

Howard A. Glickstein Civil Rights and Public Policy Lecture

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ERASE Racism, Inc.

Touro Law Center

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Race Still Matters

I am honored to be here this evening to deliver this lecture on such an important topic and in the presence of a civil rights giant, Dean Emeritus Howard A. Glickstein. It is so fitting that this lecture carries Howard's name and as such recognizes his legacy during the historic civil rights movement of the 1950s and 1960s. Howard served as a Staff Attorney with the Department of Justice, Civil Rights Division, Appeals and Research Section, where he helped draft the Civil Rights Act of 1964 and the Voting Rights Act of 1965. In addition, he was General Counsel, and later Staff Director, of the U.S. Commission on Civil Rights.

Howard is one of those individuals who possesses a strong moral core, the determination to put his values into action and the strategic acumen to be effective. Howard, and many others like him, transformed the lives of southern blacks in particular, all African Americans, and in fact, gave new meaning to freedom, democracy and justice in the United States of America. That historic civil rights movement laid the foundation for many subsequent struggles for equality, here and abroad.

Regrettably, promoting civil rights for blacks and Latinos is not a popular topic today. Let me share a few reasons why. There have been ballot initiatives prohibiting the use of affirmative action in public employment, contracting, and public education.¹ United States Supreme Court

¹ American Civil Rights Initiative has been responsible for providing the content, funding, and strategies for California's Proposition 209 (1996); Washington State Initiative 200 (1998); Michigan's Proposition 2 (2006), all of which eliminated affirmative action in public education, public contracting, and public employment. In 2008, there were attempts to place similar ballot initiatives on five state ballots to coincide with the 2008 presidential election: in Arizona, Colorado, Missouri, Nebraska, and Oklahoma. The initiative was withdrawn or failed to meet ballot requirements in Arizona, Missouri, and Oklahoma. Voters had a chance to vote in Colorado and Nebraska. For the first time, voters defeated a state-wide, anti-affirmative action initiative in Colorado. It passed overwhelmingly in Nebraska, the state in which every county voted for Republican presidential candidate John McCain and Sarah Palin, as vice president. See, The Kirwan Institute for the Study of Race and Ethnicity, *Anti-Affirmative Action Ballot Initiatives*, December 2008, http://kirwaninstitute.osu.edu/publications/anti-affirmative_action_ballot_initiatives_report.pdf. Apart from the initiative process, in November 1999, then Governor Jeb Bush announced a ban on the use of affirmative action in college admissions and some government contracts through the program "One Florida." http://www.sptimes.com/2007/03/18/Business/Jeb_Bush_on_One_Flori.shtml. In November 2010, Arizona's

decisions are rolling back affirmative action in employment,² striking down voluntary public school desegregation efforts,³ and limiting college and graduate school admissions policies designed to promote racial diversity.⁴ There are even challenges to the Voting Rights Act, perhaps the most powerful piece of civil rights legislation ever.⁵ Attempts to fashion new public policies that address the structural impediments to racial equity appear slim to non-existent today because a plurality of the U.S. Supreme Court justices believe that government may not use race for purposes of inclusion just as it couldn't use race for purposes of exclusion in the past. This ahistorical use of "colorblindness," a phrase once used by NAACP attorneys Robert Carter and Thurgood Marshall in their *Brown* arguments, has been appropriated by opponents to affirmative action and now at least four members of the Supreme Court.⁶

Most recently, civil rights activists cheered the temporary judicial reprieves of the implementation of new voter ID laws⁷ designed to suppress voting in the November 2012

voters passed Proposition 107, a ban on affirmative action that was placed on the ballot by the state Senate, thus avoiding the messy signature requirements of an ordinary ballot initiative.

<http://www.insidehighered.com/news/2010/11/03/arizona>.

² *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), minority set-aside program overturned; *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), strict scrutiny required to test viability of affirmative action remedies in federal programs; *Ricci v. DeStefano*, 557 U.S. ___, 129 S. Ct. 2658, 2671 (2009) firefighters exam results could not be ignored based on proportion of minority test takers who did not qualify.

³ *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

⁴ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003). On October 10, 2012, the U. S. Supreme Court heard oral argument in *Fisher v. Texas* 11-345; the issue presented for review is whether the holistic use of race in college admissions found constitutional in *Gratz* and *Grutter* is still permissible. A decision is expected before the close of this term.

⁵ The Voting Rights Act of 1965 (42 U.S.C. §§ 1973–1973aa-6), reauthorized in 2006 for another twenty-five years (42 U.S.C. § 1973 et seq.), now has Section 5 under review by the U.S. Supreme Court in *Shelby County v. Holder* 12-96. During oral argument on February 27, 2013, Associate Justice Scalia called Section 5 a "racial entitlement," signaling his dislike for the oversight of elections in specific southern states.

