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A CAUTIONARY TALE: THE OBAMA COALITION, ANTI-SUBORDINATION PRINCIPLES AND PROPOSITION 8

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INTRODUCTION

On November 4, 2008, Barack Obama took to the stage in Chicago's Grant Park to thank the American people for electing him as the 44th President of the United States. Although he spoke of "dreams" and of our ability to "get there,"¹—references to the metaphors of the great black orator and civil rights leader, the Reverend Dr. Martin Luther King, Jr.,²—Obama did not mention the significance of his race, which stood in stark contrast to the forty-three Presidents before him.³

One hundred and forty-three years after the adoption of the Thirteenth Amendment abolishing slavery, and forty years after Martin Luther King, Jr.'s assassination, Americans elected a man who is black (and multiracial) as their next president; yet the most our first president of African descent offered was a single, direct reference to blacks in a long string of adjectives describing who Americans are: "young and old, rich and poor, Democrat and Republican, black, white, Hispanic, Asian, Native American, gay, straight, disabled and not disabled."⁴

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†† Associate Professor, University of Denver, Sturm College of Law. J.D./M.P.A., University of South Carolina. This article is dedicated to our daughter, Zoe Jane Smith-Holladay. We thank Michael Smith and the *Denver University Law Review* for their editorial assistance, and Meg Satrom for her research assistance. We also thank Frank Rudy Cooper, co-organizer of the Obama Phenomena: Facets of a Historic Campaign, and the University of Denver Sturm College of Law faculty and staff and Dean José R. (Beto) Juárez for their support and hard work to make the conference a success.

1. Transcript: 'This is your victory,' says Obama, CNN, Nov. 5, 2008, <http://www.cnn.com/2008/POLITICS/11/04/obama.transcript/>.

2. Martin Luther King, Jr., I Have a Dream (Aug. 28, 1963), available at <http://www.americanrhetoric.com/speeches/mlkihavedream.htm>; Martin Luther King, Jr., I've Been to the Mountaintop (Apr. 3, 1968), available at <http://www.afscme.org/about/1549.cfm>. Obama often references MLK, but many scholars view him as a drawing much of his political lessons from Lincoln. See generally Susan Schulten, *Barack Obama, Abraham Lincoln, and John Dewey*, 86 DENV. U. L. REV. 807 (2009).

3. For a discussion that deconstructs Obama from a race and gender perspective, see Frank Rudy Cooper, *Our First Unisex President?: Black Masculinity and Obama's Feminine Side*, 86 DENV. U. L. REV. 633 (2009). For a race and class assessment, see Angela Onwuachi-Willig & Osamudia James, *The Inclining Significance of Presidential Races*, J. OF CONTEMP. PROBLEMS (forthcoming 2009) (on file with author). See also John A. Powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U. L. REV. 785 (2009).

4. Transcript: 'This is your victory,' says Obama, CNN, Nov. 5, 2008, <http://www.cnn.com/2008/POLITICS/11/04/obama.transcript/>.

His resistance to speaking explicitly to the racial meaning of his ascension to the highest office in the land did not stop others from doing so, however. CNN commentator Roland Martin held back tears on live television as he poignantly noted how fitting it was that Obama would be sworn into office in 2009, “in the same year [that] the National Association for the Advancement of Colored People will celebrate its 100th anniversary.”⁵ The next morning, nearly every major newspaper⁶ joined Martin in acknowledging the racial milestone that had unfolded, from the liberal *New York Times*—“OBAMA: Racial Barrier Falls in Decisive Victory”⁷—to the conservative *Wall Street Journal*—“Obama Sweeps to Historic Victory: Nation Elects Its First African American President.”⁸

Obama’s omission came as no surprise to some—his campaign had been marked by what had been called “race neutrality,”⁹—as demonstrated by lines such as “There is not a black America and a white America and a Latino America and Asian America; there’s the United States of America.”¹⁰ These types of statements sparked fear and dismay among many social justice advocates who view such statements as the hallmark of a colorblind racial justice philosophy.¹¹

In this essay we debunk the notion that Barack Obama embraces a philosophy of colorblindness and suggest an alternative interpretation of his racial justice philosophy—one rooted not in colorblindness, but in anti-subordination principles that create space for a multi-faceted approach to dismantling oppression; one that not only counters racial discrimination, but also addresses injustice on the basis of ethnicity, ability, class, sexual orientation and other categories.

