L URBAN LEAGUE, *supra* note 28.

93. *Racial Disparities*, *supra* note 86.

schools and less wealth accumulation from rising home values.<sup>94</sup> A direct effect of residential segregation is that it generally places minority jobseekers beyond the reach of employment growth and opportunity.<sup>95</sup> Moreover, black homeowners are more likely than their white counterparts to get subprime home purchase loans and to pay higher refinancing loans.<sup>96</sup> To pour salt into the wound, housing discrimination laws, designed to prevent these very situations, have been woefully under-enforced.<sup>97</sup>

#### F. *Structural Inequality*

Advocates of racial equity, including noted critical race scholars John A. Powell, and Kimberlé Williams Crenshaw and Luke Charles Harris, founders of the African American Policy Forum, partly attribute the persistence of the abovementioned disparities to structural racism, the notion that America's social institutions, public policies, cultural norms, and structures are arranged in a manner that benefits some while disadvantaging others.<sup>98</sup> They note that "[s]tructural racism requires no particular individual to either intentionally or unconsciously discriminate in order for individuals to be denied equal opportunity."<sup>99</sup> In *Does Barack Obama's Victory Herald a Post-Racial America?*, Andrew Grant-Thomas explains:

[A]ll complex societies feature institutional arrangements that help to create and distribute benefits, burdens, and interests in society, often quite independently of our conscious intentions. Consider the example of college admissions. Grades earned by high school students in

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94. *Id.*

95. *Id.*

96. *Id.*

97. See ORFIELD, *supra* note 28, at 29.

98. See AFRICAN AM. POLICY FORUM, MYTH 11, [http://aapf.org/tool\\_to\\_speak\\_out/focus/](http://aapf.org/tool_to_speak_out/focus/) (follow "Myth 11" hyperlink) (last visited Mar. 30, 2009) (discussing also the concept of implicit bias—in which people who are not overtly racist nevertheless make racially biased decisions, largely unconsciously, and on the basis of deeply ingrained stereotypes—as another phenomenon limiting equal opportunity); see also Andrew Grant-Thomas & John A. Powell, *Structural Racism and Color Lines in the United States*, in 21ST CENTURY COLOR LINES: MULTIRACIAL CHANGE IN CONTEMPORARY AMERICA 118 (Andrew Grant-Thomas & Gary Orfield eds., 2008).

99. AFRICAN AM. POLICY FORUM, MYTH 8, [http://aapf.org/tool\\_to\\_speak\\_out/focus/](http://aapf.org/tool_to_speak_out/focus/) (follow "Myth 8" hyperlink) (last visited Mar. 30, 2009). Professors Kimberlé Williams Crenshaw and Luke Charles Harris, founders of the African American Policy Forum, argue that current anti-discrimination laws are ineffective at creating equal access and that, as part of a trend to roll back civil rights, a fairly conservative judiciary is disinclined to enforce anti-discrimination laws in favor of opening the doors of opportunity to women and minorities. *Id.*

Advanced Placement (AP) and other college-prep courses may be the single most influential factor in admissions decisions—often more important than overall GPA, class rank, or test scores, and far more important than “diversity” considerations. In a society where white students are much more likely than black and Latino students to attend high schools that offer such courses, and offer more of them, weighing AP performance heavily in admissions decisions is racially inequitable. Nevertheless, we don’t need to conjure up racist admissions officers to get this outcome.<sup>100</sup>

To further illuminate the concept, Professors Crenshaw and Harris have devised a track metaphor that effectively conveys the essence of structural inequality and why affirmative action remains necessary social policy.<sup>101</sup> The metaphor acknowledges that “access to the American Dream is often framed as a race in which the swiftest runners win.”<sup>102</sup> Critics of affirmative action presume the race is unfair because it gives some runners an unfair head start.<sup>103</sup> On the other hand, proponents often say that affirmative action policies are necessary to assist “disabled” runners.<sup>104</sup> The track metaphor rejects this frame; instead of focusing on the runners, the track metaphor looks to the *track* on which the race is run. Affirmative action is neither about helping disabled runners nor giving anyone an unfair advantage. Rather, it is “about repairing damaged lanes and removing the barriers that block the pathways to opportunity that only some runners face.”<sup>105</sup> At their core, affirmative action and similar policies that promote social inclusion are about giving everyone a fair chance to com-