<http://tpmdc.talkingpointsmemo.com/2013/02/scalia-attacks-congress-for-renewing-voting-rights-act.php>.

⁶ *Parents Involved*, supra n. 3, p. 747: "As counsel who appeared before this Court for the plaintiffs in *Brown* put it: "We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." Tr. of Oral Arg. in *Brown I*, O.T. 1952, No. 8, p. 7 (Robert L. Carter, Dec. 9, 1952). There is no ambiguity in that statement. And it was that position that prevailed in this Court, which emphasized in its remedial opinion that what was "[a]t stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable *on a nondiscriminatory basis*," and what was required was "determining admission to the public schools *on a nonracial basis*." *Brown II*, supra, at 300–301, 75 S.Ct. 753 (emphasis added). What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?"

⁷ In time for the 2008 Presidential election, the U.S. Supreme Court validated Indiana's statute requiring that voters show government-issued ID at the polls: *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). These voter ID laws have been promoted by American Legislative Exchange Council (ALEC) and adopted in Republican-controlled state legislatures. According to the Brennan Center for Justice, 25 laws and 2 executive actions passed in 19 states since the beginning of 2011, all of which restrict access to the ballot with sometimes

election by segments of the population that historically vote Democratic. These laws targeted blacks, whom Republicans assume would more likely not possess the designated official identification and would have difficulty obtaining ID in time for the Presidential election. Clearly, those opposing these laws understood the racial intention of these new restrictive state voting laws. Attorney General Eric Holder acknowledged this understanding in his July 10, 2012 speech before the NAACP: "...nationally, only 8% of white voting age citizens, while 25% of African-American voting age citizens, lack a government-issued photo ID."⁸

Everyone knows who would benefit by strict enforcement of voter ID laws.⁹

It is a sad commentary, however, that we civil rights activists are reduced to cheering the outcomes of a few court decisions slowing the pace of "retreat" from the 1950s and '60s civil rights march toward racial equality.¹⁰

So what is wrong? At the height of the civil rights movement, blacks and whites, Jews and Christians and, in fact, a large number of US citizens embraced the dismantling of Jim Crow segregation in the southern states. For many, it was a moral cause that had an impact not only on the rights of African Americans. Changing the course of segregation was viewed as a requirement in order for the nation to live up to its self-perception of "...one nation, under God,... with liberty and justice for all."¹¹ Plus, as Americans, we were uncomfortable under the international spotlight, calling into question our self-perception of superiority. It is ironic that those who are the most vocal in their appreciation of American "exceptionalism" are those who would diminish the size and authority of the government and diminish the very protections of

onerous voter registration and identification requirements. <http://www.brennancenter.org/analysis/election-2012-voting-laws-roundup>. However, as of October 11, 2012, court suits in eleven states have blocked or blunted the impact of these attempts at voter suppression through registration, vote ID, or early voting restrictions in Arizona, Texas, Montana, Minnesota, Missouri, Wisconsin, Michigan, Ohio, Pennsylvania, New Hampshire, Maine, North Carolina, South Carolina, and Florida.

⁸ <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120710.html> On October 15, 2012, the U.S. Supreme Court accepted certiorari in the Arizona voter ID case *Arizona v. The Inter-Tribal Council of Arizona, Inc.* 12-71 in which Arizona demanded that prospective voters produce proof of American citizenship in order to register to vote, a condition not included in the National Voter Registration Act. Oral argument, held on March 18, 2013, included sharp disagreement between Associate Justices Scalia and Sotomayor.

<http://www.scotusblog.com/2013/02/comments-on-the-oral-argument-in-shelby-county-v-holder/>.

⁹ Pennsylvania State House Republican leader Mike Turzai publically admitted that the purpose in pressing for passage of that state's voter ID law was to ensure a Romney victory in November 2012.

<http://www.youtube.com/watch?v=EuOT1bRYdK8>. A federal court issued an injunction against the Pennsylvania law, and Pennsylvania went solidly for Obama on November 6. <http://www.reuters.com/article/2012/10/02/us-usa-campaign-pennsylvania-idUSBRE8900LA20121002>.

¹⁰ These eleven court challenges to restrictive voting state statutes were joined by United States Attorney General Eric Holder on July 10, 2012, who likened new restrictive voter ID laws to a "poll tax" in remarks after a speech before the NAACP.

http://tpmmuckraker.talkingpointsmemo.com/2012/07/eric_holder_calls_voter_id_poll_taxes.php;

<http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120710.html>.

¹¹ Pledge of Allegiance, <http://www.ushistory.org/documents/pledge.htm>.

economic, social, and political rights that have helped make this country's growth so unique and its idealistic commitment to freedoms so attractive to admirers from around the world.