In the next section, we examine the notion of colorblindness, introduce a framework to understand Obama’s anti-subordination approach and examine one area in which the results of Election Day 2008 fell short—gay rights. We conclude this essay by dissecting the ways in which the scapegoating of blacks after the passage of California’s anti-gay Proposition 8 represents the very kind of “us versus them” politicking that can be eliminated as an anti-subordination framework takes hold,

5. Roland S. Martin, *Thank You, President-Elect Barack Obama*, CREATORS.COM, Nov. 7, 2008, <http://www.creators.com/opinion/roland-martin/thank-you-president-elect-barack-obama.html> (“[T]he NAACP was created after a race riot in Springfield, Ill., the same city where Obama served as a state legislator for eight years and where he launched his presidential campaign.”).

6. Newseum.org, *Today’s Front Pages*, Nov. 5, 2008, http://www.newseum.org/todaysfrontpages/default_archive.asp?fpArchive=110508.

7. *Id.*

8. *Id.*

9. John Blake, *Could an Obama Presidency Hurt Black Americans?*, CNN, July 22, 2008, <http://www.cnn.com/2008/POLITICS/07/22/obama.hurt.blacks/index.html>.

10. Barack Obama, *Keynote Address at the 2004 Democratic National Convention* (July 27, 2004).

11. Blake, *supra* note 9; David A. Frank & Mark Lawrence McPhail, *Barack Obama’s Address to the 2004 Democratic National Convention: Trauma, Compromise, Consilience, and the (Im)possibility of Racial Reconciliation*, 8 RHETORIC & PUBLIC AFFAIRS 571, 572 (2005).

one in which racism and homophobia would no longer be used as tools to reinforce one another.

I. BARACK OBAMA'S "CHANGE WE CAN BELIEVE IN"

Colorblind racial justice philosophy—the idea that government should not consider race in any context—dominates our social, political and legal discourse, as illustrated by the outcome in the most recent school integration case decided by the United States Supreme Court, *Parents Involved in Community Schools v. Seattle School District No. 1*.¹²

At the turn of the twenty-first century, fifty years after *Brown v. Board of Education*, American schools were more segregated than they were in 1968.¹³ The data from Harvard's Civil Rights Project (now at UCLA) and hundreds of social scientists show that these contemporary segregated schools produce unequal educational opportunities for children of color who attend them.¹⁴ These segregated schools stem from segregated housing patterns that trace back to not just private housing choices, but to a history of blatant race discrimination by local, state and federal governments.¹⁵

Yet, when Seattle and Louisville sought to rectify their racially-concentrated schools by diversifying them, five justices of the Roberts Supreme Court struck down the school districts' race-conscious assignment plans.¹⁶ In finding the plans unconstitutional, the Chief Justice quipped, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."¹⁷ Roberts and his conservative brethren severed race from the history of racism and "characterize[d] the elimination of race-conscious decisions by government actors as the end in itself."¹⁸

The Equal Protection Clause's objective as delineated in *Brown*—a mandate to eliminate government practices that 1) "impl[ie]d inferiority

12. See 127 S. Ct. 2738, 2768 (2007). See also, e.g., Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 *passim* (1978) (challenging the colorblind focus of antidiscrimination law on the intent of the perpetrator which ignores the victim and the context of societal racial subordination); Neil Gotanda, *A Critique of "Our Constitution Is Colorblind,"* 44 STAN. L. REV. 1, 2-3 (1991) (criticizing the way that "[a] color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans").

13. Anna Shavers, *Katrina's Children: Revealing the Broken Promise of Education*, 31 T. MARSHALL L. REV. 499, 513 (2006).

14. See Brief of 553 Social Scientists as Amici Curiae in Support of Respondents at app. 30, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (Nos. 05-908 & 05-915) (2007), available at www.tolerance.org/images/teach/magazine/31/amicus_parents_v_seattle.pdf.

15. See Robert Chang & Catherine Smith, *John Calmore's America*, 86 N.C. L. REV. 739, 744-751 (2008).

16. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007).

