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## ASSET BUILDING by People with Disabilities

Local Prosecution of Real-Estate Fraud  
Rights of Limited-English-Proficient Individuals  
Machine Translation of Legal Information  
Toward Veterans Courts  
Language Access in State Courts  
Mapping to Show Discrimination  
Unemployment Benefits Appeals  
Postracialism or Targeted Universalism?



# POSTRACIALISM | or Targeted | UNIVERSALISM?

By john a. powell

john a. powell  
*Williams Chair in Civil Rights and  
Civil Liberties, Moritz College of  
Law, and Executive Director,  
Kirwan Institute for the Study  
of Race and Ethnicity*

Ohio State University  
433 Mendenhall Laboratory  
125 S. Oval Mall  
Columbus, OH 43210  
614.688.5429

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The United States made history on November 4, 2008, by electing Barack Obama as the first African American president of the United States. This remarkable event has generated a sense of pride and a collective celebration that is shared worldwide. The installation of a Black president, whose election was supported by a significant minority of white American voters, is an occasion imbued with meaning. The political, social, historical, and cultural significance of the election has been expressed in many ways and interpreted differently in different quarters.<sup>1</sup> Over the next several months, if not years, Americans will be trying to determine its contours, synthesizing its various strands. As we engage in this consequential process, different segments of society will undoubtedly continue to express and promote different meanings, each of which will have important ramifications. Questions will emerge, such as how are we to understand racial conditions in society, and what is the proper role of public policy and law for addressing or avoiding racial questions? These questions about where we are as a society on the issue of race are not just factual or descriptive but are deeply political, having implications for how and when we respond to existing racial conditions and the scope of our collective obligations.

In exploring this set of questions, I employ a different terminology from what is normally used to discuss this issue. Instead of using the standard nomenclature of race and racism, I will use the term “racialization.” I do so because the language of race and racism is understood in a way that is too limited and specific to help us acquire greater insight into the important questions posed at the outset. By racialization I refer to the set of practices, cultural norms, and institutional arrangements that both are reflective of and simultaneously help create and maintain racialized outcomes in society. Because racialization is a historical and cultural set of processes, it does not have one meaning. Instead it is a set of conditions and norms that are constantly evolving and interacting with the sociopolitical environment, varying from location to location, as well as throughout different periods in history.<sup>2</sup> These processes are not just uniformly present or static. They respond to what we collectively do and think and are therefore highly contested.<sup>3</sup> However, this is not typically how we as a society think

<sup>1</sup>Already there are claims being advanced that Section 5 preclearance provisions of the Voting Rights Act are no longer necessary, since they are predicated on polarized racial voting patterns, which the election of Obama supposedly refutes (see Adam Liptak, *Supreme Court Takes Voting Rights Case*, NEW YORK TIMES, Jan. 10, 2009, at A13, <http://nyti.ms/9uFFWC>).

<sup>2</sup>Much of this could be said about a proper understanding of race and racism. These terms have a long history that is also sensitive to location and sociopolitical conditions. But this is not how most Americans think of these terms. Most Americans would be surprised to learn that the term “racism” did not come into use in the United States until the 1930s. For a good discussion of changing meaning and practices of race, see generally GEORGE M. FREDRICKSON, *RACISM: A SHORT HISTORY* (2002); STEVE MARTINOT, *THE RULE OF RACIALIZATION: CLASS, IDENTITY, GOVERNANCE* (2003); DAVID R. ROEDIGER, *HOW RACE SURVIVED U.S. HISTORY: FROM SETTLEMENT AND SLAVERY TO THE OBAMA PHENOMENON* (2008); john a. powell, *The Race Class Nexus: An Intersectional Perspective*, 25 LAW AND INEQUALITY 355 (2007).

<sup>3</sup>MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960s TO THE 1990s*, at 66–68 (1st ed. 1986) (racial formation as a function of the interaction between micro- and macrolevels of social relations).

about race and racism. Rather we see them as well defined and a limited set of discrete practices that remain constant over time, in spite of social changes.

Even as we use the term “racialization” to connote the fluid nature of the phenomenon we are describing and the broader context in which racial outcomes manifest and are understood, the use of this term will not automatically break us from our reflexive thinking and mental habits around race and racism. In this country the cultural understanding of racism is most closely associated with Jim Crow, and in the individual context it is imagined as the conduct of racist individuals consciously engaging in discriminatory activity directed at a particular victim. This is the point at which most Americans became self-conscious of “racism” as a problem.<sup>4</sup> Issues of race and racism came to be understood as an explicit set of laws and policies by institutional actors such as school boards or municipal governments, or explicit action on the parts of individuals.<sup>5</sup> This overly individualistic approach to race, racism, and racialization fits well with our overall individualistic approach to many life issues. Consequently issues of race are likely to be seen primarily as deliberate psychosocial events, instigated by institutions managed or directed by bad actors, or individual actors themselves.<sup>6</sup> Even though the Jim Crow system was a highly institutionalized and extensive formal regime

of racial oppression, a system that was only partly legal, in the popular imagination much of this system is reduced to the individual bigotry of bad state actors, whose policies can be simply purged or reversed in an election cycle or by excising the offending *de jure* rules. According to this individualistic point frame of analysis, if one does not engage in conscious acts of racism, or better still does not see race as a reality, then there can be no racism or racialization.<sup>7</sup>

At the same time we have more consciously embraced a public position of racial equalitarianism. Virtually all sectors of society eschew racism.<sup>8</sup> To call someone racist does not just impugn the legality of his or her actions, but also the morality of the person. To call someone racist today is seen as incendiary and a form of character assassination. The good American not only refuses to engage in conscious, racially motivated behavior; he also refuses to see *race* or call it out. In other words, he is race-blind.<sup>9</sup> This is a principle purportedly embraced in the dream of Dr. Martin Luther King Jr.<sup>10</sup> The good American can claim that, to the extent that others share his blindness, race does not matter.

The conservative mode of race blindness has been at times extremely callous. Consider the plurality’s opinion in *Parents Involved*.<sup>11</sup> From this perspective, racial hierarchy is legally irrelevant to the Con-

<sup>4</sup>AUDREY SMEDLEY, RACE IN NORTH AMERICA: ORIGIN AND EVOLUTION OF A WORLDVIEW 332 (3d ed. 2007).

<sup>5</sup>Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 29, 29-30 (Kimberlé Crenshaw et al. eds., 1996).

<sup>6</sup>Compare *Washington v. Davis*, 426 U.S. 229, 242 (1976) (establishing the Court’s discriminatory purpose doctrine, which requires the plaintiff to prove discriminatory intent), with Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STANFORD LAW REVIEW 317, 373-78 (1987) (critiquing the Supreme Court’s discriminatory purpose doctrine and proposing alternative test that would take unconscious racism into account).

<sup>7</sup>See *Washington v. Davis*, 426 U.S. at 245-46; *McCleskey v. Kemp*, 481 U.S. 279, 312-13 (1987).

<sup>8</sup>See generally GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (50th Anniversary ed. 1996) (discussing racial subordination and equalitarianism).

<sup>9</sup>Cf. *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738, 2787-88 (2007) (Thomas, J., concurring).

<sup>10</sup>Martin Luther King Jr., *I Have a Dream* (1963), in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 217, 219 (James M. Washington ed., 1986). The oft-cited line is “I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character” (*id.*) This line is used to suggest that, were King alive today, he would oppose policies such as affirmative action or race-conscious voluntary integration efforts.