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100. Posting of Andrew Grant-Thomas to RaceWire, Does Barack Obama’s Victory Herald a Post-Racial America?, [http://www.racewire.org/archives/2008/12/does\\_barack\\_obamas\\_victory\\_her\\_1.html](http://www.racewire.org/archives/2008/12/does_barack_obamas_victory_her_1.html) (Dec. 5, 2008, 6:51 EST); Ctr. for Soc. Inclusion, Structural Racism: Definition, [http://www.centerforsocialinclusion.org/struct\\_racism.html](http://www.centerforsocialinclusion.org/struct_racism.html) (last visited Mar. 30, 2009). See Paul Kivel, *Affirmative Action for White Men?*, IN MOTION MAG., Feb. 10, 2002, <http://www.inmotionmagazine.com/pkivel4.html> (discussing the manner in which societal influences, structural arrangements, and early social programs have accrued to the benefit of white men).

101. AFRICAN AM. POLICY FORUM & AM. CIVIL LIBERTIES UNION, *supra* note 17.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* Those barriers include, *inter alia*: poor schools and limited educational opportunities, residential isolation, unconscious bias, wealth disparities, standardized tests, the school-to-prison pipeline, old-boy networks, underemployment, discrimination, racial profiling, and disparities in lifespan. See *id.* Just as runners in the outside lanes have more hurdles in their paths, those in the inside lanes—those with an “inside track”—have comparatively unobstructed paths, and their efforts are aided by privilege, wealth, and social connections. *Id.*

pete by equalizing the conditions of an unfair race.<sup>106</sup> Finally, rejecting the “color-blind” approach, the track metaphor posits that treating everyone fairly does not mean treating everyone the same.<sup>107</sup> Rather, it is important to create and defend policies, like affirmative action, that eliminate the barriers that continue to obstruct the lanes of female and minority runners.<sup>108</sup>

## II. AFFIRMATIVE ACTION REMAINS ESSENTIAL FOR EXPANDING OPPORTUNITY

In *Grutter v. Bollinger*, United States Supreme Court Justice Sandra Day O’Connor recognized the importance of affirmative action, writing that “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”<sup>109</sup> But she also famously declared that, in twenty-five years, it was her expectation that affirmative action “will no longer be necessary.”<sup>110</sup> The efficacy of that prediction, however, seems woefully at odds with the current evidence of severe racial disparity. Arriving at a place in our history where affirmative action will no longer be necessary is a laudable ambition, but we are not yet there. Indeed, such a goal seems especially unlikely if opponents of such measures—like Ward Connerly—get their way well before the playing field has been leveled.<sup>111</sup>

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106. *Id.*

107. *Id.* See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part) (“In order to get beyond racism, we must first take account of race.”); STEPHEN B. OATES, *LET THE TRUMPET SOUND: THE LIFE OF MARTIN LUTHER KING, JR.* 426 (1994) (“[A] society that has done something special against the Negro for hundreds of years must now do something special for him, in order to equip him to compete on a just and equal basis.” (quoting Martin Luther King, Jr.)). *But see* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

108. AFRICAN AM. POLICY FORUM & AM. CIVIL LIBERTIES UNION, *supra* note 17.

109. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

110. *Id.* at 343.

111. It is not inconceivable that Ward Connerly’s opposition to affirmative action is based on principle. What is certainly beyond dispute is that his crusade against equal opportunity has helped to make him a very rich man. See *Ward Connerly: The Color of Money*, Home, <http://www.bigmoneyconnerly.com> (last visited Mar. 30, 2009); Mary Moore & Jennifer Hahn, *Contracting Connerly*, Ms. MAG., Winter 2008, at 36, 37-38, available at [http://www.law.berkeley.edu/files/news\\_ContractingConnerly-MsMagWinter08.pdf](http://www.law.berkeley.edu/files/news_ContractingConnerly-MsMagWinter08.pdf). Among Connerly’s financial backers are Rupert Murdoch, Joseph Coors, William Hume, and the Bradley Foundation. LEE COKORINOS, EQUAL