17. *Id.*

18. Chang & Smith, *supra* note 15, at 757.

in civil society” and 2) denied blacks the same rights exercised by whites in educational opportunities¹⁹—drop out of the discourse as legally cognizable remedies to historical and current-day practices that deny children of color equal educational options. Over the last thirty years, the Supreme Court’s adherence to colorblind principles has functionally denied the racial injuries affecting African-Americans and has resulted in major erosions of civil rights protections.²⁰

This colorblind philosophy—that the government should not consider race in any context—forms and reinforces the status quo in most areas of law and social policy.²¹ It also dominates American racial discourse, particularly among white Americans, who often proudly proclaim, “I don’t see race.”²²

No one can or should deny the importance of Obama’s ascension as a symbol of racial progress. Yet we must, as the civil rights series tells us, keep our “eyes on the prize”²³—a colorblind philosophy espoused by the first African-American President of the United States would be a step backward, not forward, for racial progress. Some commentators assert that Obama purposefully courted white America with a “post-racial,” colorblind promise.²⁴ As early as 2004, Mark McPhail argued that “Obama weaves a therapeutic narrative of opportunity for all . . . [h]e breaks down binary oppositions when he contends that ‘there’s not a liberal America and conservative America—there’s the United States of America. There’s not a black America and white America and Latino America and Asian America; there’s the United States of America.’”²⁵ McPhail argues that similar to Dr. King, “Obama’s appeal to identification and unity illustrates the use of consilience, the linking of diverse voices and values, to achieve coherence, the finding of similarity in difference, of unum in pluribus.”²⁶ However, McPhail insists that unlike other civil rights orators like Dr. King, Obama ignores the historical and social realities of American racism. Obama’s speech “draws heavily upon the re-

19. *Brown v. Bd. of Educ.*, 347 U.S. 483, 491 n. 5 (1954) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1880)).

20. See Jennifer Holladay, *BROWN V. BOARD: Timeline of School Integration in the U.S., TEACHING TOLERANCE*, Spring 2004, at 42, 54-56, available at <http://www.tolerance.org/teach/magazine/features.jsp?ar=487> (presenting the timeline of school integration decisions post-*Brown* which shows increasing race neutrality in judicial decisions).

21. Gotanda, *supra* note 12, at 2.

22. Charles Lawrence III, *The Epidemiology of Color-Blindness: Learning to Think and Talk about Race, Again*, 15 B.C. THIRD WORLD L.J. 1, 6 (1995) (“Such an assertion [that our constitution and society are colorblind] can only be believed if we engage in massive denial of what we see and hear every day.”). Clearly race was on the minds of Americans, not only as it related to Barack Obama, but Michelle Obama as well. See Verna Williams, *The First (Black) Lady*, 86 DENV. U. L. REV. 833 (2009).

23. *Eyes on the Prize* (PBS television broadcast 1987). See also Camille Nelson, *Racial Paradox and Eclipse: Obama as a Balm for What Ails Us*, 86 DENV. U. L. REV. 743 (2009).

24. Shelby Steele, Op-Ed., *Obama’s Post-Racial Promise*, L.A. TIMES, Nov. 5, 2008, <http://www.latimes.com/news/opinion/commentary/la-oe-steele5-2008nov05.0.6553798.story>.

25. Frank & McPhail, *supra* note 11, at 581.

26. *Id.*

sources of whiteness and its dominant rhetorical tropes: innocence, race neutrality, and positive self-presentation. It articulates well with white racial recovery narratives that silence serious discussions about race in this country."²⁷

Although we agree with some of McPhail's observations, we interpret Obama's ultimate message differently. Barack Obama often avoided direct references to his race, yet we believe his racial, or really, social justice philosophy is not one of race-neutrality, colorblindness or even post-raciality, but rather is based on anti-subordination principles.²⁸ Society must seek to eliminate policies and practices that further marginalize groups who have been historically disadvantaged.²⁹ This certainly includes African-Americans, but it also speaks to the marginalization of other groups who also have stark histories of discrimination. Indeed, some histories are being written as we speak, such as the granting and subsequent removal of gays and lesbians' fundamental right to marry in California. Obama's fundamental message includes racial reconciliation and also incorporates many forms of oppression that are intertwined to maintain the status quo.

