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# Why America Still Needs Affirmative Action

by Jonathan K. Stubbs

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*The best proof that we needed and still need affirmative action was that the segregationists were and still are resisting desegregation. If there were no authoritative pressure segregationists would never change their discriminatory practices.*

—Oliver W. Hill<sup>1</sup>

Affirmative action has gotten a bad rap. Many people think of affirmative action as race-based policies that favor unqualified persons because of the color of their skin.<sup>2</sup> Resentments and misunderstandings flow from such perceptions in part because race remains America's most inflammatory unfinished business.

To ignite a spirited, thoughtful discussion as well as practical action regarding affirmative action, this article briefly discusses what constitutes affirmative action; evaluates why affirmative action programs that consider race, gender, and class remain necessary; and offers some thoughts regarding when affirmative action should end.

## What is affirmative action?

Affirmative action entails policies designed to ensure that each person has the resources available to achieve his or her maximum potential; evidence of such potential is fairly evaluated; and valuable societal goods such as jobs, education, housing, and financial credit are made available to qualified individuals in a more representative fashion.<sup>3</sup>

An example illustrates the problem: Imagine two candidates for admission to a premier state university. One attends an urban high school of six hundred students with only two honors level courses, a small library with seven working computers, one classroom with twenty-six computers that a teacher can use if she reserves the room a day in advance, and an antiquated science lab. Fewer than 20 percent of the graduating seniors receive post-secondary education such as college or advanced vocational training.<sup>4</sup>

In contrast, suppose the second student attends a nearby suburban high school. That school offers more than twenty honors and advance placement classes, provides each student with her own laptop computer, features a modern science lab, and sends more than 80 percent of the graduating seniors to college.

Now assume that both students have A-minus grade point averages and take the same college admissions tests. If the inner-city student scores 1100 on the Scholastic Aptitude Test and the suburban student scores 1200, which student is more

qualified? Do we look solely at classroom performance and use the test scores as "tie breakers"? Alternatively, do we also consider a combination of factors, including the educational resources available to each individual? In other words, do we evaluate what each person did with what she had?

Admission based primarily on the numbers asks us to enter a world of make-believe. In fantasy land, we pretend that each student had the same opportunities to excel. We know that to be an illusion. In the real world, many urban and rural schools do not have the material and human resources to place their students on an equal playing field with wealthier suburban schools. State-of-the-art computer and science labs, small classes that provide individualized instruction, modern vocational training facilities, and challenging advanced academic courses are expensive and require well-trained teachers. The coal miner's daughter or factory worker's son might have the potential to discover an avian flu vaccine, but we will never know because a numbers-based admissions deck is stacked against the economically disadvantaged and favors materially wealthier children.

Evaluating potential requires some prophecy. How else can you know how well a person who is admitted to a college or hired for employment will do until the person has a chance to perform?<sup>5</sup> A system more attuned to individually assessing how effectively a person used available resources makes sense.

Many persons have little problem with affirmative action plans for persons on the lower economic rungs of society.<sup>6</sup> Yet such affirmative action supporters rebel when someone mentions the proverbial eight-hundred-pound gorilla: consideration of gender or the color of a person's skin. Opponents of race- and gender-based affirmative action assert that we are all human. True. And the Human Genome Project has told us that at the molecular level, all humans are 99.9 percent the same.<sup>7</sup> True, too.

But let's be real. If you took a brief look at American history and at our contemporary society, you would not know how similar we are. An abbreviated recapitulation of our history, and contemporary situation helps illustrate the reality of past and present discrimination, and reinforces why race and gender must still be considered in remedying such discrimination.

## A Thumbnail History and Some Major Contemporary Challenges

In 1857 in the infamous *Dred Scott* case, Chief Justice Taney summarized the first 250 years of American race relations as follows:

They [Negroes] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race.<sup>8</sup>

Following the Civil War, the Thirteenth and Fourteenth amendments abolished slavery, acknowledged that blacks were citizens, and sought to protect blacks from southern legislatures that attempted (through “Black Codes”) to re-enslave blacks by prohibiting them from owning property, serving on juries, moving without restriction, making contracts, and freely choosing vocations.<sup>9</sup> The Fifteenth Amendment recognized black men’s right to vote.