<sup>11</sup>*Id.* at 2743-44.

stitutional principle of equal protection unless state-sponsored, conscious discrimination is directly implicated and is a proximate cause.<sup>12</sup> The conservative uses color blindness not just as a bar to engage the issue of race but also as a justification to preclude any intervention. It is a narrative that not only supports the racial status quo but also easily blames marginal groups for it.<sup>13</sup> Color-blind conservatives purport not to be concerned with racial conditions, but only with purity of mind with respect to intent. They see the evil to be guarded against as the noticing of race—the psychological state, not the condition of racial groups and the distribution of opportunity itself.<sup>14</sup> For example, Justice Thomas is not only indifferent to racial arrangement, practices or conditions; he believes that there is a real harm suffered when we see race, whether our intentions are benevolent or malign.<sup>15</sup>

This is not the position of the liberals that supported President Obama. The phrase

“postracialism” has been adopted to describe their race blindness.<sup>16</sup> Like their conservative cousins, they also believe that racialization is primarily a psychological event and that good Americans are beyond race.<sup>17</sup> Race does not matter—much.<sup>18</sup> Unlike color-blind conservatives, they are willing, under some conditions, to be race sensitive. But they also agree that a frontal attack on racial conditions is divisive.

In the wake of President Obama’s victory, the question of where we are with regard to race has surfaced again and again. The answer that both the conservative color-blind proponents and the liberal postracial proponents assert is that we are all but beyond race. According to this perspective, a few old-style racists may remain, especially in the South, but they, like many civil rights activists, are still stuck in the old paradigm from the past. Apparently neither of these groups has realized how much conscious racial attitudes have

<sup>12</sup>Some conservatives assert that “moving beyond race” is not just an aspiration or a description of where we ought to be but also the best means to get us there (see *id.* at 2742–43 (Roberts, C.J.); see also Chief Justice Roberts’s opinion in *Parents Involved*, at 2768 (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”)). Most legal jurists and conservatives trace their argument to Justice John M. Harlan’s dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”). While arguing for a color-blind constitution, Justice Harlan was not claiming that it would create an end to racial hierarchy (see *id.*). On the contrary, he believed that adherence to color blindness would support the continued dominance of the white race (*id.*) (“The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty.”). Although Chief Justice Roberts asserts that color blindness is the appropriate mechanism for addressing our racial hierarchy, this assertion is not consistent with empirical evidence. Not only has a race-blind stance failed to address racial conditions, but also it has failed to avoid the divisiveness that many conservatives are attempting to mitigate in the United States.

<sup>13</sup>See ABIGAIL THERNSTROM & STEPHAN THERNSTROM, NO EXCUSES: CLOSING THE RACIAL GAP IN LEARNING 76–78 (2003).

<sup>14</sup>MICHAEL K. BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 7–8 (2003). Conservatives are likely to explain existing racial arrangements as caused by a culture of poverty of nonwhites. But their use of the term is often used to justify making culture essential, and all but immutable.

<sup>15</sup>*Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part) (“The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.”). In *Parents Involved* Thomas and the plurality assert that only harms caused by intentional state action can be remedied by using race, with a very limited set of exceptions (*Parents Involved*, 127 S. Ct. at 2755–59). Justice Kennedy, while also expressing concern about racial classification, did not join them in this view (*id.* at 2791) (Kennedy, J., concurring in part and concurring in the judgment).

<sup>16</sup>President Obama specifically rejects the claim that we are in a postracial world and cites the continued racial disparities as proof that we are not in a postracial world: “When I hear commentators interpreting my speech to mean that we have arrived at a ‘postracial politics’ or that we already live in a color-blind society, I have to offer a word of caution. To say that we are one people is not to suggest that race no longer matters—that the fight for equality has been won, or that the problems that minorities face in this country today are largely self-inflicted . . . as much as I insist that things have gotten better, I am mindful of this truth as well: Better isn’t good enough” (BARACK OBAMA, AUDACITY OF HOPE 232–33 (2006)). Yet there is and will likely be stubborn persistence that we are indeed in a postracial world evidenced, most poignantly by President Obama’s success (see Debra J. Dickerson, *Class Is the New Black*, MOTHER JONES, Jan. –Feb. 2009, <http://bit.ly/1Rby>; Joel Kotkin, *The End of Upward Mobility?*, NEWSWEEK, Jan. 26, 2009, [www.newsweek.com/id/180041](http://www.newsweek.com/id/180041)).

<sup>17</sup>GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 142 (2002).

<sup>18</sup>This was the chant that Obama supporters made after he won the South Carolina primary, and it was not challenged by the campaign (Ginger Thompson, *Seeking Unity, Obama Feels Pull of Racial Divide*, NEW YORK TIMES, Feb. 12, 2008, at A1, <http://nyti.ms/aYSn1X>).

changed, even since Barack Obama was elected president. The postracialists see the civil rights activists and the explicit racists as locked in a struggle that has already been won. According to this view, it is not just a distraction—it is divisive. The alternative to this old, tired battle is postracialism.<sup>19</sup> The question of where we are with regard to race then becomes binary. We are either in a divisive space from the past where we continue to assert the dominance of conscious racism, or we are in a postracial world where race really does not matter to most Americans.

To postracialists, white Americans' support of President Obama is proof positive that we are in, or rapidly approaching, a new, postracial era. They argue that young people do not even see race and that only those persons over 40 are still likely to think in racial terms. All we must do is wait patiently, and postracialism will grow as the older generations pass on. They further assume that there is a direct connection between improved racial conscious attitudes, meaning race blindness and ending racial inequality.<sup>20</sup> While there is a certain intuitive logic to this assumption, it turns out that is often clearly wrong.

One way of expressing this racial blindness is to be neutral on the issue of race. There are several problems with this ap-

proach. The proponents of this position are apparently most interested in race blindness or neutrality in the design of policy and programs. Less attention is paid to the administration or implementation of policies and programs, and more important their effects. It is clear that something that is neutral in design is not necessarily neutral in its effect.<sup>21</sup> Yet the courts and the public are all but obsessed with the design, and even more narrowly with the intent of the design, but not the effects of these policies. If an otherwise neutral program is overlaid on practices that are themselves racially unfair, it is likely to not only leave such arrangements undisturbed but perpetuate and exacerbate them. Consider the fact that black veterans returning from World War II received federal monies to attend colleges that were highly segregated and uneven in quality.<sup>22</sup> Awarding federal college grants to all soldiers on a racially neutral basis would only exacerbate inequality in educational outcomes as whites receive a greater advantage for the same tax dollar. Fairness is not advanced by treating those who are situated differently as if they were the same.<sup>23</sup> For example, it would make little sense to provide the measured protections against hurricanes for Midwestern communities as coastal communities or to provide the

<sup>19</sup>Adolph L. Reed Jr. asserts that we should stop using race and deal with the real issue of class (see Adolph L. Reed Jr., *The Real Divide*, *PROGRESSIVE*, Nov. 2005, at 27, [http://progressive.org/mag\\_reed1105](http://progressive.org/mag_reed1105)). Some postracialists also use the changing demographic to support the claim that we are beyond race (see RICHARD J. PAYNE, *GETTING BEYOND RACE* 78 (1998); GWEN IFILL, *THE BREAKTHROUGH: POLITICS AND RACE IN THE AGE OF OBAMA* (2009)).