Nearly fifty years after President John F. Kennedy signed the first executive order creating affirmative action,<sup>112</sup> racial disparity remains deeply ingrained in our social fabric. While affirmative action and other equal opportunity measures have yielded progress, the severity and persistence of racial disparity warrants serious interventions—the use of all available measures—including race-conscious ones. For all of its controversy,<sup>113</sup> affirmative action has been a very effective social

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JUST. SOC'Y, THE BIG MONEY BEHIND WARD CONNERLY, [http://www.equaljusticesociety.org/Cokorinos\\_Connerly\\_BigMoney.pdf](http://www.equaljusticesociety.org/Cokorinos_Connerly_BigMoney.pdf) (last visited Mar. 30, 2009); *Know Your Right-Wing Speakers: Ward Connerly*, CAMPUS PROGRESS, Dec. 4, 2006, <http://www.campusprogress.org/tools/230/>.

112. The order was issued on March 6, 1961, and required federal contractors to “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.” Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961). This marked the first time the phrase “affirmative action” was used. Ever since, the phrase has been variously defined. The U.S. Commission on Civil Rights offers the following useful definition:

[A]ny measure, beyond simple termination of a discriminatory practice, that permits the consideration of race, national origin, sex, or disability, along with other criteria, and which is adopted to provide opportunities to a class of qualified individuals who have either historically or actually been denied those opportunities and/or to prevent the recurrence of discrimination in the future.

OFFICE OF GENERAL COUNSEL, U.S. COMM'N ON CIVIL RIGHTS, BRIEFING PAPER FOR THE U.S. COMMISSION ON CIVIL RIGHTS: LEGISLATIVE, EXECUTIVE, AND JUDICIAL DEVELOPMENT OF AFFIRMATIVE ACTION (1995).

113. Professors Crenshaw and Harris of the African American Policy Forum believe that one cause of the controversy surrounding affirmative action is that “[w]hat most people know about affirmative action isn’t right, and what’s right about affirmative action most people don’t know.” 13 MYTHS ABOUT AFFIRMATIVE ACTION, *supra* note 17 (see picture). To address this dearth of accurate information regarding affirmative action, Professors Crenshaw and Harris created *13 Myths About Affirmative Action*. The myths addressed—and dismantled—include: (1) affirmative action constitutes preferential treatment; (2) affirmative action is a radical policy and is outmoded for current American ideals; (3) America no longer needs affirmative action; (4) affirmative action allows unqualified students to enter colleges and universities; (5) affirmative action is simply an African-American entitlement program; (6) affirmative action should cover class, not race; (7) beneficiaries are stigmatized by affirmative action; (8) existing anti-discrimination laws are adequate for the creation of equal opportunity; (9) individual hard work and effort determine who becomes wealthy and prosperous; (10) colorblindness has always been a guiding American ideal, and opponents of affirmative action merely seek to achieve this colorblindness and are not opposed to racial progress; (11) affirmative action is creating racial differences, because without affirmative action race is as meaningless and empty as skin color; (12) affirmative action reflects an obsession with race, which is uncommon for

policy,<sup>114</sup> and the majority of Americans, some seventy percent, support such programs.<sup>115</sup> There are a number of reasons why that support remains justified, and why affirmative action is essential to ensure equal opportunity for all Americans.

#### A. *Affirmative Action Is About Expanding Opportunity*

Americans value greatly the notion that we are a country where people are treated fairly regardless of skin color, family connections, or wealth. Affirmative action promotes equality of opportunity for everyone and provides a fair chance to achieve one's full potential and to strive for the American Dream. It breaks down barriers—including

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America; and (13) Dr. Martin Luther King's dream of a colorblind America is opposed to affirmative action. *Id.*