In 2012, the most visible progress advancing equal rights for "minority groups" has focused on "gay rights" rather than equal access to opportunity for blacks and Latinos. Don't get me wrong, I personally applaud the multi-leveled efforts of civil rights groups to fight against the voter ID laws in the courts¹² and the advances in equal rights for gay and lesbian individuals who wish to marry, including New York's Marriage Equality Act of 2011.¹³ Like Dr. King, I believe "The arc of the moral universe is long, but it bends toward justice."¹⁴

I am not going to offer a comprehensive analysis of the similarities and differences between the African American struggle for civil rights and the LGBT fight for marriage equality. I will, however, share a couple of observations related to the 1960s and 2013, and how the politics of who is "deserving" and "undeserving" might be affecting how the public views current civil rights efforts. [Let me say from the outset that, in the interest of time, these observations are over-simplified.]

It was much easier for people like Dr. Martin Luther King, Jr. and other civil rights leaders during that period to make a direct connection between the oppression of slavery (which at the time was almost universally discredited as wrong, at least by those in the North) and Jim Crow segregation, a vestige of slavery that embraced the pseudo-science of racial hierarchy with its "God-given" right to oppress Negroes and keep them in their proper place.¹⁵ Nightly television images reinforced the narrative of church-going blacks not asking for much, just to be treated like human beings, yet suffering under the cruelty of police and other establishment figures operating within a legal structure that was blatantly immoral. The change in national opinion did not happen overnight. Remember that there was no universal outcry to the rampant

¹² For example, the South Carolina challenge was brought by League of Women Voters of South Carolina, with The Brennan Center for Justice and Lawyers' Committee for Civil Rights Under Law representing the League, and joined by South Carolina State Conference of the NAACP and the Family Unit Inc. The Texas challenge was brought by the Texas State Conference of the NAACP and the Mexican American Legislative Caucus of the Texas House of Representatives, along with Brennan Center for Justice, Lawyers' Committee for Civil Rights Under Law, lawyers from the NAACP, Dechert LLP, and the Law Office of Jose Garza. The Pennsylvania challenge was brought by the League of Women Voters of Pennsylvania, NAACP State Conference, and Homeless Advocacy Project, represented by the ACLU. The purge of voter lists in Florida was stopped by a suit brought by the National Congress for Puerto Rican Rights and the Florida Immigration Coalition, Fair Elections Legal Network (FELN), along with the Advancement Project, LatinoJustice PRLDEF, and Project Vote. The U.S. Department of Justice joined in that suit.

¹³ On June 24, 2012, New York State became the seventh jurisdiction to legalize same-sex marriage when Governor Andrew Cuomo signed the New York State Marriage Equality Act. The fight was won through coordinated efforts by local affiliates and national organizations, including: Freedom to Marry, New Yorkers United for Marriage, Empire State Pride Agenda, Human Rights Campaign, Lambda Legal, and the New York Log Cabin Republicans.

¹⁴ Martin Luther King, "It's a Dark Day in our Nation," Sermon at the Ebenezer Baptist Church, Apr. 30, 1967.

¹⁵ See, ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION* (2010).

lynching of blacks, with lynchings still being recorded as late as 1964.¹⁶ Between 1882 and 1964, 3,445 African Americans were lynched, mostly in the South; whites were occasionally lynched, too, although less frequently once Jim Crow took hold.¹⁷

Even though northern liberal whites clearly recognized blacks as being different from themselves, the southern segregationists were so egregious in their behavior that many people of good will finally sympathized with the Negroes and wanted to support their cause. The Negroes were “deserving” of their care and support. They did nothing to deserve the treatment they were receiving and disparities, such as in public school education and achievement, could readily be traced to racial segregation, which intentionally maintained separate and unequal school curriculum, facilities, staffing and resources. They were urged to be sympathetic to the plight of blacks by white religious leaders from Christian and Jewish denominations who saw continued segregation as a moral issue. It should be noted, however, that the lack of racial integration and the existence of racial disparities in the north would more likely elicit a charitable response of helping those less fortunate but not a demand for structural changes to structural problems.¹⁸

Television, too, helped make the case that the brutality of Southern racial politics was indeed shameful.¹⁹ Jim Crow laws were legal, structural impediments that intentionally denied southern blacks access to numerous opportunities which therefore demanded legal, structural, intentional solutions. The northern version of racial discrimination received short shrift in the media and in the minds of northern whites.²⁰

Fast forward to 2012 and we see a very different situation and a very different narrative.