<sup>20</sup>As racial attitudes improved, there has been a move from expressed racial hostility to racial resentment (DONALD R. KINDER & LYNN M. SANDERS, *DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS* 92–93 (1996)). There was also a period where many young Americans rejected materialism. Many assumed that this would lead to a country where materialism would decline as the young became the leaders of the country. But the counterculture hippie movement did not develop into a less material America. Likewise, we should not assume that the hope we now have will naturally lead to racial nirvana.

<sup>21</sup>See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 *DEPAUL LAW REVIEW* 993 (1990), and Liza Weiman Hanks, Note, *Justice Souter: Defining "Substantive Neutrality" in an Age of Religious Politics*, 48 *STANFORD LAW REVIEW* 903 (1996), for a similar discussion of formal and substantive neutrality in the First Amendment Free Exercise Clause. Justice David Souter is critical of approaching neutrality from only a formal perspective (*id.* at 922).

<sup>22</sup>See IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE* 129–33 (2005).

<sup>23</sup>Aristotle, who gave us much of our understanding of equality, asserted that it is just to treat those who are situated similarly the same, but it would be unjust to treat those who are situated differently the same (see Maureen B. Cavanaugh, *Towards a New Equal Protection: Two Kinds of Equality*, 12 *LAW AND INEQUALITY* 381, 384 (1994)). Once stated, this seems obvious, yet we have difficulty even acknowledging that some are situated differently from others. Even when we are more attuned to the fact that differences matter, we are inclined to focus on a single factor, which causes us to misunderstand our situatedness. The debate over neutrality has a particular jurisprudential history. Herbert Wechsler argued that *Brown* was not rightly decided because it was not based on the neutrality principle (see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARVARD LAW REVIEW* 1 (1959)). According to Wechsler, even if segregation harmed blacks, legal neutrality required also considering the harm of integration and association for whites. This argument was rejected by other legal scholars such as Charles L. Black Jr., who asserted that the Fourteenth amendment and other Civil War Amendments were not meant to be neutral but embodied certain constitutional values (CHARLES L. BLACK JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* 24 (1997)). The Supreme Court has been moving toward the neutrality principle, effectively overturning *Brown* and changing the meaning of the Civil War Amendments (see John Powell & Stephen Menendian, *Little Rock and the Legacy of Dred Scott*, 52 *ST. LOUIS UNIVERSITY LAW JOURNAL* 1153 (2008)).

same degree of health resistance investment for diseases such as malaria where an outbreak is much less likely. But even the goal of race neutrality in the effect is too narrow to redress racial disadvantage. Even if the institutions where such resources will be used are themselves neutral, it may not be enough to aim for neutrality in effect if the beneficiaries of such efforts are situated differently. Equality of effect can produce very different outcomes depending on the needs of the beneficiaries.

With those considerations in mind, what are we to do with our existing racialized conditions and arrangements, from schools, to housing, to the criminal justice system? Will these issues be automatically addressed by the passing of time? Many conservatives say that the proper response—the only possible response—is to do nothing.<sup>24</sup> They argue that color blindness prohibits us from doing anything that would be either sensitive to race or require the use of racial classifications.<sup>25</sup> They wrongly assume as an article of faith that color blindness as a process is the way to achieve color-blind results. Other conservatives argue that we must

convince racially marginalized groups to adopt the proper cultural values so that they may take advantage of the new race-blind landscape. The opportunity is there; if Blacks and Latinos fail to take advantage of this new arrangement, it is their own fault. For the conservatives, it would be a moral and legal mistake to have the state intervene. The postracialists are more likely to support state intervention, but they are reluctant to do much unless it can be framed in a universal manner where an explicit consideration of race is largely off the table.<sup>26</sup> This has the apparent advantage of helping those who have been historically excluded while avoiding being race-specific, which is seen as divisive.<sup>27</sup>

There are a number of problems with this approach, which I will call false universalism. One concern is conceptual, another is empirical, and still a third is problematic from a legal or policy perspective. Given the constraint of space, I will focus primarily on the first two problems. Universal programs begin with a conception of what is universal based on background assumptions that are nonuniversal. Virtually all universal approaches are *de facto* targeted or particular.<sup>28</sup> The So-

<sup>24</sup>Compare RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 117–18 (1994) (class is determined by intelligence rather than racial or social advantages or disadvantages), with BROWN ET AL., *supra* note 14 (racism persists and organized racial advantage exists across many institutions in American society).

<sup>25</sup>See *City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 493–94 (1989); *Metro Broadcasting Incorporated v. Federal Communications Commission*, 497 U.S. 547 (1990) (O'Connor, J., dissenting); *Adarand Constructors Incorporated v. Peña*, 515 U.S. 200 (1995).

<sup>26</sup>See, e.g., WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE* (2d ed. 1980). Wilson has been one of the most influential and persistent advocates for a postracial universal approach. In his most recent book (WILLIAM JULIUS WILSON, *MORE THAN JUST RACE* (2009)) Wilson explicitly rejected his earlier position: “The question is not whether the policy should be race-neutral or universal; the question is whether the policy is framed to facilitate a frank discussion of the problems that ought to be addressed and to generate broad political support to alleviate them. So now my position has changed: in framing public policy we should not shy away from an explicit discussion of the specific issues of race ...” (*id.* at 141). Wilson argues for a frame that recognizes both the universal and the particular aspects of race. He also asserts that the discussion of poverty and race must put a structural approach not as the exclusive focus but certainly the primary focus. The shift in Wilson’s position is very significant and should give serious pause to liberals who shy away from race. It is still important to figure out how to talk about race and link it to a broader discussion.

<sup>27</sup>While President Obama expresses a preference for universal programs to address the issue of racialized disparities and some hesitance for race-specific programs, he also acknowledges the need for targeted programs. In particular, he asserts that a targeted focus will be needed for both “underclass” blacks and undocumented immigrants (see OBAMA, *supra* note 16). While the approach I am advocating here is in much agreement, there is a difference in scope. Programs should be universal in approach, but without being targeted the goal of fairness and inclusion will falter—not just for inner-city blacks and the undocumented but for many other racialized and nonracialized groups, such as rural groups, disabled groups, the elderly, etc. This is in part an empirical claim. Where untargeted universal approaches fall short, we should be willing to adjust. There is also a way to communicate this need that should be able to avoid most of the racial divisiveness.

<sup>28</sup>ROBERT C. LIEBERMAN, *SHIFTING THE COLOR LINE: RACE AND THE AMERICAN WELFARE STATE* 227–28 (2001). Lieberman argues that there are a number of ways a program that purports to be universal can in fact be particular. He focuses not just on the targeting but also on the administration and funding of a program. He sees social security as our best example of a truly universal program. But others have challenged even this claim (see, e.g., Alice O’Connor, *The “New Institutionalism” and the Racial Divide*, 29 *REVIEWS IN AMERICAN HISTORY* 111, 117–18 (2001)). If we look at not just social security itself but how it interacts with other systems, it is clearly not universal. Even President George W. Bush cynically noted that social security was not fair to blacks because they died earlier than whites (Michael Kranish, *Bush Argues His Social Security Plan Aids Blacks*, *BOSTON GLOBE*, Jan. 30, 2005, at A1).