When Martin Luther King, Jr. delivered his last Sunday sermon on March 31, 1968, he recounted the story of Rip Van Winkle.³⁰ He explained that when Rip Van Winkle went up the mountain, there was a picture of King George III of England and, when he woke-up twenty years later, there was a picture of George Washington.³¹ Dr. King profoundly explained that "[o]ne of the great liabilities of life is that all too many people find themselves living amid a great period of social change and yet they fail to develop the new attitudes, the new mental responses—that new situations demand. [Like Rip Van Winkle], [t]hey end up sleeping through a revolution."³²

27. *Id.* at 583. We note that McPhail's observations were made early on, in 2004, before Obama's actual run for the Presidency. *But see* Shelby Steele, *Obama's Post-Racial promise: Barack Obama Seduced Whites with a Vision of Their Racial Innocence precisely to Coerce Them into Acting Out of a Racial Motivation*, Los Angeles Times, Nov. 5, 2008, available at <http://www.latimes.com/news/opinion/commentary/la-oe-steele5-2008nov05,0,6553798.story>.

28. For a discussion of performing identities in political campaigns, see Ann McGinley, *Hillary Clinton, Sarah Palin, and Michelle Obama: Performing Gender, Race, and Class on the Campaign Trail*, 86 DENV. U. L. REV. 709 (2009).

29. *See generally*, Ruth Colker, *Anti-Subordination Above All: Sex, Race and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986); Darren Lenard Hutchinson, "Unexplainable on Grounds Other than Race": *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 632 (2003).

30. MARTIN LUTHER KING, JR., *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 268 (1986) (James Washington ed. 1990).

31. *Id.* at 268-278.

32. *Id.* at 268-269 (identifying three areas in which a revolution was taking place: technology, weaponry and human rights).

We are in such a period. Two factors signify its emergence. First, white Americans are on the cusp of losing their majority status.³³ Second, an ever-deepening array of subordinated groups are seeking their seat at the table, claiming their rightful place for their voices and concerns to be heard and addressed—from newly arrived immigrants to people with disabilities to gays and lesbians.³⁴ These realities combine to form a new chorus for social change, one that will include both those traditionally subjugated as well as previous white power elites³⁵ who will need to renegotiate their status in a new social context.

Citizens make election decisions based on many things—political ideology, party-allegiance, and specific issues (such as the economy, the Iraq War, or the environment). Importantly, some citizens, if not most, are also influenced consciously and unconsciously by group identities—by their race, gender, disability, sexual orientation and religion. These socially constructed categories have meaning in our day-to-day interactions and evolve depending on situation and context.³⁶ What was unique about Barack Obama's presidential campaign was that, in addition to his political platform, he also consistently and deliberately invoked these categories. He often spoke of racism against African-Americans, Latinos and Asians; the class struggles of working and middle class blacks and whites, Latinos and Asian Americans; homophobia against gays and lesbians; and profiling of Arab-Americans. However, he did not stop there: He brought these themes back into larger scale issues like health care, employment and education, which, generally speaking, are of concern to almost everyone.³⁷

Instead of a group-based, us versus them political tactic (i.e. white vs. black, black vs. brown, gay vs. straight), Obama offered Americans a

33. John Derbyshire, *Towards a White Minority*, NATIONAL REVIEW ONLINE, May 25, 2007, <http://tinyurl.com/d8tnh7>.

34. A PLACE AT THE TABLE: STRUGGLES FOR EQUALITY IN AMERICA (Maria Fleming ed., 2000).

35. "Power elite" is a term coined by sociologist C. Wright Mills in 1956 to describe the relatively small, loosely knit group of people who tend to dominate American policymaking. See generally C. WRIGHT MILLS, *THE POWER ELITE* (Oxford Univ. Press) (2000); see also PAUL KIVEL, *YOU CALL THIS A DEMOCRACY? WHO BENEFITS, WHO PAYS, WHO REALLY DECIDES*, 43-47 (Apex Press) (2004) (discussing race and gender as tools of the power elite in contemporary America).

36. Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C. R.-C.L. L. REV. 91, 95-99 (2003); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 745-49 (2005); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1497-506 (2005); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1258-76 (1998); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1202-04 (1995); Catherine E. Smith, *The Group Dangers of Race-Based Conspiracies*, 59 RUTGERS L. REV. 55, 75-79 (2006).