### Voting

The Supreme Court interpreted these constitutional amendments in such a stingy manner that state laws were found consistent with the equal protection clause, even though the laws required racial segregation and prevented women from voting or practicing law.<sup>10</sup> The Court’s interpretation of the Reconstruction amendments made the legal status of blacks and women after the Civil War not much different than their status before it.<sup>11</sup>

Moreover, from the 1880s through the first decade of the twentieth century, political, business, and religious leaders espoused white supremacy. For example, during the Virginia Constitutional Convention of 1901–1902, then-state senator Carter Glass stated:

Discrimination! Why that is what we propose; that exactly is why this Convention was elected — to discriminate to the very extremity of permissible action ... with a view to the elimination of every Negro voter who could be gotten rid of, legally, without materially impairing the numerical strength of the white electorate.<sup>12</sup>

In fact, within one hundred days of the promulgation of the new constitution, more than 125,000 of the 147,000 African American voters in Virginia were purged from the voting rolls.<sup>13</sup> When the poll tax became effective in 1903, many poor white males lost their voting rights, and the small remnant of black voting strength was reduced even further.<sup>14</sup>

After making ample provision for disenfranchising black voters and ensuring segregation in public education and transportation, Virginia’s political elite refused to allow the electorate to vote upon the new state constitution. Following the precedent of other oligarchies in Mississippi, South Carolina, North

Carolina, and Louisiana, Virginia’s constitutional framers merely proclaimed the constitution as being in effect.<sup>15</sup>

In *Jones v. Montague*,<sup>16</sup> African American plaintiffs, represented by John S. Wise — a former Confederate Army officer — challenged the newly decreed Virginia state constitution. Plaintiffs alleged that state officials had conspired to deprive plaintiffs of their rights under the U.S. Constitution. The U.S. Supreme Court concluded that, because the U.S. House of Representatives was the judge of its members’ qualifications and had seated the persons from Virginia who claimed to have been elected under the newly proclaimed state constitution, the Court could not intervene.<sup>17</sup> The Court shirked its duty to address the egregious deprivation of constitutional rights that flowed from massive election fraud and racial discrimination in the electoral process.

Until passage of the Nineteenth Amendment in 1920, many states excluded all women from voting.<sup>18</sup> The poll tax was used to disenfranchise poor and less-knowledgeable voters. It survived until 1966, when the U.S. Supreme Court found the Virginia poll tax unconstitutional in *Harper v. Virginia Board of Elections*.<sup>19</sup> The legacy of a race- and gender-based political system is obvious: today, most of state governors — as well as state and federal legislators and all of America’s presidents — have been white males.

### Housing

During the Great Depression, the federal government created a national program that required loan underwriters to promote housing segregation. For example, to make loans, the Federal Housing Administration (FHA) directed lenders to use color-coded residential neighborhood maps. Neighborhoods were graded A (green), B (blue), C (yellow), and D (red). Upper-class, all-white neighborhoods typically received A grades, and communities with blacks, immigrants, and Jews frequently received Cs and Ds.<sup>20</sup>

Oliver W. Hill referred to the U.S. government’s master plan for national housing segregation as replete with “gimmicks that were used to maintain and guarantee segregated communities.”<sup>21</sup> Prominent social scientists have pointed out the pernicious and effective nature of such “gimmicks”:

One infamous housing development of the period — Levittown, New York — provides a classic illustration of the way blacks missed out on this asset accumulating opportunity. Levittown was built on a mass scale, and housing there was eminently affordable, thanks to the FHA’s ... accessible financing, yet as late as 1960 “not a single one of the Long Island Levittown’s 82,000 residents was black.”<sup>22</sup>

Not long after the Court’s decision in *Brown v. Board of Education*, the federal government began implementing a national transportation program. A prominent feature of the new highway system was easy travel for white persons seeking

homes in government-funded, lily-white suburbs.<sup>23</sup> Accordingly, segregated suburbs like Levittown are not surprising.