cial Security Act, often described as the quintessential universal policy, was universal only insofar as the universal was a white, male, able-bodied worker.<sup>29</sup> In its early years, the elderly were excluded since they did not have a history of paying contributions into the system.<sup>30</sup> Under the cultural norms of the era, men were the primary wage earners, and women typically worked in the home. As a consequence of discriminatory patterns, they were often kept out of most areas of the labor force. Unpaid household labor and child-rearing responsibilities are not counted toward social security earnings. Even today women who take time off to raise children or select careers with more flexible working hours will earn less, on average, than their male counterparts and will therefore have lower social security benefits upon retirement. And because of exclusions of agricultural and domestic workers, exclusions built-in to appease Southern resistance to the Act, 65 percent of African Americans were denied its protections.<sup>31</sup>

The following question helps expose the conceptual problem: why is it divisive to focus on race-specific programs or talk about race?<sup>32</sup> The stock explanation is that race does not matter. But even if race does not matter, why is such an approach seen as divisive? The very intensity of racial feelings in our society belies the assertion that race does not matter. The energy and need for race not to matter to

whites in and of itself suggests that race does indeed matter. There is an assumption that racially targeted programs create white resentment because there is a sense that whites who are playing by the rules are having things taken from them and given to undeserving nonwhites who do not play by the same rules. This resentment is, apparently, not of the Jim Crow form. These whites are willing to accept any nonwhite who plays by the rules. What they object to is helping those they perceive as rule breakers. This has more promise for racial fairness but also turns out to be wanting.<sup>33</sup>

Consider some issues such as fair housing, school integration, or reform of the criminal justice system. Why should these efforts be controversial and divisive? George Lipsitz suggests that what is being challenged is not a material zero-sum policy but instead what he calls the “possessive investment in whiteness.”<sup>34</sup> The need to keep the racial “other” out of schools and neighborhoods and controlled by the criminal justice apparatus can make sense only if race does matter. What the overused resentment argument conceals is how concern for white resentment is employed to protect white prerogative and privilege.<sup>35</sup> But why would whites vote for Obama and still insist that schools, neighborhoods, and other opportunities continue to be racialized? Are they racist or not? I will return to this question below.

<sup>29</sup>Targeted policies and programs (poorhouses in the nineteenth century, mother’s pensions in 1910, the War on Poverty in the 1960s) are likely to be viewed through the prism of zero-sum politics. At a time of perceived scarcity and contracting government budgets, targeted policies may be viewed as favoring some constituent group rather than the public good. If the target group is historically disfavored or considered “undeserving,” targeted policies risk being labeled “preferences” for “special interests.” In order to avoid alienating voters, policies are often packaged for broad appeal (see THEDA SKOCPOL, SOCIAL POLICY IN THE UNITED STATES: FUTURE POSSIBILITIES IN HISTORICAL PERSPECTIVE 250–51 (1995)).

<sup>30</sup>See LIEBERMAN, *supra* note 28, at 34.

<sup>31</sup>See KATZNELSON, *supra* note 22, at 43.

<sup>32</sup>Many liberals are concerned that any targeted or particular program will not work because it will not maintain the necessary support (see Theda Skocpol, *Targeting Within Universalism: Politically Viable Policies to Combat Poverty in the United States*, in THE URBAN UNDERCLASS 411 (Christopher Jencks & Paul E. Peterson eds., 1990); WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED (1990)). They may be right to be skeptical of a targeted program, but this does not speak to the problems of false universalisms. A number of scholars who are skeptical of targeted programs have started to embrace a form of targeted universalism instead.

<sup>33</sup>There is much to suggest that racial resentment is not so neat (BROWN ET AL., *supra* note 14, at 55–56 (arguing that white opposition to affirmative action is based mostly on fear of losing white privileges)); see also Lawrence, *supra* note 6, at 323.

<sup>34</sup>GEORGE LIPSITZ, THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS (1998).

<sup>35</sup>*Id.* at 229–31; see also IAN HANLEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 131 (2006).

There is also an empirical problem with the false universal approach as well. The empirical issue is not one of design or administration but outcome. What is it that we are trying to achieve in our universal efforts? There is no single answer to this question. Some are trying to achieve racial blindness; others are trying to achieve racial justice or fairness.<sup>36</sup> While the two goals could work in tandem, in practice they are often in conflict.<sup>37</sup> Dona and Charles Hamilton look at many efforts to use universal programs.<sup>38</sup> They conclude that to the extent we are concerned with racial justice, for a number of reasons, virtually all of them fail to promote this outcome.<sup>39</sup> Ira Katznelson looked at some of the most popular universal programs coming out of the New Deal and World War II and concluded that these programs by and large benefited whites disproportionately.<sup>40</sup> While the programs may have still benefited nonwhites, they often exacerbated the disparities between whites and nonwhites. In many instances, universalism will not work to address the needs of marginalized racial and ethnic groups.

This is not just a problem with the New Deal programs; it is likely that most universal programs will exacerbate existing inequalities. Some universal programs were designed to benefit whites more than nonwhites, but let us consider programs where this was not the clear design. Defined as one of this country's greatest accomplishments, the Interstate Highway Act of 1956 used federal dollars to subsidize the creation of the suburbs. This was the largest public works project in American history at the time. It gave

impetus to waves of migrating middle- and upper-class families to abandon the central cities for the suburbs. At the same time, many downtown regions were surrounded or demolished by massive highway construction, and the revenue generated by these projects did not return to the communities that were losing their churches, schools, and homes. As one author put it, “[h]ighways made suburban housing available on one end while destroying urban housing on the other.”<sup>41</sup> The ensuing arrangement of racially isolated urban dwellers and equally racially isolated suburban residents, hastened by the white flight that followed *Brown v. Board of Education*'s integration mandate the same year, is a pattern we live with today. Simply put, ostensibly universal programs have no less potential to exacerbate inequality than to ameliorate it. Treating people who are situated differently as if they were the same can result in much greater inequities.

Consider also the Veterans Administration (VA) programs. These programs helped millions of Americans attend college, acquire homes, and start businesses. Veterans Administration mortgages paid for five million new homes.<sup>42</sup> It was the GI Bill and New Deal policies that made home ownership within the reach of the majority of Americans.<sup>43</sup> Prior to these policies, borrowers would be required to have a down payment of up to 50 percent and to retire the loan within five years. The new programs allowed for the borrower to put down 10 percent or less and retire the loan in thirty years. For the first time, it became cheaper to buy a home than to rent a home. Under

<sup>36</sup>DAVID R. ROEDIGER, *HOW RACE SURVIVED U.S. HISTORY* (2008).

<sup>37</sup>*Id.*

<sup>38</sup>DONA COOPER HAMILTON & CHARLES V. HAMILTON, *THE DUAL AGENDA* (1997).

<sup>39</sup>*Id.* at 236. The Hamiltons suggests that targeted universal programs were indeed pushed by civil rights groups but that racial resentment was so high that even these programs could not garner support (*id.* at 241). There is some work today that deals with symbolic racism and suggests whites are more willing to support some targeted universal programs. This might represent a meaningful shift in attitudes.

<sup>40</sup>KATZNELSON, *supra* note 22, at x.

<sup>41</sup>Kevin Douglas Kuswa, *Suburbification, Segregation, and the Consolidation of the Highway Machine*, 3 *JOURNAL OF LAW IN SOCIETY* 31, 47 (2002).

<sup>42</sup>KATZNELSON, *supra* note 22, at 115.