114. Kivel, *supra* note 89 (making the link between affirmative action and social justice). See Am. Psychological Ass'n Online, Affirmative Action: Who Benefits?, <http://www.apa.org/pubinfo/affirmaction.html> (last visited Feb. 22, 2009). Proof of the effectiveness of affirmative action also can be seen in the aftermath of its elimination. For example, after the passage of California's Proposition 209, which invalidated state affirmative action programs, admissions of African-American, Latino, and Native American students dropped by sixty-one percent at UC Berkeley and by thirty-six percent at UCLA. Bassett, *supra* note 17; Rebecca Trounson, *A Startling Statistic at UCLA*, L.A. TIMES, June 3, 2006, at A1, available at <http://articles.latimes.com/2006/jun/03/local/me-ucla3> (reporting that only two percent of the incoming class at UCLA were African-American, the lowest enrollment of black freshmen since 1973). It also must be noted that where the anti-affirmative action initiatives have succeeded, a host of equal opportunity programs beyond colleges and universities have come under fire, including targeted outreach to underrepresented communities, mentoring for women in nontraditional employment, admissions and hiring programs, and data collection requirements that help the government identify racial and gender discrimination. See, e.g., Beth H. Parker, Equal Rights Advocates, *The Impact of Proposition 209 on Education, Employment and Contracting*, <http://www.equalrights.org/publications/reports/affirm/full209.asp> (last visited Mar. 30, 2009). Even battered women's shelters and domestic violence programs have been challenged for promoting gender-based "preferences." AFRICAN AM. POLICY FORUM, MYTH 5, [http://aapf.org/tool\\_to\\_speak\\_out/focus/](http://aapf.org/tool_to_speak_out/focus/) (follow "Myth 5" hyperlink) (last visited Mar. 30, 2009).

115. Press Release, Pew Research Ctr. for the People & the Press, *Trends in Political Values and Core Attitudes: 1987-2007* (Mar. 22, 2007), <http://people-press.org/reports/pdf/312.pdf> (reporting that support for affirmative actually has increased substantially in recent years). That support is also broad-based, including: high-ranking officers and civilian leaders in the armed forces, see Consolidated Brief of Lieutenant General Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (No. 02-241); over sixty Fortune 500 companies, see Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (No. 02-241); and America's top universities, see Brief of Harvard University et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (No. 02-241).



good ole boy networks and glass ceilings—that have long blocked the pathways of opportunity primarily for people of color and women. Affirmative action policies help to make level a notoriously and historically uneven playing field. When obstacles are removed from the paths of women and minorities—providing greater access to more Americans—it allows families, communities, and our society as a whole to benefit.

Affirmative action is not, as opponents proclaim, preferential treatment that gives some people an unfair head start or advantage.<sup>116</sup> Nor is it about quotas, which were outlawed in *Regents of the University of California v. Bakke*.<sup>117</sup> Rather, at its core, affirmative action recognizes existing barriers to equal opportunity, like job bias and exclusion from business relationships, and seeks to expand opportunity by eliminating those barriers, thereby giving everyone a fair chance to compete.<sup>118</sup>

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116. The phrase “preferential treatment” is even used, perhaps unwittingly, by supporters of affirmative action. See, e.g., *Grutter*, 539 U.S. at 343 (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”). The “preference” terminology misapprehends the origin and essential nature of affirmative action and contributes to the controversy surrounding it. See Janine Jackson, *Affirmative Action Coverage Ignores Women—and Discrimination: A Six-Month Study of Media Coverage*, EXTRA!, Jan./Feb. 1999, <http://www.fair.org/index.php?page=1442>. Language matters in the conversation about affirmative action. *Id.* (pointing out the large difference in support for “affirmative action” as compared to “preferences,” sixty-eight versus eleven percent). Ward Connerly knows this all too well, and has been intentional and strategic in his use of pro-civil rights language in his anti-affirmative action ballot initiatives. See Bassett, *supra* note 17. Unsurprisingly, Connerly’s Civil Rights Initiative has been sued for using fraud and deception for its language and tactics. *Operation King’s Dream v. Connerly*, No. 06-12773, 2006 WL 2514115 (E.D. Mich. Aug. 29, 2006), *appeal dismissed*, 501 F.3d 584 (6th Cir. 2007); Kimberlé Crenshaw, *A Preference for Deception*, Ms. MAG., Winter 2008, available at <http://www.ms magazine.com/winter2008/WardConnerlyPart2.asp>.

117. 438 U.S. 265 (1978).