Point 1: The general public and civic and political leaders, on the whole, reject the argument that the disparities between whites and blacks and whites and Latinos have anything to do with structural impediments. Even a plurality of justices on the U.S. Supreme Court refuse to acknowledge that anything other than intentional discrimination can be legally addressed

¹⁶ University of Missouri, Kansas City has compiled lynching figures by state, race, and year.

<http://law2.umkc.edu/faculty/projects/ftrials/shipp/lynchingyear.html>.

¹⁷ *Ibid.*

¹⁸ When the first school cases were brought challenging northern segregation, the U.S. Supreme Court curtailed remedies by creating the distinction between de jure, or intentional, legally sanctioned segregation which warranted judicial intervention, and de facto, or unintentional or social segregation that occurred “naturally” through alleged choice rather than government action. De facto segregation does not trigger judicial remedies. Thus, there could be no inter-district busing between urban and suburban schools to integrate rather than desegregate northern schools without a showing of intentional illegal government action intending to keep the races apart. *Milliken v. Bradley*, 418 U.S. 717 (1974). See, Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN.L.REV. 1049 (1978).

¹⁹ The Civil Rights Movement and Television, Museum of Broadcast Communications.

<http://www.museum.tv/eotvsection.php?entrycode=civilrights>.

²⁰ See, WILKERSON, *supra* note 14.

through government action.²¹ Why can't they pull themselves up by their boot-straps? is the familiar refrain.

Point 2: Nightly TV news reinforces the idea that blacks and Latinos are responsible for their own fate. Most news reports that have anything to do with race are overwhelmingly about crimes, gang violence, and present African Americans and Latinos as victims of their self-imposed poverty. These accused victims or witnesses to crimes are seen as poor and "other" and, in the case of Latinos, their "illegal" status in the U.S. blocks any conversation about civil rights for Hispanics. The local "show me your papers" statutes,²² most notably enacted in Arizona and Alabama, open the doors for local law enforcement personnel to demand identification of any Hispanic-looking individual walking in the wrong place at the wrong time.

Missing, almost completely, are news stories that provide an historical context and a structural analysis to the problems facing blacks and Latinos, which brings me to Point 3.

Point 3: The problem is really economic, not racial, is the common refrain. Look at all of the wealthy black and Latino high achievers in entertainment, sports, even some corporate leaders and, of course, don't forget the President of the United States is black.

Most recently, the New York Times reported that income inequality can adversely affect any economic recovery. One percent of earners accumulated 93% of income gains made during the first full year of the economic upswing after the 2008 economic crisis. However, in reporting on income disparities, there was not a single mention of race or the intersectionality of race and poverty.²³ And now looking back at the November 2012 election, we can unfortunately say that neither candidate discussed poverty and race or the increasing relationship between poverty and race in any of the three Presidential debates, ignoring the impact of the 2008 economic

²¹ See, MICHAEL AVERY & DANIELLE MCLAUGHLIN, *THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS* (Vanderbilt University Press, April 15, 2013).

²² See 2010 Ariz. Sess. Laws 113. Support Our Law Enforcement and Safe Neighborhoods Act—better known as S.B. 1070 (2010). Campbell, Kristina M., *The Road to S.B. 1070: How Arizona Became Ground Zero for the Immigrants' Rights Movement and the Continuing Struggle for Latino Civil Rights in America* (August 17, 2011). Harvard Latino Law Review, Vol. 14, Spring 2011. Available at SSRN: <http://ssrn.com/abstract=1911435>. See 2011 Ala. Code 31-13-13, Beason-Hammon Alabama Taxpayer and Citizen Protection Act, better known as HB 56. Three suits were filed to enjoin this most stringent immigration law, which included a prohibition against issuing driver's licenses and a requirement that public schools collect information on children's immigration status. Portions of the law were enjoined, and a petition for writ of certiorari is pending before the U.S. Supreme Court on some provisions of the law. *Alabama v. United States*.

²³ Annie Lowry, *Income inequality might take its toll on growth*, N.Y. TIMES, Oct. 16, 2012 http://www.nytimes.com/2012/10/17/business/economy/income-inequality-may-take-toll-on-growth.html?pagewanted=all&_r=0

meltdown.²⁴ Nor was there any discussion from either candidate about the increasing racial isolation found in American metropolitan areas, including the suburbs.²⁵

As our news gets broken into sound bites, the media avoids complicated issues like disparate impact, the need to intentionally plan and implement fair housing policies, and post-*Brown v. Board of Education* inter-district school segregation. We know that especially here on Long Island that 124 school districts, which mirror the racially segregated communities they serve, produce separate and unequal public school education for blacks and Latinos as compared to whites and Asians in 2013. It's easier on Long Island to talk about income segregation rather than racial segregation; however in reality we remain much more segregated by race than by income with segregation between blacks and whites being the most severe.²⁶