<sup>43</sup>*Id.* at 116.

these policies, from 1945 to 1954 the United States added thirteen million new homes.<sup>44</sup> Equally impressive were the educational benefits of VA programming. By 1950 the federal government spent more on schooling for veterans than on expenditures for the Marshall Plan and literally created a new middle class.<sup>45</sup> For the first time, millions of Americans acquired a college degree. These programs were race- and gender-neutral in their design. Yet, in practice, they increased disparity between Blacks and whites and between white men and white women.<sup>46</sup> In fact, there was no single greater instrument for widening the racial gap in postwar America. The GI Bill provided for local and state administration with congressional oversight, which was controlled by Southern congressmen.<sup>47</sup> As a result, Blacks were excluded, rejected, and discouraged from partaking in the benefits of a generous federal program.

This disparity was challenged by women in an important U.S. Supreme Court case, *Personnel Administrator of Massachusetts v. Feeney*.<sup>48</sup> In that case women were able to show that 98 percent of the benefit for some portions of this policy went to men.<sup>49</sup> The Court found there was no discrimination because there was no proof of any explicit conscious desire to exclude women.<sup>50</sup> The Court was narrowly focused on intentional design, not impact or results. That the program was for veterans, and that women were not likely to be veterans, was coincidental and not legally or morally significant. And while the disparities were not as stark, there were also a disproportionate number of white men who benefited from this pro-

gram. This universal program that helped create the middle class was insensitive to the conditions of women and non-white men. This is what Katznelson calls an affirmative action program for white men.<sup>51</sup> There are several reasons why the program worked out this way. One was that white men were disproportionately represented in the military. The reason for this was the racialization and sorting of benefits in other parts of our society. Among other things, there was an explicit discriminatory barrier for nonwhites trying to join the military. But there were also impediments from other nonmilitary institutions that impacted their ability to join the service. For example, the service had reading and writing requirements for enlistment. Given the state of black education, this disproportionately limited the number of Blacks who could join the military.<sup>52</sup>

Even the black men who did join the military did not receive benefits on parity with their white counterparts. As Amartya Sen notes, they were not able to utilize this benefit to the same extent as whites.<sup>53</sup> This was partly because in the area of education Blacks could use the educational benefits from the VA only in a limited number of poorly equipped historical black colleges. One of the major assumptions today is that if universal programs focus on an area where a marginalized group is overrepresented, such as poverty, then the benefit will disproportionately benefit the marginal group. This would allow race-blind universal policies to do race-sensitive work. This approach is favored not only by policymakers but also by the Supreme Court,

<sup>44</sup>*Id.*

<sup>45</sup>*Id.*

<sup>46</sup>*Id.* at 114–15; see also Theda Skocpol, *The G.I. Bill and U.S. Social Policy, Past and Future*, SOCIAL PHILOSOPHY AND POLICY, June 2007, at 95, 114.

<sup>47</sup>KATZNELSON, *supra* note 22, at 127.

<sup>48</sup>*Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

<sup>49</sup>*Id.* at 284.

<sup>50</sup>*Id.* at 279–81.

<sup>51</sup>KATZNELSON, *supra* note 22, at 112.

<sup>52</sup>*Id.* at 107.

<sup>53</sup>AMARTYA SEN, DEVELOPMENT AS FREEDOM 136 (1999).

which has limited the remedial efforts to those where the harms are most visible.<sup>54</sup> While the idea is intuitively appealing, in fact it is often wrong. A number of efforts to use income as a soft proxy for race simply do not deliver.<sup>55</sup> On closer examination the reason is clear.

As Gunnar Myrdal noted in 1944, poor Blacks and poor whites are not similarly situated.<sup>56</sup> Blacks suffer from cumulative causation or mutual reinforcing restraint.<sup>57</sup> Let us assume for simplicity that there are ten constraints reducing opportunity for Group A, and two of those constraints are reducing opportunity for Group B. If 50 percent of Group A is constrained by 1 and 2 and only 10 percent of Group B is constrained by 1 and 2, we might assume that since Group A is disproportionately constrained by 1 and 2, Group A would disproportionately benefit from the removal of Constraints 1 and 2. Suppose that the presence of any of the constraints is sufficient to deny opportunity. A universal policy that removed Constraints 1 and 2 would vastly increase the opportunity movement of Group B. It would not, however, change the conditions of Group A because there are still eight remaining constraints reducing opportunity for that group. Yet the failure of Group A to translate the policy into opportunity might be seen as a failure on the part of Group A, and not a failure of policy. What this false universalism fails to address is that groups of people are differently situated in relation to insti-

tutional and policy dynamics. If one only looks at one or two constraints, one is likely to assume inaccurately that groups who are in very different circumstances are in fact similar. The flaw in this false universalism is not overcome by anti-discrimination policies. One could argue that the disfavored group is not being discriminated against in a traditional sense. Instead their situatedness is the cause of the disadvantage.<sup>58</sup> It is important and appropriate to remove the institutional and situational constraints of Group A. This is the universal part of the effort. But it is equally important to remove the additional constraints that are experienced by Group B. This is the targeted part of the effort. Failure to do so in issues related to race will not only reproduce racialized disparities; it will also continue to support divisive racialized meaning and discourse.

Race was a central issue in the *Mt. Laurel* suit brought to address the needs of low-income home seekers.<sup>59</sup> For the sake of comity, the case was reframed as a case about class instead of race. It was assumed that because Blacks and Latinos were in greater need of affordable housing, policymakers could address the issue of race in a less divisive universal frame of class or socioeconomic status. The program proved successful in producing affordable housing. But it also increased the racial isolation of Blacks and further segregated them from opportunity.<sup>60</sup> On closer examination, it is clear why this

<sup>54</sup>See *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring); *City of Richmond*, 488 U.S. at 509–10.

<sup>55</sup>Sean F. Reardon et al., *Implications of Income-Based School Assignment Policies for Racial School Segregation*, 28 EDUCATIONAL EVALUATION AND POLICY ANALYSIS 49, 50 (stating that SES will not adequately racially integrate schools even where nonwhites are overrepresented).

<sup>56</sup>1 GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 70 (1944).

<sup>57</sup>*Id.* at 75–76.

<sup>58</sup>See Rebecca M. Blank, *Tracing the Economic Impact of Cumulative Discrimination*, AMERICAN ECONOMIC REVIEW, May 2005, at 99, 100 (labor economist's analysis of labor market discrimination controlling for background characteristics and educational preparation of workers ignores prior discrimination in education, housing, and health markets and way in which those earlier factors contribute to the more immediate question; racialized outcomes are the product of cumulative effects of discrimination "over time and across domains"). One may object to considering our situatedness since we are all situated differently. Which conditions should count or be considered for policy concerns? There are a couple of responses to this. One is that we are discussing group and not just individual differences. But, more important, it is critical in a democracy that we are attentive to how opportunity is distributed and for whom. While we cannot determine the outcome of such a discussion, it would be beneficial to have such a discussion. It would also be useful for the policymaker to deliberately consider our situatedness and its relevance when adopting policies.

<sup>59</sup>*Southern Burlington County NAACP v. Mount Laurel Township*, 336 A.2d 713, 717 (N.J. 1975).

<sup>60</sup>Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of Mount Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL LAW REVIEW 1268, 1302–5 (1997).

universal program worked to isolate nonwhites further. Nonwhites were not just constrained by the lack of affordable housing; they were also constrained by discrimination. In addition, their housing needs were different from many of their white counterparts. Because they had larger families, they could not use the one- and two-bedroom units built that would address the need of many of the whites. Even though both white and nonwhite groups need low-income housing, and both groups were low-income, they were not similarly situated as the court and policymaker assumed. Like the VA program and the New Deal, it increased the material and social distance between poor whites and poor nonwhites. The housing program failed to understand the importance of the situatedness of different groups in relation to institutional interactions and processes. To understand fully the importance of this situatedness, one must look at what the interaction of institutions does in creating and distributing opportunity benefits and burdens. The political philosopher Iris Young observed that the more complex society becomes, the more our relationships and opportunities will be mediated through institutional arrangements.<sup>61</sup> This is not just true in relationship to nonwhites but for all groups in society.