118. THE OPPORTUNITY AGENDA, AFFIRMATIVE ACTION IN THE PUBLIC DISCOURSE: MEDIA CONTENT AND OPINION ANALYSIS (2008), available at [http://opportunityagenda.typepad.com/the\\_state\\_of\\_opportunity/files/affirmative\\_action\\_report.pdf](http://opportunityagenda.typepad.com/the_state_of_opportunity/files/affirmative_action_report.pdf). According to this report, the language used to discuss affirmative action and the manner in which it is addressed in the media impacts Americans’ understanding and support for it. *Id.* See Jackson, *supra* note 116 (arguing that women and minorities other than African-Americans who benefit from affirmative action and the persistence of racist and sexist practices are largely excluded in the media coverage of the issue, and that the terms “affirmative action” and “preferences” are inappropriately used interchangeably).

### B. *Affirmative Action Is Necessary to Remedy Ongoing Disparities*

As discussed above, whether in the arenas of housing, employment, education, wealth, health care, or the justice system, African-Americans, Latinos, and Native Americans continue to lag way behind others.<sup>119</sup> By way of example, according to one study of over 1300 employers in Boston and Chicago, job applicants with “white-sounding” names are twice as likely to be called back for interviews as equally qualified applicants with “black-sounding” names.<sup>120</sup> More than one million students will not graduate from high school this year, and a disproportionate number of them will be African-American, Latino, or Native American.<sup>121</sup> African-American women, moreover, earn only sixty-three cents per hour and Hispanic women only fifty-two cents per hour for every dollar a white man earns for similar employment.<sup>122</sup> Given its well-documented effectiveness,<sup>123</sup> affirmative action is an appropriate tool for combating these and other ongoing disparities.<sup>124</sup>

### C. *Affirmative Action Benefits Many Groups, Not Just African-Americans*

One of the myths associated with affirmative action is that it is an entitlement program for African-Americans—who are its sole beneficiaries.<sup>125</sup> So pervasive is this notion that, for many people, the mere mention of the term “affirmative action” reflexively conjures up an image of an African-American with hand held out. This idea is perpetuated by the erroneous notion that affirmative action is no longer necessary because of the election of a black man to the presidency. The media aids and abets this stereotype with its use of certain terminology and imagery, and with its general exclusion of white men, women,

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119. See *supra* notes 31-108 and accompanying text for a fuller discussion of racial disparity in present-day America.

120. See Maxwell, *supra* note 81.

121. See Michelle D. Anderson, *Report: More Than 1 Million High School Students Will Fail to Graduate in 2008, Minorities Most at Risk*, DIVERSE ONLINE, June 5, 2008, [http://www.diverseeducation.com/artman/publish/printer\\_11245.shtml](http://www.diverseeducation.com/artman/publish/printer_11245.shtml).

122. See NAT'L WOMEN'S LAW CTR., CONGRESS MUST ACT TO CLOSE THE WAGE GAP FOR WOMEN 1 (2008), available at [http://www.nwlc.org/fairpay/PayEquityFactSheet\\_050508.pdf](http://www.nwlc.org/fairpay/PayEquityFactSheet_050508.pdf).

123. See, e.g., Kivel, *supra* note 89.

124. *But see* *Rothe Dev. Corp. v. Dep't of Def.*, 545 F.3d 1023 (Fed. Cir. 2008) (holding that evidence of disparity was insufficient to justify federal affirmative action program).

125. See 13 MYTHS ABOUT AFFIRMATIVE ACTION, *supra* note 17; Jackson, *supra* note 116.

and other minorities from its coverage of affirmative action.<sup>126</sup> The truth of the matter is that, in addition to other minorities—Asians, Hispanics, and Native Americans, for example—white men<sup>127</sup> and women<sup>128</sup> also benefit from affirmative action. As discussed herein, legacy and veteran programs constitute just two of many examples of affirmative action policies that transcend coverage of only African-Americans.<sup>129</sup>

#### D. *Class-Based Affirmative Action Is Insufficient to Address Racial Disparities*

Many of the disparities confronting racial minorities are the result of racial discrimination and animus. The antidote for such practices is the adoption of race-conscious policies.<sup>130</sup> While many people of color would not benefit from class-based affirmative action, even working class people of color benefit from traditional affirmative action policies, by virtue of a greater “[a]ccess to job training programs, vocational schools, and semi-skilled and skilled blue-collar, craft, pink-collar, police and firefighter jobs . . . .”<sup>131</sup>

President Obama has indicated his support for affirmative action policies that take account of economic circumstances, but he has never

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126. See Jackson, *supra* note 116.