Today, federal, state, and local governments continue to channel taxpayer money to affluent, nearly all-white neighborhoods and schools created using the FHA's planning blueprints dating from the 1930s. In *San Antonio v. Rodriguez*, the U.S. Supreme Court exacerbated gross disparities in educational opportunities by ruling the Constitution does not recognize that individuals have a right to an education.<sup>24</sup> The Court also stated that wealth is not a "suspect class" that would require the state to furnish compelling justification for policies that discriminate against poor children.<sup>25</sup> Thus the Court upheld Texas's school financing system, even though the system made it impossible for poor children to have resources equivalent to those of their wealthy counterparts.<sup>26</sup> In the Seattle and Louisville schools decisions,<sup>27</sup> the United States Supreme Court ruled recently that the school systems of those two jurisdictions attributed too much weight to race in attempting to voluntarily desegregate. The majority myopically overlooked continuing governmental subsidy of tried, true, and effective housing development schemes designed to maintain racial and class segregation. With *Rodriguez*, the recent school cases ensure perpetuation of a divided nation by race and material wealth.

Former Senator Edward W. Brooke III of Massachusetts—one of two living members of the Kerner Commission, the popular name of the National Advisory Commission on Civil Disorders appointed in 1968 by President Lyndon B. Johnson—recently pointed out that the commission report implicated the federal government in establishing and maintaining the ghettos that predictably exploded forty years ago.<sup>28</sup> Unless steps are taken to create jobs, better housing, high quality schools, and affordable health care and day care, it is quite conceivable that America's cities may erupt again.

A 2004 Pew Hispanic Center Report points out that, on average, whites are eleven times wealthier than Hispanics and sixteen times wealthier than blacks.<sup>29</sup> Much of the wealth differential is attributable to differences in home ownership rates that flow from the government's segregated housing and racially discriminatory loan programs.<sup>30</sup> To make matters worse, the government is similarly implicated in its relationships with lenders that make subprime loans to people of color with credit scores that merit conventional loans, especially when the subprime loans help keep the borrowers bottled up in segregated communities.<sup>31</sup> In August 2008, the United States Census Bureau reported that the median income of African Americans was 62 percent of that of whites, and for Hispanics the median income was 70 percent of whites.<sup>32</sup> Census Bureau reports indicate that in 1968 the median family income for black families was 60 percent of white families—a 2 per cent increase over forty years.<sup>33</sup>

### Education

After World War II, black GIs such as Oliver Hill and his law partner, Samuel W. Tucker—who had risked their lives to "make the world safe for democracy"—confronted the bitter

reality that the doors of segregated colleges and universities in many states remained shut to them. Under the GI Bill of 1944, those same doors opened widely to welcome returning white GIs<sup>34</sup> such as former President George H.W. Bush, who could attend any college in the United States.<sup>35</sup> With taxpayer money and legally entrenched racial quotas, the paths of white GIs—mostly men—were smoothed. For example, even in elite schools that were nominally opened to black GIs, unofficial quotas kept the population of black students and other outcasts, such as Jews, at token levels.<sup>36</sup>

Moreover, women were denied admission to many colleges and universities—particularly as undergraduates. One year before World War II ended, Pauli Murray, a pioneering African American woman lawyer who later became an Episcopal priest, received widespread attention when she applied for admission to the all-male Harvard Law School in an unsuccessful struggle to overcome "Jane Crow"—gender discrimination.<sup>37</sup> Through Eleanor Roosevelt's intervention, Murray obtained support from President Franklin Delano Roosevelt, though to no avail as Harvard stood firm in keeping its law school all male and nearly all white.

Many colleges and universities throughout the United States were in lockstep with Harvard's example. Princeton and Yale universities first admitted women to their undergraduate programs in 1969. The University of Virginia followed in 1970.

Today, white males are a minority group who make up slightly less than 35 percent of the nation's population.<sup>38</sup> It is estimated that white men account for 95 percent to 97 percent of senior managers of Fortune 1000 industrial and Fortune 500 companies<sup>39</sup>, as well as approximately 80 percent of United States senators and tenured professors.<sup>40</sup>

In 2006, ten Fortune 500 companies had women chief executive officers, and in 2007 five African Americans held such positions.<sup>41</sup> At the end of the twentieth century, white males were receiving over 90 percent of the federal government's funding for prime public contracts.