As we consider the importance of this insight, at a rudimentary level it is not particularly profound. Most of our modes of commerce, from the purchase of groceries to banking, have been depersonalized. Instead of buying produce from the farmer or taking a loan from the local banker, we mediate these exchanges through ATM machines and supermarkets. At a deeper level, we know that the neighborhood we live in may be more important than the house we live in.<sup>62</sup> We know that where we live will impact the schools our children go to, our safety, and our access to not just jobs but also people and both material and social wealth. A middle-income person living in a poor neighborhood is not similarly situated

to a middle-income person living in a middle-income neighborhood. The importance of institutional arrangements and the interactions within these structures for the distribution of opportunity in our society is only increasing.

Universal programs often operate on the unstated assumptions that are sensitive to the particular conditions of the more favored group. Thus the Social Security Act, a quintessentially universal program, began with a conception of a recipient who was a working, white male. The development of a policy or program with an ostensibly universal norm that favors or disfavors a particular group is likely to be an unconscious and unintentional process but no less harmful. When Hurricane Katrina struck New Orleans, there was a great deal of confusion. Were we not already in a largely color-blind society, where if race mattered at all, it mattered only very little? Why then were so many Blacks stranded? I received several calls from media outlets asking me if I thought President Bush was racist. It is not that we do not know that there is still persistent racial inequality in our society, but we have a story line that allows us to justify and explain this fact when it rudely intrudes into our otherwise public stance that race does not matter. We tell each other stories about the culture of poverty and the lack of personal and collective responsibility in racially marginal communities. We talk about segregation from opportunity in terms of choice, of people just wanting to live with their own. We become armchair sociologists, uninterested and unconcerned with the facts and even less aware of institutional arrangements and the work they do. What made Hurricane Katrina particularly difficult is that these stories of institutional racialization were less available. We never asked why Blacks in New Orleans are so segregated and so poor. We never asked how they came to be in harm's way. We never asked why the disinvestment in their communities and lives had been extended to those shameful levels.

<sup>61</sup>Iris Marion Young, *Inclusion and Democracy* 121–22 (2000).

<sup>62</sup>Jeanne Brooks-Gunn et al., *Do Neighborhoods Influence Child and Adolescent Development?*, 99 *AMERICAN JOURNAL OF SOCIOLOGY* 353 (1993); Tama Leventhal & Jeanne Brooks-Gunn, *Moving to Opportunity: An Experimental Study of the Neighborhood Effects on Mental Health*, 93 *AMERICAN JOURNAL OF PUBLIC HEALTH* 1576 (2003).

We never asked ourselves why a universal evacuation plan required cars when many Blacks were carless. We assumed. And if there was some unjustified racial play at work, we looked for the conscious racist.

The final problem for the postracial position is what I would call a legal and policy limitation. Once a race-blind position is adopted, it becomes difficult to justify race-sensitive or race-specific policies or laws. The color-blind proponents who oppose considering race at all are on firmer ground. If race is irrelevant, what is the justification legally or otherwise for using it? The conservative position, while concerned about the socially explosive consequence of using race, is not concerned about racial conditions. But the very assertion that the use of race is explosive belies their claim that race does not matter.<sup>63</sup> The conservative position would not only reject the use of race; it would also be very skeptical of race-sensitive policies.<sup>64</sup> Consider the issue of voluntary integration measures implemented by democratically elected school boards struggling to overcome legacies of residential separation.<sup>65</sup> The plurality makes the color-blind case in *Parents Involved*, arguing that, no matter how well intentioned, the Constitution absolutely forbids the use of racial classifications.<sup>66</sup> Furthermore, according to the plurality, this is the clear meaning of *Brown*.<sup>67</sup> Ac-

ording to the plurality, *Brown* was not about racial conditions or subordination but classification.<sup>68</sup> Fortunately this position is not the law at this point because Justice Kennedy, the tie-breaking vote, rejected the claim that the Constitution is color-blind.<sup>69</sup> But the postracial proponents have not stated a justification of when and why race should be considered in this postracial world.

Consider also how postracial advocates might argue for maintaining Section 5 of the Voting Rights Act of 1965 (VRA), which the Supreme Court has agreed to review. Overall the VRA prohibits voting practices or procedures that discriminate on the basis of race, color, or membership in one of the language-minority groups. Section 5 requires that certain state and local governments, mostly in the South, obtain permission, or “preclearance,” from the U.S. Department of Justice or a federal court before making changes that affect voting.<sup>70</sup> A Texas municipal utility district has challenged the application of this section to itself, arguing that Congress did not take sufficient account of more than four decades of progress toward racial equality, proven by the recent election of the nation’s first black president.<sup>71</sup> Does this historic moment mean that the central justification for the VRA has now dissipated? It might be easier to adopt a conservative approach and question the VRA in its entirety than attempt

<sup>63</sup>*Grutter*, 539 U.S. at 347–49 (Scalia, J., concurring in part and dissenting in part).

<sup>64</sup>*See id.*

<sup>65</sup>*Parents Involved*, 127 S. Ct. 2738. Of course, it is clear that there are some situations where race and racialization matter more than other situations. But our simplistic notion makes that difficult to see. We need help not only in seeing that race matters but also when and how. Race blindness is incapable of doing that work.

<sup>66</sup>*Id.* at 2765.

<sup>67</sup>*Id.* at 2767–68; “Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice” (*id.* at 2764 (quoting *City of Richmond*, 488 U.S. at 500)).

<sup>68</sup>*Id.*

<sup>69</sup>*Id.* at 2791–92 (Kennedy, J., concurring).

<sup>70</sup>National Voting Rights Act of 1965, 42 U.S.C.A. § 1973-1973aa-6 (2009); “The requirement applies to nine states—Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, and Texas and Virginia—and scores of counties and townships in other states that Congress found had a history of discrimination at the polls” (Liptak, *supra* note 1). The same reasoning that race does not matter would greatly change cases which were decided under the Thirteenth Amendment—such as *Jones v. Alfred H. Mayer Company*, 392 U.S. 409 (1968) and *Runyan v. McCrary*, 472 U.S. 160 (1976)—and which extend to private action claims denied by the Supreme Court under the Fourteenth Amendment.

<sup>71</sup>*Northwest Austin Municipal Utility District No. 1, v. Mukasey*, No. 06-1384 (D.D.C. May 30, 2008) (opinion withdrawn from bound volume because it has been amended).

to show that this is one of the instances in which race still matters. Perhaps the issue will be decided by Chief Justice Roberts, who opposed efforts to expand the voting rights law in 1982 as a young lawyer in the Reagan administration and who currently and clearly challenges governmental use of racial classifications.<sup>72</sup>

Even if postracial liberals can make an argument for maintaining the VRA, or addressing racial isolation in schools or neighborhoods, such an exercise is likely to be seen as inconsistent with the more fundamental position that race does not matter. Of course we could take a more nuanced position that race matters more under some circumstance and not others. And of course this is right, but it flies in the face of our attraction to simplistic answers and our eagerness to be done with race—a position that is markedly less concerned with extant racial conditions.