127. See Kivel, *supra* note 100 (recounting a long history of affirmative action for white men, including in his own family, which benefited from such programs as the G.I. Education Bill, the Veteran Administration Housing Authority, and the Veteran Administration health care system, all of which were administered in an explicitly or effectively racially exclusionary manner); Katha Pollitt, *Affirmative Action for White Men*, Chap. 4, 651, *THE NATION*, Mar. 23, 2006, [http://www.thenation.com/blogs/notion/71545/affirmative\\_action\\_for\\_white\\_men\\_chap\\_4\\_651](http://www.thenation.com/blogs/notion/71545/affirmative_action_for_white_men_chap_4_651) (writing that on college campuses middle-class white males benefit from quota systems—which the article’s author calls “extra-credit-for-testicles” policies—designed to maintain gender balance).

128. See Crenshaw, *supra* note 116 (stating that women are the primary beneficiaries of affirmative action, given their number and “multiracial, multigenerational, and cross-class” status); Kivel, *supra* note 89 (“One indication that attacks on affirmative action are part of a white backlash against equality is that affirmative action in the form of preferences that primarily benefit white people are not being questioned.”).

129. See Kivel, *supra* note 100.

130. See Bassett, *supra* note 17. Affirmative action expert and author George Curry supports race-conscious equal opportunity programs and strongly rejects the notion that class-based affirmative action is more appropriate. Curry says that, while a class-based approach “may help some people because of the intersection of race and class, it does not directly address the problem of discrimination.” *Id.* Curry further believes that the “needs of poor whites should be addressed, but through antipoverty measures.” *Id.*

131. See Kivel, *supra* note 89.

stated that race-conscious equal opportunity programs be discontinued.<sup>132</sup> To the contrary, Obama has said: “[W]e shouldn’t ignore that race continues to matter” in our society.”<sup>133</sup> Any other suggestion, Obama said, “turns a blind eye to both our history and our experience—and relieves us of the responsibility to make things right.”<sup>134</sup> Obama’s position is consistent with that of Martin Luther King, Jr., who once said: “[A] society that has done something special *against* the Negro for hundreds of years must now do something special *for* him, in order to equip him to compete on a just and equal basis.”<sup>135</sup>

The embrace of a class-based approach to affirmative action, in lieu of a race-based one, perhaps evokes America’s historical discomfort with matters of race. At the end of the day, however, nothing requires that the approaches be mutually exclusive.<sup>136</sup> There is clearly a need for race-conscious opportunity programs in response to racially discriminatory practices. Likewise, addressing a person’s underprivileged economic circumstances in seeking to expand opportunity is also appropriate.

#### E. *Affirmative Action Does Not Reward the Unqualified*

Another myth surrounding affirmative action is that it rewards unqualified candidates.<sup>137</sup> That stereotype flies in the face of what is

132. David Paul Kuhn, *Obama Shifts Affirmative Action Rhetoric*, POLITICO, Aug. 10, 2008, <http://www.politico.com/news/stories/0808/12421.html>.

133. Joseph Williams & Matt Negrin, *Affirmative Action Foes Point to Obama*, BOSTON GLOBE, Mar. 18, 2008, available at [http://www.boston.com/news/nation/articles/2008/03/18/affirmative\\_action\\_foes\\_point\\_to\\_obama/](http://www.boston.com/news/nation/articles/2008/03/18/affirmative_action_foes_point_to_obama/).

134. *Id.*

135. OATES, *supra* note 107, at 426 (quoting Martin Luther King, Jr.).

136. Bassett, *supra* note 17. See AFRICAN AM. POLICY FORUM, MYTH 6, [http://aapf.org/tool\\_to\\_speak\\_out/focus/](http://aapf.org/tool_to_speak_out/focus/) (follow “Myth 6” hyperlink) (last visited Mar. 30, 2009).