37. See Alan Brinkley, *This is Our Moment*, N.Y. TIMES, Jan. 18, 2009, at 7 ("Obama, of course, has proposed bolder plans—among them universal access to health care for all citizens"); Barack Obama, *A More Perfect Union* (Mar. 18, 2008), available at <http://my.barackobama.com/page/content/hisownwords>; Barack Obama, Keynote Address at the 2004 Democratic National Convention (July 27, 2004).

“counter narrative” of how those who view themselves as marginalized on some axes (and not), including an immense number of white voters, could combine votes with one another to challenge the status quo. What Obama built in the course of his campaign, what ultimately catapulted him to the White House, was a new kind of coalition: one based not in the assertion of “hear *my* concerns,” but rather in asking, “how are *our* concerns related?” In an America with rapidly changing demographics, Obama’s message and the success of that message offers a glimpse of the coalition-building opportunities that are possible when we focus not solely on race but on anti-subordination principles.

On November 4, 2008, Obama became the first Democratic nominee in more than twenty years to win the presidency with support from a majority of voters,³⁸ and the majority who delivered his victory fulfilled the promise of the coalition-building rhetoric that had signified his campaign. Voters of nearly every hue and disposition aligned themselves with him.³⁹ Obama won 95% of the African-American vote, 67% of the Latino vote and 62% of the Asian-American vote.⁴⁰ He appealed to more white voters than John Kerry did in 2004, drawing 41% of white men and 46% of white women,⁴¹ and the white voters who resisted Obama lived primarily in the South.⁴² Obama secured a majority of voters from every educational bracket and every age group, except those sixty-five and older.⁴³ He drew more Protestant, Catholic, Jewish and evangelical voters than Kerry did in 2004; he also swung more independents and conservatives to the Democratic ticket and thus created a space where, for the first time in a long time, the poorest among us (those making less than \$15,000 a year) and the richest among us (those making more than \$200,000 a year) chose the same candidate as voting blocks.⁴⁴

38. Timothy Noah, *What We Didn't Overcome*, SLATE, Nov. 10, 2008, <http://www.slate.com/id/2204251/>.

39. It is no coincidence that 2008 DNC delegates were the most diverse in history and at all time highs for African-Americans, Latinos, Asian and Pacific Islanders, Native Americans, persons with disabilities and gay, lesbian and transgendered delegates. DEMOCRATIC NATIONAL CONVENTION COMMITTEE, DEMOCRATIC NATIONAL CONVENTION DELEGATE DIVERSITY 1984-2008 (2008), <http://www.demconvention.com/assets/downloads/Delegate-Diversity-1984-2008.pdf>.

40. Posting of Nate Silver to FiveThirtyEight.com, <http://www.fivethirtyeight.com/2008/11/obama-outperforms-kerry-among-virtually.html>, (Nov. 6, 2008 13:03 EST). For a discussion of what the vote by Asian Americans means, see Keith Aoki & Robert S. Chang, *Half-Full, Half-Empty? Asian American Electoral "Presence" in 2008*, 86 DENV. U. L. REV. 565 (2009).

41. *Id.*

42. Pew Research Center, *Inside Obama's Sweeping Victory*, Nov. 5, 2008, <http://pewresearch.org/pubs/1023/exit-poll-analysis-2008>. In Alabama, for example, only 10% of whites voted for Obama. See Equal Justice Initiative, *Election Analysis Shows Only 10% of Whites in Alabama Voted for Obama*, Nov. 17, 2008, <http://www.eji.org/eji/node/236>.

43. Posting of Nate Silver to FiveThirtyEight.com, <http://www.fivethirtyeight.com/2008/11/obama-outperforms-kerry-among-virtually.html>, (Nov. 6, 2008 13:03 EST).