Today the country faces a housing and credit crisis that disproportionately impacts Blacks and Latinos.<sup>73</sup> But they remain largely invisible except for the occasional blaming of those communities for taking out loans they could not afford. We know that these communities have been undercapitalized since World War II, when affirmative action was white.<sup>74</sup> With little residential or commercial lending from mainstream banking institutions for decades, isolated communities of color were prey for high-cost credit institutions that face little competition.<sup>75</sup>

Things have indeed changed since World War II. We could not have had a Black president a decade ago, let alone in the

1940s. Conscious racial attitudes have greatly improved. But it would be wise for us to remember the euphoria after the *Brown v. Board of Education* decision, when many Americans thought that racialization and racism would be dead within ten years.

Today many pundits are asserting that racialization is or soon will be a thing of the past. Thomas Friedman has stated that the civil war is finally over and the North has won.<sup>76</sup> Others are asserting that the country is now going through a major realignment that will put an end to the Southern strategy of appealing to white resentment.<sup>77</sup> But the writers making these assertions have failed to take into account that only a few years ago most Americans had not even heard of the Southern strategy and that conservatives have been claiming for decades that we are beyond race.

The process of racialization has changed and is changing. We continue to have some old-style explicit racists, but their numbers are declining. Even though we talk about white and nonwhite attitudes, there is a range of attitudes and conditions reflected in each racialized group. What may be more interesting is that most of us carry conflicting racial attitudes within ourselves.<sup>78</sup> As President Obama accurately described, “[n]one of us—black, white, Latino, or Asian—is immune to the stereotypes that our culture continues to feed us, especially stereotypes about [Blacks].”<sup>79</sup> But it is a serious mistake to define racialization narrowly, only to then dismiss it. There

<sup>72</sup> Liptak, *supra* note 1, at A13.

<sup>73</sup> U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *UNEQUAL BURDEN: INCOME AND RACIAL DISPARITIES IN SUBPRIME LENDING IN AMERICA* (2000).

<sup>74</sup> See Powell, *supra* note 2, at 355; see generally KATZNELSON, *supra* note 22.

<sup>75</sup> Christy Rogers, Kirwan Institute for the Study of Race and Ethnicity, *Subprime Loans, Foreclosure, and the Credit Crisis: What Happened and Why?—a Primer* (2008), <http://tinyurl.com/bn5ln6>; see also Board of Governors of the Federal Reserve System, *Staff Analysis of the Relationship Between the CRA and the Subprime Crisis 8* (2008) (table demonstrating that only 6 percent of banking institutions within Community Reinvestment Act assessment area gave high-priced loans to lower-income individuals).

<sup>76</sup> Thomas L. Friedman, *Finishing Our Work*, *NEW YORK TIMES*, Nov. 5, 2008, at A35, <http://nyti.ms/aUP8cw>.

<sup>77</sup> See Adam Nossiter, *For South, A Waning Hold on National Politics*, *NEW YORK TIMES*, Nov. 10, 2008, at A1, <http://nyti.ms/ftt5>.

<sup>78</sup> DREW WESTEN, *THE POLITICAL BRAIN* 221 (2007).

<sup>79</sup> OBAMA, *supra* note 16, at 138.

are more possibilities than the Jim Crow racial practices of the 1950s and 1960s, the color-blind position, or postracialism. We are in a space where our old way of thinking about race does not serve us well and can easily lead us to misunderstand the opportunities and challenges that are before us.

There are two emerging sites for the practice of racialization today, and they are related. The first site is in the processes and practices of interinstitutional arrangement that continue to distribute racialized outcomes in part because of our different situatedness. The second site is ambivalence that unconsciously impacts our racial meaning and practices. The first is called structural racialization.<sup>80</sup> And the second is called implicit bias.<sup>81</sup> To start with the latter first, implicit-bias research suggests that most of us have implicit biases that can impact our behavior and understanding.<sup>82</sup> Although most of us are completely unaware of their influence on our subconscious, these biases affect how we perceive, interpret, and understand others' actions.<sup>83</sup> Because these attitudes—unrecognized on the conscious level but powerful at the subconscious level—influence choices and decisions, individual and institutional discrimination can occur even in the absence of blatant prejudice, ill will, or animus. This bias has been measured and documented in the Harvard Implicit Association Tests.<sup>84</sup> This does not mean that we are all secretly racist. It does suggest, however, that we are complex and conflicted and that this conflict can be organized to make either our biases more salient or our equalitarian aspiration more salient. The Southern strategy was designed to mobilize racial resentment and worked well from 1968 until

the election of President Obama. We can challenge the nefarious effort to make our biases more salient, but we cannot do so by being race-blind. As President Obama reminds us,

[i]f an internalization of antidiscrimination norms over the past three decades—not to mention basic decency—prevents most whites from consciously acting on [negative racial] stereotypes in their daily interactions with persons of other races, it's unrealistic to believe that these stereotypes don't have some cumulative impact on the often snap decisions of who's hired and who's promoted, on who's arrested and who's prosecuted, on how you feel about the customer who just walked into your store or about the demographics of your children's school.<sup>85</sup>

To address structural racialization, we must understand the work that our institutions and policies are in fact doing, not what we want or hope for them to do. In order to understand this, we must take seriously our group situatedness. I have already argued that a universal approach is likely to be ineffective. Others argue that targeted racial efforts are likely to fail in part because of the continuing racial resentment that targeted efforts create and preserve. For a sincere policymaker, this suggests a difficult choice. Either avoid race and leave much of the existing racial practices and arrangements undisturbed, or deal with race and excite racial resentment that will undermine the policies and the electability of the politician. But there are powerful and effective alternatives to these two choices.

<sup>80</sup>See Andrew Grant-Thomas & John A. Powell, *Structural Racism and Colorlines in the United States*, in *Twenty-First Century Color Lines: Multiracial Change in Contemporary America* 119 (Andrew Grant-Thomas & Gary Orfield eds., 2009); John A. Powell, *Structural Racism: Building upon the Insights of John Calmore*, 86 *NORTH CAROLINA LAW REVIEW* 791 (2008).

<sup>81</sup>ASPEN INSTITUTE ROUNDTABLE ON COMMUNITY CHANGE, *STRUCTURAL RACISM AND COMMUNITY BUILDING* 11 (2004); Project Implicit, <http://www.projectimplicit.net/generalinfo.php> (last visited Jan. 9, 2009).

<sup>82</sup>Project Implicit, *supra* note 81.

<sup>83</sup>Because of these implicit biases, identical actions or opinions of two people of different social groups often are interpreted differently, depending upon the group to which each belongs; see also Jerry Kang, *Trojan Horses of Race*, 118 *HARVARD LAW REVIEW* 1489 (2005).

<sup>84</sup>Project Implicit, *supra* note 81.

<sup>85</sup>OBAMA, *supra* note 16, at 139.

One alternative is to learn a great deal about how to talk about race in ways that are not divisive. The second alternative is to make sure our institutions do the work we want them to do. This is done by adopting strategies that are both targeted and universal. A targeted universal strategy is one that is inclusive of the needs of both the dominant and the marginal groups but pays particular attention to the situation of the marginal group. For example, if the goal were to open up housing opportunity for low-income whites and nonwhites, one would look at the different constraints for each group. Targeted universalism rejects a blanket universal which is likely to be indifferent to the reality that different groups are situated differently relative to the institutions and resources of society. It also rejects the claim of formal equality that would treat all people the same as a way of denying difference. Any proposal would be evaluated by the outcome, not just the intent. While the effort would be universal for the poor, it would be especially sensitive to the most marginal groups.