In Virginia, a Department of Minority Business Enterprises report covering 1998-2003 found that the state awarded over 99.5 percent of the state's procurement dollars to businesses owned by white persons.<sup>42</sup> Over 98 percent of the procurement dollars went to white-male-owned businesses.<sup>43</sup>

### Snapshot of Virginia's Judiciary

In Virginia, where the General Assembly elects judges, in 1974, Barbara Milano Keenan became the first woman elected to a Virginia circuit court.<sup>44</sup> The first African American elected a full-time judge after Reconstruction was Willard Douglas, also in 1974.<sup>45</sup> Two hundred years after Virginia joined the United States the General Assembly elected Angela E. Roberts the first African American woman to a full-time judgeship in Virginia.<sup>46</sup> Recently, Governor Timothy M. Kaine appointed Judge Cleo E. Powell, a circuit judge serving in Chesterfield County, to the Virginia Court of Appeals. Judge Powell is the first African American woman appointed to a state appellate court. While

this is an important milestone, many qualified women of color are admitted to the Virginia State Bar. Inexplicably, the Virginia General Assembly has never elected a woman of color to serve on its highest appellate court.

Regarding the Virginia State Bar itself, there has never been a person of color who has served as president of the bar, and very few persons of color or women who have been elected by the circuits to the bar's governing council.

### Employment

Princeton Professor Devah Pager has published results of studies conducted in Newark, New Jersey, and Milwaukee, Wisconsin, that indicate when persons with black skin seek employment, some employers treat them as though they are criminals. In both cities, white job testers who reported they had a criminal conviction were more likely to be called back for job interviews than blacks who had the same professional qualifications but no criminal records.<sup>47</sup>

This brief (and incomplete) narrative of American history and contemporary society suggests that race, gender, and class still matter. In a world shaped by bias, affirmative action remains necessary to assess individual potential while redressing bias.

Signs of hope exist. Since the 1954 *Brown* decision, American society has begun desegregating in many areas. In higher education, sons and daughters of steelworkers, coal miners, sanitation workers, small farmers, the working poor, and individuals receiving welfare benefits have been able to attend prestigious colleges and universities. In the past, with few exceptions, such institutions admitted only the sons of rich white people. Our national problem has been that many of us seem to believe that the limited progress we have made is enough.

The law can promote needed progress. The Declaration of Independence proclaimed freedom for all: "We hold these truths to be self-evident that all men are created equal and that they are endowed by their Creator with certain unalienable rights." Abraham Lincoln stated this "was the word, 'fitly spoken,' which has proved an 'apple of gold' to us." Lincoln argued that "The Union, and the Constitution, are the picture of silver...The picture was made, not to conceal, or destroy the apple; but to adorn, and preserve it. The picture was made for the apple—not the apple for the picture."<sup>48</sup> The privileges or immunities clause of the Fourteenth Amendment and the Ninth Amendment of the Constitution are part of the constitutional picture of silver crafted by American statesmen to protect our God-given rights of liberty. America's Constitution provides ample support for recognizing and protecting education as a fundamental human right.

Moreover, education is essential to reaching one's human potential. In a global economy, a high-quality education for all Americans is vital for our national survival. India and China each have a middle class comprised of increasingly well-educated adults. India's middle class is larger than the entire population of the United States and by 2020 China is expected to have a middle class of seven hundred million persons.<sup>49</sup> How will

America—with tens of millions of semiliterate, technologically unskilled workers and entrepreneurs—be able to compete with these two economic powers, much less with the European Union, and Japan? If America fails to invest in all its inhabitants, by the middle of the twenty-first century it will become an impoverished, has-been participant in the global community.

In these circumstances, some people have suggested that affirmative action should be ended because it has achieved its end: Senators Barack H. Obama and Hillary R. Clinton performed well in the primaries. Recently, the Republican Party nominated Alaskan Gov. Sarah Palin for the vice presidency. The notion that affirmative action has thus succeeded is at best wishful thinking, bordering on sheer folly. Clinton's, Palin's, and Obama's accomplishments are historic, but in the broader social context their achievements have not made the political and economic structure more representative of the people of this great land. One hopes that *positive change* is coming. To say, however, that affirmative action should end because of one person's extraordinary individual achievement is like telling a lung cancer patient because you are no longer coughing and spitting up blood it's OK to resume smoking.

### How Long?

Affirmative action properly understood requires individualized attention directed toward two related goals. First, evaluate how well a person is likely to perform if given an opportunity; and second, ensure that qualified persons from a wide variety of backgrounds receive such opportunities to demonstrate their potential. Realistically, for the foreseeable future, standardized tests will play an important role in allocating educational and employment opportunities.