The standard narrative explains the cause for underachievement among these racial groups as the students themselves and their parents. The parents don't value education and their kids don't apply themselves. This is a much more comprehensible sound bite than describing a complex cause and effect relationship between segregation and underachievement for media, government officials, and the general voting public. Furthermore, a new narrative explains that public school education is itself the problem. The story goes: Unionized teachers are overpaid and deliver poor instruction. This narrative is particularly helpful for those who wish to dismantle public school education and replace it with profit-making charter schools or voucher programs.²⁷

Turning now to gay rights, the successful push for marriage equality in New York was certainly aided by a confluence of political factors, but I believe there was an important shift in the last several years in the narrative about gays and whether or not they were "deserving."

²⁴ Thomas Shapiro, Tatjana Meschede & Sam Osoro, "The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide," Institute on Assets & Social Policy, Brandeis University, Research and Policy Brief, Feb. 2013 <http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf>. Tracing the same households over a twenty-five year period, the wealth gap between blacks and whites tripled from \$85,000 in 1984 to \$236,500 in 2009.

²⁵ Richard Fry and Paul Taylor, "The Rise of Racial Segregation by Income, Pew Research Center, <http://www.pewsocialtrends.org/2012/08/01/the-rise-of-residential-segregation-by-income/1/>. Here on Long Island, despite increased diversity, racial isolation, especially among Hispanics, is rising.

²⁶ ERASE Racism, an internal analysis of tract level data from the 2010 Census and the 2009 American Community Survey using the dissimilarity index with 0 as total integration and 100 as total segregation: black and white segregation (69), Hispanic and white segregation (49), Asian and white segregation (38), low income and high income segregation (30), medium income and high income segregation (23), low income and medium income segregation (17)

²⁷ The 2012 Republican National Party Platform states: School choice – whether through charter schools, open enrollment requests, college lab schools, virtual schools, career and technical education programs, vouchers, or tax credits – is important for all children, especially for families with children trapped in failing schools. Getting those youngsters into decent learning environments and helping them to realize their full potential is the greatest civil rights challenge of our time. http://www.gop.com/2012-republican-platform_Renewing/#Item13.

Historically, gays and lesbians were viewed by many as “the other.” They were fundamentally different from so-called “normal” Americans and therefore many heterosexuals did not sympathize with their cause. My observation regarding the fight for the marriage equality law is that prominent and important heterosexuals embraced the idea that gays were not really “outsiders”; they are born into almost every family; they are even the sons and daughters of powerful Wall Street tycoons, a former Vice President of the United States, and now even a U.S. Senator.²⁸ Gays and lesbians are someone in your extended family. In addition, many of the proponents of same sex marriage are successful financially and, most importantly, the gays and lesbians among these prominent and important heterosexuals are white.²⁹

In other words, they are “deserving.” It is only fair that they should be able to marry whomever they want. Besides, granting this request would not cost others anything. Actually, some of the support for same-sex marriage included estimates of just how much money would be brought into New York once couples here could marry. The Independent Economic Conference projected that same-sex unions would generate about \$284 million in additional wedding revenue and tourism and put another \$27 million in taxes and license fees into New York State’s coffers over the next three years.³⁰ The status quo will be largely untouched; there are no demands to redistribute wealth or increase taxes, no call for changes to school district lines; if they move into your neighborhoods, it’s because they have the money and good jobs and so, “get over it.” Yes, there might be some cost associated with same-sex marriage: inheritance rights would decrease government revenues and permitting survivor benefits might take some

²⁸ Vice President Dick Cheney acknowledged that his daughter was a lesbian and after leaving office in 2009, openly supported same sex marriage. His daughter married and had a child. <http://www.newsmax.com/Newsfront/Mary-Cheney-lesbian-marriage/2012/06/23/id/443234>. Senator Rob Portman (R-Ohio) announced that he changed his stance on same sex marriage after the 2012 election although his son had come out to him and his wife two years previously. http://www.huffingtonpost.com/2013/03/15/rob-portman-gay-marriage_n_2881805.html.

²⁹ Gays and lesbians are found among all racial and ethnic groups, although freer in some to be “out.” There is a pervasive myth that gays and lesbians are wealthy or at least have above-average incomes, but that is just a myth. Brad Sears and Lee Badgett, *Beyond Stereotypes: Poverty in the LGBT Community*, Tides Foundation, Momentum <http://williamsinstitute.law.ucla.edu/headlines/beyond-stereotypes-poverty-in-the-lgbt-community/> In twenty-five states, same-sex couples are denied by law any government-conferred benefits that would keep these families out of poverty when calamity hits, such as health insurance, workers’ compensation awards, child support, Social Security benefits, inheritance, and wrongful death awards. Other states permit some benefits and not others, requiring families to patch together a safety net. Of course, the federal Defense of Marriage Act (DOMA) prohibits federal benefits, such as Social Security or survivor benefits to gay and lesbian couples. Catherine E. Smith, *Equal Protection for Children of Same-Sex Parents*, forthcoming *Washington University Law Review*, April 9, 2012, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2037519.