Because institutions interact and impact the effects of each other, it will also be necessary to be mindful of the interaction of institutions. This is an approach that we have adopted at the Kirwan Institute under the rubric of opportunity communities or opportunity structures. This was also one of the key issues in *Parents Involved*, where a majority of the Court acknowledged the interactions of institutions, and softened its requirement of conscious racial infraction to support race-sensitive policy intervention.<sup>86</sup>

At the same time, targeted universalism sees marginalized populations in American society as the canary in the coal mine, to borrow a metaphor developed by Lani Guinier and Gerald Torres.<sup>87</sup> It recognizes

that problems faced by particular segments of American society are problems that could spill over into the lives of everyone, just as the lower Ninth Ward was not the only part of New Orleans to suffer in the wake of Katrina. Likewise, the subprime credit crisis did not end in poor, urban communities but has spread far beyond and has been felt throughout the global economy.

In a time of economic crisis, the dangers are never greater than a commitment to racial fairness will be jettisoned to expedience or ostensibly universal concerns. This is a mistake. As President Obama wrote, “nowhere is it ordained that history moves in a straight line, and during difficult economic times it is possible that the imperatives of racial equality get shunted aside.”<sup>88</sup> As the experience of the New Deal initiatives illustrate, even universal policies, if not well designed, can exacerbate rather than ameliorate racial conditions. Many of the current proposals for spending the infrastructure funds look to divert much of the funding to existing road proposals across states.<sup>89</sup> This broad and regressive use of the infrastructure stimulus funds may produce jobs in the short term, but it is just a replication of existing models of public investment which have produced inequitable and unsustainable growth. What are truly needed are strategic investments which produce economic and institutional development at a broad scale while strategically transforming communities and cities.

The manifold crisis we now face has produced a rare opportunity to transform our present institutional and regulatory arrangements. The policies we promulgate will set the course of development for generations to come just as the post-New Deal and post-World War II arrangements laid the groundwork for genera-

<sup>86</sup>*Parents Involved*, 127 S. Ct. at 2791–92 (Kennedy, J., concurring). In a complex real world setting, policies have unintended consequences and resistance that thwart policy intentions. It is critical that targeted universal policies set clear goals and use mechanisms to closely monitor and correct for negative feedback loops and other resistance to achieve those goals.

<sup>87</sup>LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY* (2002).

<sup>88</sup>OBAMA, *supra* note 16, at 146.

<sup>89</sup>Most of the infrastructure funds may go to routine fixes (see Alec MacGillis & Michael D. Shear, *Stimulus Package to First Pay for Routine Repairs*, WASHINGTON POST, Dec. 14, 2008, at A01, [http://www.washingtonpost.com/wp-dyn/content/article/2008/12/13/AR2008121301819\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/12/13/AR2008121301819_pf.html)).

tions that followed them. This window of opportunity will remain open only for so long. In this moment we can work toward building a more equitable future, or repeat the mistakes of the past. If we fail at this, we will be trying to correct our missteps for years to come.

Targeting within universalism is also the approach supported by President Obama in his book *The Audacity of Hope*. He writes: “We should support programs to eliminate existing health disparities between minorities and whites . . . , but a plan for universal health-care coverage would do more to eliminate health disparities between whites and minorities than any race-specific programs we might design.”<sup>90</sup> Although President Obama expresses support for race-targeted policies designed to “eliminate” certain disparities, he prefers universal policies which are race-sensitive in pursuit of the same end as “good politics” that is less likely to arouse the flames of racial resentment.

There will still be an issue of possible racial resentment, even with targeted universal programs. Racial resentment does not simply represent racist attitudes; it also represents both ambivalence and confusion. A more sophisticated understanding of implicit bias and how the mind works will be important in learning how to effectively communicate in a way that makes our sense of fairness and connectedness salient. That this kind of communication is even possible suggests that we have made progress. But it should not be overstated. Ambivalence on matters of race is a deep part of U.S. history. Thomas Jefferson hated slavery and worried about what it was doing to the country and the psyche of whites.<sup>91</sup> He had a long-term, intimate relationship with a slave and yet was one of the major architects of the ideology of racial inferiority.<sup>92</sup> Lincoln supported the end of slavery but did

not believe that the races could ever live together. Our very concept of freedom is bound up with the concept of slavery and unfreedom.<sup>93</sup>

In analyzing how Obama’s ascendancy to the presidency has changed and will change the process of racialization, we should congratulate ourselves. But we should also be deliberate and thoughtful about how to make the most of this important opportunity. The popular media and culture like the idea of postracialism and color blindness. Some have suggested that we are entering into a new era of color-blind racial dominance.<sup>94</sup> Some have suggested that we are moving from a white and nonwhite society to a black and nonblack society where educated and professional Blacks will be embraced as nonblack, while those who are considered black will be extremely marginalized.<sup>95</sup> The struggle for racial justice and fairness will need to focus on two related areas—the two emerging sites of racialization that are discussed above.

First, we must develop a more sophisticated understanding of the working of the human mind, building on the research on neurolinguistics and implicit bias. Second, we must focus on the institutional arrangements and policy interactions and the work that they do with sensitivity to our situatedness. Where we are, and where we are going, in terms of racial justice is in flux and fluid. We are changing both as a matter of demographics but more important as a matter of our history and practices. Where this journey and process will lead us is not predetermined. As we develop as a pluralistic nation, we must acknowledge that the racial binary is not a useful way to think about our journey. The language of race and racism does not adequately express all that needs to be conveyed in our discussion of race. We need a new way to talk

<sup>90</sup>OBAMA, *supra* note 16, at 247.

<sup>91</sup>WINTHROP JORDAN, *THE WHITE MAN’S BURDEN* (1974).

<sup>92</sup>*Id.* at 170.

<sup>93</sup>See ORLANDO PATTERSON, *FREEDOM: FREEDOM IN THE MAKING OF WESTERN CULTURE* 10 (1991).

<sup>94</sup>See Ian Haney Lopez, *Colorblind White Dominance* 18 (2006) (unpublished article) (on file with john a. powell).

<sup>95</sup>GEORGE YANCEY, *WHO IS WHITE? LATINOS, ASIANS, AND THE NEW BLACK/NON-BLACK DIVIDE* 149–64 (2003).

about race and racialization and a meaningful way to analyze racialization. A universal approach for inclusion requires sensitivity to our particular conditions.<sup>96</sup> The approach focuses on outcomes, not just inputs or design. Our communication strategy must be tailored to garner support for policies that are sensitive to the particular but broadened to encompass universal concerns.

In the final analysis, we should not allow this important milestone to blind us to the important work that needs to be

done. We are not there, wherever there is. Race matters, but not in the same way as it did forty years ago. And maybe most important—what we do and what our institutions do matters. If we do not change our institutions to reflect our expressed attitude, our attitudes will change to reflect our institutions.

#### ***Author's Acknowledgments***

*I would like to thank Jessica Larson and Stephen Menendian for their research assistance.*

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<sup>96</sup>This approach is not uniquely race-sensitive. All groups and people at times will be situated in ways that are important to consider if they are to be full members of our society (see generally John A. Powell, *The Needs of Members in a Legitimate Democratic State*, 44 SANTA CLARA LAW REVIEW 969 (2004)).



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