At some point in our nation's future, persons from diverse backgrounds (irrespective of race, gender, or class) will demonstrate similar performance levels on standardized tests or other proxies for "being qualified." Achieving such performance levels is a laudable goal. But that is not enough. We should have a straightforward national test. When the president of the United States has a permanent suntan, or is a woman, or is a person whose first language is not English, and when the overwhelming majority of Americans genuinely believe that having such a leader is not a big deal, then we can seriously consider discontinuing affirmative action based on race, gender, or national origin.

### Endnotes:

- 1 Oliver W. Hill Sr., *The Big Bang: Brown v. Board of Education and Beyond*, 338 (Jonathan K. Stubbs, ed. 2007).
- 2 Richard Delgado, "Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?" 89 *Michigan Law Review* 1222, 1225 (1991); David Benjamin Oppenheimer, "Distinguishing Five Models of Affirmative Action," 4 *Berkeley Women's Law Journal* 42 (1988).
- 3 Robert Belton, "The 40th Anniversary of Title VII of the Civil Rights Act of 1964 Symposium: Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact

- Theory of Discrimination,” 22 *Hofstra Labor and Employment Law Journal* 431, 469, n. 243 (2005); William Bradford, “With a Very Great Blame on Our Hearts: Reparations, Reconciliation and an American Indian Plea for Peace and Justice,” 27 *American Indian Law Review* 1, 93 at n. 446 (2002/2003); Beverly Moran, “The Case for Black Inferiority? What Must be True If Professor Sander is Right: A Response to a Systemic Analysis of Affirmative Action in American Law Schools,” 5 *Connecticut Public Interest Law Journal* 41, 58 (2005); Harold Orlans, “Affirmative Action in Higher Education,” 523 *The Annals of the American Academy of Political & Social Science (Affirmative Action Revisited)* 144, 146 (1992); Ronald E. Hall, “Entitlement Disorder: The Colonial Traditions of Power as White Male Resistance to Affirmative Action,” 34 *Journal of Black Studies* 562, 567 (2004).
- 4 The profiles of the two high schools are based on a comparison of Armstrong High School in Richmond and Hermitage High School in Henrico County, Virginia. See, Amanda E. Washington, “Educational Inequality in Richmond, Virginia” (2003) (unpublished manuscript on file with author).
- 5 See, Jonathan Marks, “Science and Race,” 40 *The American Behavioral Scientist* 123, 128-29 (1996) arguing that “ability is a concept that is generally easy to see only in the past tense.”
- 6 *City of Richmond v. Croson*, 488 U.S. 469, 528 (1989) (Scalia, J. concurring in the judgment “race-neutral remedial programs aimed at the disadvantaged” would be constitutionally permissible to redress the effects of societal discrimination).
- 7 Eric S. Lander, et al., “Linkage Disequilibrium in the Human Genome,” 411 *Nature* 199 (2001) (establishing that a small number of Africans emigrated to Europe about twenty-five thousand years ago and established the earliest European societies); Li Jin, et al., “African Origins of Modern Humans in East Asia: A Tale of 12,000 Y Chromosomes,” 292 *Science* 1151 (2001) (documenting strong probability that Africans colonized East Asia between thirty and ninety thousand years ago). See also, Lisa M. Krieger, “Genetic Code Doesn’t Reveal Distinctions in Race,” *San Jose Mercury News*, Feb. 21, 2001; Mark Henderson, “Colour Irrelevant, Say Genome Researchers,” *The Times* (London), Feb. 12, 2001; Rick Weiss, “Life’s Blueprint in Less Than an Inch; Research: Little of Genome Makes a Human,” *Washington Post*, Feb. 11, 2001, at A1; “Human Genome: Analysis of Genetic Map Yields Surprises,” *American Health Line*, Feb. 12, 2001; Jack Kemp, “Genome Shows Race is Non-Existent,” *Seattle Post-Intelligencer*, Feb. 21, 2001, at B5.
- 8 *Scott v. Sanford*, 60 U.S. 393, 407 (1857).
- 9 Eric Foner, *Reconstruction: America’s Unfinished Revolution 1863-1877*, 199-210 (1988).