³⁰ Lauren Streib, *The Billion-Dollar Gay-Wedding Boost*, *The Daily Beast*, June 28, 2011, <http://www.thedailybeast.com/articles/2011/06/28/the-billion-dollar-gay-wedding-boost.html>. A year later, those economic benefits were touted by New York City Mayor Mike Bloomberg, a supporter of same-sex marriage. On July 24, 2012, it was announced that same sex-marriages in New York City had generated an estimated \$259 million in economic impact and \$16 million in City revenues. <http://www.mikebloomberg.com/index.cfm?objectId=B9BB6B4E-C29C-7CA2-F1D74B44ADE35CC4>

additional Social Security, but overall, our system of financial advantage benefiting whites would remain intact.³¹

This is the stereotype and this was the narrative that allowed the powerful and elected officials to embrace the notion of permitting homosexuals to marry. I state again, that this analysis does not minimize the systematic and immoral discrimination of members of the LGBT community or the fearsome steady drumbeat from some sectors of conservative religious denominations, which believe that gay relationships of any kind (married or not) is a sin and an abomination. Nor does it minimize the skillful, strategic organizing on the part of the leaders in this fight to get this legislation passed in the State of New York.

I said at the start that this comparison reflected an over-simplified analysis. Nonetheless, I think the point is made. Questions of access to opportunity, self-determination, and the right not to be discriminated against for blacks and Latinos remain a heavy lift in today's climate. Fundamentally, they are portrayed as and considered "undeserving" by elected officials, civic leaders and the average white citizen. Addressing racial inequities through affirmative action and voluntary accommodations has been redefined in the 21st century as offering special treatment to those who don't deserve it at the expense of innocent whites. This is the underlying ideology of reverse discrimination cases which has found its way into dominant culture and perceptions.³² A recent survey found that far fewer whites and Hispanics strongly disagree that "racism is by and large a thing of the past"—34 and 32 percent—whereas African Americans strongly believe that racism is here and as virulent as ever—58 percent.³³ However,

³¹ United States v. Windsor 12-307 is currently before the U.S. Supreme Court in which the federal Defense of Marriage Act (DOMA) is being challenged under the equal protection clause. It is a companion case to Hollingsworth v. Perry 12-144 in which California's Proposition 8 is also being challenged

³² The first reverse discrimination cases were brought on behalf of men, represented by the ACLU's Women's Rights Project headed by now Associate Justice Ruth Bader Ginsburg. The strategy was to do away with gender classifications that had previously been labeled "benign" or protective of women. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontero v. Richardson*, 411 U.S. 677, 682 (1973) (plurality opinion); *Kahn v. Shevin*, 416 U.S. 351 (1974). On the same day as *Kahn* was argued before the United States Supreme Court, *DeFunis v. Odegaard*, 416 U.S. 312 (1974) was also heard. *DeFunis* was the first reverse race discrimination case to arrive at the Court, but was dismissed as moot because the plaintiff had been admitted to University of Washington School of Law and was about to finish law school. See, Rosalie Berger Levinson, *Gender-Based Affirmative Action and Reverse Gender Bias: Beyond Gratz, Parents Involved, and Ricci*, 34 Harv.J. Law & Gender 1, 5-9 (2011). The reverse race discrimination cases began reaching the Supreme Court in the late 1970s with *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976) (employment); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (medical school admissions); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (minority set-aside program); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (law school admissions); *Gratz v. Bollinger*, 539 U.S. 244 (2003). (college admissions).

³³ *Harper's Index*, HARPER'S MAGAZINE, Apr. 2013, p. 15.

a recent Washington Post-ABC News survey found that 58% of Americans now support same sex marriage, including 81% of the 18-29 year olds questioned.³⁴

Although there are white Hispanics who enjoy the advantages of being white, the skin color of blacks and of brown Hispanics prevents them from being included within that feeling that they are “family” and therefore deserving of our caring and support. Even with increasing numbers of inter-racial relationships and marriages, blacks and Latinos as a group are fundamentally “different” or “the other”; the ones “let in” are the exceptions: mostly celebrities, athletes, artists, and actors.

Given this reality, how does one enact civil rights public policies in the 21st century that advance equal opportunity and equal access to such unequivocal basic rights as quality public school education and decent, safe housing for blacks and Latinos in a neighborhood of their choosing?