44. *Id.*

This coalition of voters does not represent colorblindness; it does not, like Roberts and his conservative brethren on the Supreme Court, suggest that Americans ignore the history and current-day discrimination against African-Americans. Instead, Obama's anti-subordination agenda recognizes the racial harms against African-Americans and at the same time makes room for other marginalizations as well. He asks simultaneously that we recognize the history of genocide against Native Americans, that we refuse to deny gays and lesbians equal opportunities in employment, health care benefits and taxes, and that we recognize the dangers of poverty for people of color and whites. By helping us see our connectedness, Obama minimized the ability of his opponents to pit identity groups against one another. More importantly, in an era in which, as a result of colorblind rhetoric, we see civil rights being severely scaled back and an increasing gap between "haves" and "have-nots," he created a broad coalition of voters, one in numbers large enough to "change" the status quo.

As Dr. King suggested forty years ago, social justice advocates must develop new attitudes, new mental processes and new approaches to erode the historical vestiges of slavery and racial segregation that are institutional and systemic;⁴⁵ to counter the powerful changing rhetoric, such as colorblindness and its many permutations;⁴⁶ and to identify and challenge the ways in which racial discrimination continues to perpetuate itself in more unconscious and perhaps even more insidious ways.⁴⁷ Yet, no minority identity-group can do it alone. Barack Obama's social justice message affords us an opportunity to adopt "new attitudes [and] the new mental responses . . . that new situations demand" to advance black

45. See John O. Calmore, *Exploring Michael Omi's "Messy" Real World of Race: An Essay for "Naked People Longing to Swim Free,"* 15 LAW & INEQ. 25, 28 (1997) (American law reinforces "oppressive and exclusionary expressions of racism that are institutional and cultural, structural and systemic, and harmful.").

46. See Robert S. Chang, *Critiquing "Race" and Its Uses: Critical Race Theory's Uncompleted Argument*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 87, 95 (Francisco Valdes et al eds., 2002) (arguing that "after formal equal treatment has been secured, the terrain shifts . . . [so that] [t]oday, in the era of colorblind jurisprudence and the new racialism, social construction must be argued to establish that individuals and institutions have acted in concert to create differences in the material conditions of racial minorities and that this requires or justifies remedies that necessarily entail racially different treatment.").

47. See Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1258-76 (1998); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1203 (1995); Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-23 (1987). For additional articles on unconscious bias, see Tristin K. Green, *Discrimination in the Workplace Dynamics: Toward a Structural Account of Disparate Treatment*, 38 HARV. C. R.-C.L. L. REV. 91, 95-99 (2003); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 745-49 (2005); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1497-1506 (2005); Catherine Smith, *The Group Dangers of Race-Based Conspiracies*, 59 RUTGERS L. REV. 55 (2006).

interests.⁴⁸ Part of this work is building a coalition base, instead of fracturing along lines of race, class, ethnicity, gender or sexual orientation.

II. PROP 8 AS A CAUTIONARY TALE

On that special Tuesday in November 2008, one group of Americans who had offered 70% of its votes to help elect the first black president in U.S history found themselves standing with one foot firmly outside the celebration: gays and lesbians.⁴⁹

For Lesbian, Gay, Bisexual and Transgendered (LGBT) Americans, that historic day surely was to be celebrated. “For the past eight years, 1600 Pennsylvania Avenue was a dead end for our community,” observed Joe Solmonese, president of the Human Rights Campaign, which had endorsed Obama.⁵⁰ “Now the LGBT community and the entire social justice movement will have a voice at the highest level of government. Our years in the wilderness are over, and this really is a change we can all truly believe in.”⁵¹

But November 4 also proved to be an exercise in stigma for LGBT people. In Arkansas, voters approved a measure prohibiting unmarried partners from adopting children or serving as foster parents, functionally deeming LGBTs to be unfit for parenting.⁵² In Arizona and Florida, a majority of citizens voted to deny LGBT people access to marriage protections, limiting them to unions that include one man and one woman.⁵³

All eyes then turned to California, where the state Supreme Court just months earlier had identified marriage as a fundamental right to which all Californians were entitled; consequently, thousands of gay couples had married after the Court’s decision.⁵⁴ Yet anti-gay advocates had managed to get a measure on the ballot—Proposition 8—that sought to amend the state’s constitution and limit marriage benefits to heterosexual couples.⁵⁵

Prop 8’s vote was too close to call when Obama took to the stage in Chicago’s Grant Park to deliver his victory speech, but ten hours later the

48. *Remaining Awake Through a Great Revolution, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* (1986) (James Washington ed.).