- 10 *Minor v. Happersett*, 82 U.S. 162 (1874) (right to vote not a privilege or immunity of American citizenship); *Bradwell v. Illinois*, 83 U.S. 130 (1873) (right to practice law not a privilege or immunity of American citizenship).
- 11 See Alexander Tsesis, “Undermining Inalienable Rights: From Dred Scott to the Rehnquist Court,” 39 *Arizona State Law Journal* 1179, 1219-23. Foner, *supra* note 9 at 446-49.
- 12 Andrew Buni, *The Negro in Virginia Politics: 1902-1965*, 17 (1967); Michael Perman, *Struggle for Mastery: Disfranchisement in the South, 1888-1908*, 221 (2001).
- 13 Buni, *supra* note 12 at 24; *Virginia Writers Project, The Negro in Virginia*, 239 (1940); Perman, *supra* note at 222.
- 14 Buni, *supra* note 12 at 27; *Virginia Writers Project, supra* note 13 at 240.
- 15 Perman, *supra* note 12 at 213.
- 16 194 U.S. 147 (1904).
- 17 *Id.* at 153.
- 18 Peter Carroll & David W. Noble, *The Free and the Unfree: A Progressive History of the United States*, 296 (3<sup>rd</sup> ed. 2001).
- 19 383 U.S. 663 (1966).
- 20 John Kimble, “Insuring Inequality: The Role of the Federal Housing Administration in the Urban Ghettoization of African Americans,” 32 *Law & Society Inquiry* 399, 405-06 (2007).
- 21 Hill, *supra* note 1 at 270.
- 22 Melvin Oliver and Thomas Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Equality*, 18 (1995).
- 23 Nancy A. Denton, “The Persistence of Segregation: Links Between Residential Segregation and School Segregation,” 80 *Minnesota Law Review* 795, 803-04 (1996).
- 24 411 U.S. 1, 35-38 (1973).
- 25 *Id.* at 21-29.
- 26 *Id.* at 64-68 (White, J. dissenting).
- 27 *Parents Involved in Community Schools vs. Seattle School District*, 127 S. Ct. 2738; 168 L. Ed. 2d 508.
- 28 Edward Brooke, “King and Kerner: An Unfinished Agenda,” *Washington Post*, Apr. 3, 2008, at A17.
- 29 Rakesh Kochar, *Pew Hispanic Center, The Wealth of Hispanic Households: 1996-2002*, (2004).
- 30 Oliver and Shapiro, *supra* note 22 at 51.
- 31 National Community Reinvestment Corporation, *Income Is No Shield Against Racial Differences in Lending: A Comparison in High Cost Lending in America’s Metropolitan Areas*, 8-9 (2007); Manny Fernandez, “Study Finds Disparities in Mortgages by Race,” *New York Times*, Oct. 15, 2007, *supra* note at 8-9.
- 32 U.S. Bureau of the Census. *Income, Poverty and Health Insurance Coverage in the United States: 2007*, 6, available at <http://www.census.gov/prod/2008pubs/p60-235.pdf> (last visited Aug. 29, 2008).
- 33 Dedrick Muhammad, et al. “The State of the Dream 2004: Enduring Disparities in Black and White,” *United for a Fair Economy* (2004) at 7, available at <http://www.faireconomy.org/files/pdf/StateoftheDream2004.pdf> (last visited Sep. 2, 2008).
- 34 See Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality* 256-58 (1976); Anthony M. Platt, “The Rise and Fall of Affirmative Action,” 11 *Notre Dame Journal of Law, Ethics & Public Policy* 67, 69 (1997); John A. Powell and Marguerite L. Spencer, “Remaking the Urban University for the Urban Student: Talking About Race,” 30 *Connecticut Law Review* 1247, 1262 (1998); F. Michael Higginbotham, “Soldiers for Justice: The Role of the Tuskegee Airmen in the Desegregation of the American Armed Forces,” 8 *William & Mary Bill of Rights Journal* 273, 286 n. 72 (2000).
- 35 See Servicemen’s Readjustment Act of 1944, 58 Stat. 285 (WWII veterans “whose education was impeded, delayed, interrupted, or interfered with by reason of his entrance into the service” were eligible).
- 36 For discussion of the invidious nature of group based quotas, particularly as applied to Jews, see Marcia Graham Synott, *Anti-Semitism and American Universities: Did Quotas Follow the Jews in Anti-Semitism in American History* 233-71 (David A. Gerber, ed. 1986); *Gutter v. Bollinger*, 288 F. 3d at 793-94 (Boggs, J., dissenting); Karen Sacks, “How Did Jews Become White Folks?” in

*Critical White Studies* 395-401 (Richard Delgado and Jean Stefano, eds. 1997).