137. Related to this argument is the notion that affirmative action is detrimental to its beneficiaries because they suffer a sense of stigma. See *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (Thomas, J., dissenting). African American Policy Forum counters this argument with the assertion that it is not affirmative action that stigmatizes its beneficiaries, but rather the very stereotypes that have always been used to exclude women and people of color from educational and employment opportunities. AFRICAN AM. POLICY FORUM, MYTH 7, [http://aapf.org/tool\\_to\\_speak\\_out/focus/](http://aapf.org/tool_to_speak_out/focus/) (follow “Myth 7” hyperlink) (last visited Mar. 30, 2009). Additionally, few purveyors of the stigma argument appear to apply it to other beneficiaries of affirmative action, such as wealthy students admitted to elite universities based upon family connections. *Id.* Those students are not required to prove to their classmates that they deserve to be there or that they have been unfairly associated with other wealthy students admitted for reasons other than their own “merit.” *Id.* Such a selective concern for only certain beneficiaries of affirmative action rings hollow to advocates of equal opportunity.

really known about affirmative action policies.<sup>138</sup> Affirmative action programs never mandate that someone unqualified be hired.<sup>139</sup> That applicants competing for a job or a spot in an incoming college class are qualified is the starting point. What affirmative action and other equal opportunity programs require is that, when deciding between equally qualified candidates, extra consideration should be given to those from traditionally excluded or underrepresented groups or disadvantaged backgrounds.<sup>140</sup>

By the same token, “more qualified” white men are not deprived of opportunities on a broad scale at all. Writer Paul Kivel rejects the notion that white men are widely subjected to “reverse discrimination” or are systematically bypassed in favor of unqualified minorities:

If one looks at the composition of various professions such as law, medicine, architecture, academics and journalism, or at corporate management, or at higher-level government positions, or if one looks overall at the average income levels of white men[,] one immediately notices that people of color are still significantly underrepresented and underpaid in every category. People of color don't make up the proportions of these jobs even remotely equal to their percentage in the population.<sup>141</sup>

#### F. *Affirmative Action Programs Are Often Voluntary*

Most affirmative action programs, particularly those in schools, on college campuses, and in the workplace, are voluntary in nature. Institutions themselves decide to implement affirmative action policies consistent with their judgment of what likely will make their operations most effective.<sup>142</sup> Public schools, colleges and universities, states

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138. AFRICAN AM. POLICY FORUM, MYTH 4, [http://aapf.org/tool\\_to\\_speak\\_out/focus/](http://aapf.org/tool_to_speak_out/focus/) (follow “Myth 4” hyperlink) (last visited Mar. 30, 2009). See OFFICE OF GENERAL COUNSEL, U.S. COMM’N ON CIVIL RIGHTS, *supra* note 112 (defining affirmative action as “provid[ing] opportunities to a class of *qualified* individuals” (emphasis added)).

139. See Kivel, *supra* note 89.

140. *Id.*

141. *Id.*

142. For example, many employers, including the Author’s, the American Civil Liberties Union, include pro-affirmative action statements in their job announcements that are generally a variation of the following: “The ACLU is an equal opportunity/affirmative action employer and encourages applications from women, people of color, persons with disabilities, and lesbian, gay, bisexual, and transgender individuals.” Am. Civil Liberties Union, Fall 2009 Fellowship Opportunity—National Security Project ACLU, New York (Sept. 5, 2008), <http://www.aclu.org/jobs/careers/36659res20080905.html>. Statements of this nature reflect an institution’s acknowledgment of the benefits of a diverse workplace and its voluntary pursuit of such an environment.

and municipalities, and private industries all should have the authority to create environments they believe will allow them to offer the best possible services.<sup>143</sup> Many of these institutions have concluded that an integrated and diverse atmosphere enables precisely that. The school districts in Seattle and Louisville, just like the University of Michigan's undergraduate program, certainly subscribed to this notion when they attempted to craft carefully balanced and well-considered policies designed to increase diversity in their school districts and on their campuses.<sup>144</sup> Striking down these policies essentially penalized the institutions for trying to ensure meaningful educational opportunities for everyone.<sup>145</sup>

### CONCLUSION

When properly understood, affirmative action enjoys significant popular support.<sup>146</sup> Indeed, it is one of the most essential and effective social policies for leveling the playing field and expanding opportunity in America.<sup>147</sup> Although racial inequity is a particularly entrenched and tenacious opponent, affirmative action remains a valuable tool for combating inequality. President Obama, whose election led to proclamations that affirmative action is no longer necessary, has recognized the importance of affirmative action.<sup>148</sup> The noise surrounding affirmative action does not reflect the reality of a policy that is past its time or even flawed. Rather, it demonstrates a significant amount of misunderstanding and misinformation, particularly when decontextualized from its historical and structural underpinnings.