First, one cannot minimize the pervasive success of the leaders of the Republican Party nationally and certain conservative religious leaders and their organizations in creating a new narrative about the U.S. heading in the wrong direction.³⁵ There is an urgent call to reverse at any cost everything that liberals or progressives have stood for, including dismantling the gains of the civil rights movement, like the bold-faced efforts to disenfranchise black voters.

The traditional approach to developing public policy is to identify issues and problems and then develop the policy solutions to the problems identified. Some policy experts have gone about their work by first establishing a paradigm or broad vision of what society should look like for all of its inhabitants (humans and, for some, all life on earth) and then think about the specific policies that will produce the end goal. Others are less focused on a world view and instead, perhaps more pragmatically, target their efforts narrowly, looking to solve one specific problem at a time without seeing the interconnectedness among problems.

In my opinion, if we don’t know where we are going and why, we will likely never get there. So we do need a vision of where we want to go. I want our society to reflect the diversity of this nation. That is my vision: where race and ethnicity will not be determinative of one’s place in the economic, social, or political order. How we get there requires a structural analysis, because any attempt to stop re-segregation and to promote an integrated public life requires

³⁴ Gay marriage support hits new high in Post-ABC News poll, March 18, 2013, <http://www.washingtonpost.com/blogs/the-fix/wp/2013/03/18/gay-marriage-support-hits-new-high-in-post-abc-poll/>.

³⁵ Kevin Phillips, the architect of the Republican Party’s “southern strategy” admitted that the very basis of the strategy was to optimize racial hostility among working class white ethnic voters and African Americans who now saw hope in the 1964 Civil Rights Act and 1965 Voting Rights Act. James Boyd, *Nixon’s Southern Strategy: It’s All in the Charts*, N.Y.TIMES, May 17, 1970, <http://www.nytimes.com/packages/html/books/phillips-southern.pdf>. The red state-blue state maps tracking the 2012 Presidential election demonstrated how effective the strategy has been in luring white southern Democrats to the Republican rolls.

structural change. Furthermore, where we want to go needs to reflect structural alternatives to seemingly intractable problems like housing discrimination and racially segregated schools, like those on Long Island that do not offer blacks and Latinos an opportunity to access the highest performing schools where whites are attending. The New York State Department of Education statistics report that on Long Island, 65% of black and 61% of Hispanic children attend the lowest performing schools as compared to 13% of white students and 10% of Asian students.

If our vision only addresses how individuals treat other individuals and does not recognize the power of institutions to maintain the status quo, our efforts will fall far short.

As an example, under No Child Left Behind and now Race to the Top, our prescription for addressing the achievement gap in Long Island schools is: keep the segregated schools unchanged and give the black and Latino students a new school building or equipment, give them some tutors via a special program administered by a nonprofit organization (for a year or two), even give them a little extra money via New York State funding . But don't under any circumstances utilize the one proven strategy to increase the academic achievement of blacks in the U.S.: school and classroom integration, giving blacks and Latinos access to the same high performing educational environment and rigorous curriculum as whites by allowing access to the same schools and classrooms as the white students.³⁶

I also believe that while we work on the longer-term structural changes, we need to identify opportunities where an immediate strategy can both make a difference and move us toward our longer-term structural alternative. The U.S. narrative about our success, even as a young nation, was that we caught up with older European counterparts and surpassed them in economic development in large part because of the system of public education, which was largely for whites. Now that the population of our public schools increasingly includes more blacks and Latinos, mirroring global demographic changes, this is not the time to dismantle our public school system. This is not the time to replace public education with a fragmented patchwork of private schools with little government oversight and even less community investment and control. These highly visible, yet unsuccessful interim strategies that help dismantle the public schools, such as the promotion of charter schools, will not help us to reach our long-term vision or ensure that children of color can be productive in our future economy.³⁷

We need institutions to help guide this work. Institutions that both nurture our preferred values, collect the evidence that proves the discrimination and disparate impact, and

³⁶ Dennis J. Condrón, Daniel Tope, Christina R. Steidl & Kendralin J. Freeman, *Racial Segregation and the Black/White Achievement Gap, 1992-2009*, 54 *The Sociological Quarterly* 130-157 (2013).

³⁷ See, for example, Center for Research on Education Outcomes (CREDO), *Multiple Choice: Charter School Performance in 16 States*, Stanford University 2009. A longitudinal study showed that 17% of charter schools outperformed public schools, however, nearly half showed no difference, and 37% performed considerably below public schools. http://credo.stanford.edu/reports/MULTIPLE_CHOICE_CREDO.pdf.

institutions that analyze specific power relationships, government and social structures that warrant changes. We need to envision the alternative structures (laws, policies, frameworks and institutions) that support greater racial equity, and we also need the external narrative that can change the hearts and minds of decision-makers and the general public.