<sup>37</sup> Pauli Murray, *Song in a Weary Throat* 238-45 (1987).

<sup>38</sup> U.S. Bureau of the Census, Census 2000 Summary File 2 (SF 2) 100 Percent Data, Detailed Table PCT3 (A White Alone, not Hispanic or Latino) (2002).

<sup>39</sup> Glass Ceiling Commission, *Good for Business: Making Full Use of the Nation's Human Capital*, iii-iv (1995).

<sup>40</sup> See: <http://womenincongress.house.gov/>; see also *Congressional Quarterly*: <http://oncongress.cq.com/corp/flatfiles/editorialFiles/temporaryItems/mon20041103-3minorities.pdf>. The Senate is 1 percent African American, 3 percent Latino, 16 percent female, 2 percent Asian American. The House is approximately 17 percent female, 9 percent African American, 5 percent Latino, and 1 percent Asian American. Maxine Waters, "Not Only Should Affirmative Action Be Preserved, It Should be Expanded to Eliminate Discrimination," *Roll Call*, Dec. 8, 1997; Cathy A. Trower and Richard P. Chait, "Faculty Diversity: Too Little for Too Long," *Harvard Magazine*, Mar.-Apr. 2002, at 33-37.

<sup>41</sup> Earl Ofari Hutchinson, "Corporate America — Don't Preach Diversity, Practice It," *New America Media*, Oct. 31, 2007 available at [http://news.newamericamedia.org/news/view\\_article.html?article\\_id=163769a6\\_f444ee96938797936ff896f4](http://news.newamericamedia.org/news/view_article.html?article_id=163769a6_f444ee96938797936ff896f4) (last visited July 7, 2008).

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<sup>42</sup> MGT of America, *A Procurement Disparity Study of the Commonwealth of Virginia*, Jan. 12, 2004.

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

<sup>44</sup> Sandra Gross Schneider, "Women's Entry into the Legal Profession in Virginia," 34 *Virginia Bar News*, Apr. 1986, at 45.

<sup>45</sup> Hill, *supra* note 1 at 277; Gerald B. Lee, Veryl V. Miles, and G. Nelson Smith, III, "The Black Lawyer in Virginia: Reflections Upon a Journey, 1938-1988," 37 *Virginia Lawyer*, 1988, at 34.

<sup>46</sup> Brooke A. Masters, "Lawyer's Judicial Appointment Is a Milestone for Prince William Court," *Washington Post*, Mar. 13, 1990, at B4.

<sup>47</sup> Devah Pager, *The Mark of a Criminal Record*, 108 *American Journal of Sociology* 937, 958 (2003).

<sup>48</sup> Abraham Lincoln, "Fragment on the Constitution and the Union," *The Collected Works of Abraham Lincoln* 169 (Basler ed., 1953), cited in Paul Brest, *et al*, *Processes of Constitutional Decision Making: Cases and Materials*, 286 (5<sup>th</sup> ed. 2005).

<sup>49</sup> India's middle-class population numbers 325-350 million out of a population of 1.1 billion. See U.S. Department of State, <http://www.state.gov/r/pa/ei/bgn/3454.htm> (last visited Aug. 29, 2008). See, Peter Ford, "Consumer Tidal Wave on the Way: China's Middle Class," *Christian Science Monitor*, Jan. 2, 2007 available at <http://www.csmonitor.com/2007/0102/p01s02-woap.html> (last visited Aug. 29, 2008); Leslie T. Chang, "Gilded Age, Gilded Cage: China's Sudden Prosperity Brings Undreamed of Freedoms and New Anxieties," *National Geographic Magazine*, May 2008 available at <http://ngm.nationalgeographic.com/2008/05/china/middle-class/leslie-chang-text> (last visited August 29, 2008).