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143. Ward Connerly suffered one of his earliest ballot initiative defeats in Houston. See Sam H. Verhovek, *The 1997 Elections: Affirmative Action; Referendum in Houston Shows Complexity of Preferences Issue*, N.Y. TIMES, Nov. 6, 1997, at A1, available at <http://www.nytimes.com/1997/11/06/us/1997-elections-affirmative-action-referendum-houston-shows-complexity.html?n=Top/Reference/Times%20Topics/Subjects/E/Elections>. Crucial to the defeat of the initiative was opposition by many of Houston's corporate leaders, who argued that "Houston was one of the most ethnically diverse cities in the country, and that this was a great asset nurtured in part by affirmative action." *Id.*

144. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (concerning voluntary desegregation policies, as opposed to affirmative action policies, but the same argument applies, given the shared goal of providing equal educational opportunities to students); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

145. *Parents Involved*, 551 U.S. 701; *Gratz*, 539 U.S. 244.

146. See sources cited *supra* note 115.

147. See Kivel, *supra* note 89.

148. Ben Smith, *Affirmative Action Change Under Obama?*, POLITICO, Nov. 3, 2008, <http://dyn.politico.com/printstory.cfm?uuid=61EA9116-18FE-70B2-A8B62601C63D9235>.

Juxtaposed against real information and the relevant data, stereotypes about affirmative action fall over like so many dominoes.<sup>149</sup> Yet, Ward Connerly and his wealthy supporters—themselves, at a minimum, arguably the beneficiaries of structural inequality—turn a blind eye to the reality of persistent racial disparity and show no signs of slowing down their crusade to eliminate affirmative action altogether.<sup>150</sup> Just like his largely failed “Super Tuesday for Equal Rights,” Connerly’s future attempts to eradicate measures designed to expand opportunity must be met with vigorous opposition. Legal challenges have been an important part of the pushback against Connerly, as well as on-the-ground mobilization and public education. Given what is at stake, those efforts must continue.

W.E.B. Dubois once said that “the problem of the 20th century is the problem of the color line.”<sup>151</sup> While it is abundantly clear that America has made laudable progress towards racial equality—as reflected, in part, by the election of Barack Obama as the nation’s forty-fourth president—the same can be said of the twenty-first century. President Obama, in his *Speech on Race* in Philadelphia in March 2008, declared that race is something in American history and life “that we’ve never really worked through.”<sup>152</sup> He acknowledged both the tremendous progress made by the country and the tight grip that a history of legalized discrimination continues to hold on many African-Americans, including segregated schools, neighborhoods concentrated in poverty, and single-parent households.<sup>153</sup> Simply put, America’s promise of a fully inclusive society has not materialized. In light of all the relevant evidence, America has not fulfilled Dr. Martin Luther King, Jr.’s dream of a truly equal society. While Obama’s election qualifies as a down payment on equality, much more remains to be done.<sup>154</sup> Affirmative action—which is just one of many effective tools for expanding opportunity—remains essential for the full inclusion of

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149. See, e.g., 13 MYTHS ABOUT AFFIRMATIVE ACTION, *supra* note 17.

150. See Bassett, *supra* note 17.

151. W.E.B. DuBois, *THE SOULS OF BLACK FOLK* (1903).

152. Obama, *supra* note 6.

153. *Id.*; Bassett, *supra* note 17.

154. Dr. King famously said that, “America has defaulted on [her] promissory note, insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check, a check which has come back marked ‘insufficient funds.’” Martin Luther King, Jr., *Speech at the Lincoln Memorial, Washington, D.C., I Have A Dream* (Aug. 28, 1963), available at <http://www.americanrhetoric.com/speeches/mlkihavedream.htm>. Cf. Neuman, *supra* note 5 (noting that Bush expressed that Obama’s victory is a “dream fulfilled”).

all of those who historically have been and continue to be structurally relegated to the margins of society, and who are increasingly left further behind in the race to achieve the American Dream.