Too often there are those who think we just need a different discourse based on the facts and those who think, "Enough talking, let's just push through policy changes that we need through direct action," or whatever is needed. Both of these groups would probably agree that they also need to map out a strategy for change that takes into account political realities. Even if they are both interested in structural changes, which some social justice activists may not be, they may skip two additional important components of the policy change strategy: 1) figuring out exactly how existing institutions can support the values underpinning the change we want, i.e., systematically considering power dynamics in our democracy; and 2) creating a narrative that is easy to understand, that ties into familiar values and constructs that ordinary people and thought-leaders and decision-makers can buy into. The narrative will need to re-legitimize the role of government, re-affirm the call for well-meaning people of all races to take a stand for racial equity, and reconstruct who we are as "Americans" and re-state the values we hold collectively.

Lawyers played a pivotal role throughout the civil rights movement of the 1950s and '60s, which pushed through sweeping, societal changes to enfranchise disenfranchised blacks.³⁸ There are many lessons to learn from the successes during that time period. Clearly, the ability of lawyers to use the rule of law in support of greater equity is priceless. Unfortunately, the rule of law is now, once again, being used to protect racial inequity and cement in place structural impediments that deny racial groups, which are perceived as undeserving, access to opportunity. I would suggest that civil rights lawyers revisit the demand for equal rights and the principle that separate is not equal, especially when it comes to public school education.³⁹

Bayard Rustin was one civil rights leader who talked about transition from protests to political power. He cautioned that by destroying Jim Crow we would not in fact gain equality. He suggested that the post-Jim Crow era would be even more challenging than the legal battles under Jim Crow.⁴⁰ I believe that was a profound analysis, especially given that even today, structural racism is not seen by many otherwise intelligent individuals.

³⁸ John Payton, *The Myth of Our Post-Racial Society*, in *VULNERABLE POPULATIONS AND TRANSFORMATIVE LAW TEACHING: A CRITICAL READER* (Golden Gate University School of Law & Society of American Law Teachers ed., 2010).

³⁹ Gary Orfield, John Kucsera, Genevieve Siegel-Hawley, *E Pluribus...Separation: Deepening Double Segregation for More Students* (2012) <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students>.

⁴⁰ Bayard Rustin, *Negro Revolution in 1965*, Santa Barbara, California, 1964, <http://americanradioworks.publicradio.org/features/blackspeech/brustin.html>.

There were strong, organized, trained voices of dissent then, but our voices are more muted today. There were clear, often coherent visions of freedom and equality then, but our visions, when we have them are frequently fragmented and blurrier today. There was thoughtful, strategic leadership then, which sometimes made mistakes, but, on the whole, was on the money and fearless; today, there are more demagogues than leaders, and we have clearly not coalesced into a fearsome force for change.

I conclude my remarks with a hope and a challenge to everyone here. We can do this. We can in fact re-energize a movement for racial equity. We can do it on Long Island, and we can do it today. It will not be easy, but I hope you will join the fight. If you are looking for a place to join with others, I invite you to explore ERASE Racism. But this is not about a personal plug; this is about a challenge for each of us to find a path that works for you in concert with others. Here is my charge: Remember that structural change is needed, not just charity. Remember to look at the racial impact, the racial disparities, the racial outcomes from policies, practices and behaviors, not just whether someone intends to discriminate or whether some policy, practice or behavior is intended to produce disparities or disproportionalities or block access to opportunities or create or maintain separate institutions. If you remember my charge to you this evening, it can help guide what you do to advance the civil rights movement and how you prioritize your work.

I will end with a quote from Dr. Martin Luther King, Jr. from remarks he gave on December 5, 1955 at the Holt Street Baptist Church, Montgomery, Alabama. To set the stage, this was a mass meeting with 3-4,000 people in attendance to act on resolutions related to continuing the Montgomery bus boycott. On December 1st, Rosa Parks had been arrested for refusing to get up from her seat in the “white section” of the bus when instructed to do so by the driver.

Yes, I know, this is a very different situation tonight, but here are Dr. King’s words:

“We are here this evening for serious business. We are here in a general sense because first and foremost we are American citizens, and we are determined to apply our citizenship to the fullness of its means. We are here because of our love for democracy, because of our deep-seated belief that democracy transformed from thin paper to thick action is the greatest form of government on earth.”⁴¹

Good evening and thank you.

⁴¹ Dr. Martin Luther King, Jr., *The Montgomery Bus Boycott Speech*, Dec. 5, 1955, <http://www.blackpast.org/?q=1955-martin-luther-king-jr-montgomery-bus-boycott>.