49. Posting of Nate Silver to FiveThirtyEight.com, <http://www.fivethirtyeight.com/2008/11/obama-outperforms-kerry-among-virtually.html>, (Nov. 6, 2008 13:03 EST). For a compelling account of the events leading up to Prop. 8, see Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R.-C.L. (forthcoming 2009).

50. Human Rights Campaign, *Human Rights Campaign Lauds 2008 Election Results*, Nov. 4, 2008, <http://www.hrc.org/11517.htm>.

51. *Id.*

52. Emanuella Grinberg, *Mixed results on measures banning same-sex marriage*, CNN, Nov. 5, 2008, <http://edition.cnn.com/2008/POLITICS/11/04/state.laws/?imw=Y&ieref=mpstoryemail>.

53. *Id.*

54. *California Gay Marriage Banned As Proposition 8 Passes*, THE HUFFINGTON POST, Nov. 5, 2008, http://www.huffingtonpost.com/2008/11/05/california-gay-marriage-b_n_141429.html.

55. *See id.*

Associated Press announced that it had passed.⁵⁶ California voters had banned marriage rights for gay couples. It was a stunning triumph for the conservative right. McCain had won just 37% of Californians' votes;⁵⁷ the anti-gay measure passed thanks to support from Obama's base.

Commentators quickly jumped to point out the lines upon which "us and them" had been drawn. On November 6, the *San Francisco Chronicle* reported, "While Obama publicly backed the 'No on Prop. 8' effort, African-American voters had no trouble voting overwhelmingly for the man who will be the nation's first black president and then voting 70 percent in favor of Prop 8, exit polls showed."⁵⁸ White, gay commentator Dan Savage notoriously pointed the finger at blacks, too.⁵⁹

African-Americans did not cause Prop 8's passage. Subsequent analysis of polling data clarified that age, religiosity, and political ideology served as stronger indicators of support for the measure.⁶⁰ Nevertheless, the scapegoating of black voters in the wake of the anti-gay measure's success serves as a potent reminder that race and homophobia are intermingled as tools of oppression and often are levied for divide-and-conquer, us-versus-them purposes. The truth is, LGBT interests and blacks' interests are far more entangled than most acknowledge.

The LGBT movement is often portrayed by mainstream LGBT advocates, the far right and the media as serving the interests of white, middle-class LGBTs, and the majority of the population views it as such.⁶¹ Marginalizing the diversity of individuals that make up the LGBT community by equating gayness with whiteness ignores the fact that a significant number of African-American, Latino and Asian LGBTs

56. *See id.*

57. CNN Election Center 2008, California Results, <http://edition.cnn.com/ELECTION/2008/results/individual/#mapPCA> (last visited Jan. 26, 2009).

58. John Wildermuth, *Many Obama Supporters Also Backed Prop. 8*, S.F. CHRON., Nov. 6, 2008, at A18, available at <http://tinyurl.com/69drvd>.

59. Posting of Dan Savage to SLOG, http://slog.thestranger.com/2008/11/black_homophobia (Nov. 5, 2008, 9:55 EST).

60. Patrick J. Egan and Kenneth Sherrill, *California's Proposition 8: What Happened, and What Does the Future Hold?* (2009) (on file with author); David Binder, *Proposition 8 Post-Election California Voter Survey* (2008) (on file with author); Justin Evers, *Poll: Black Voters Not Responsible for Passage of Same-Sex Marriage Ban in California*, U.S. NEWS & WORLD REPORT, Dec. 4, 2008, <http://www.usnews.com/articles/news/national/2008/12/04/poll-black-voters-not-responsible-for-passage-of-same-sex-marriage-ban-in-california.html>.

61. *See* Kate Kendall, *Race, Same-Sex Marriage, and White Privilege: The Problem with Civil Rights Analogies*, 17 YALE J. L. & FEMINISM 133, 135 (2005) ("Gay liberation—including the right to marry—will remain illusory unless white queers actively challenge and combat the rich, white stereotype. Given the culture we live in, the image is seductive, but it is inaccurate and ultimately unhelpful."); Darren Lenard Hutchinson, "Gay Rights" for "Gay Whites"?: *Race, Sexual Identity and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1362-68 (2000).

are also marginalized by heterosexism, in addition to racism and classism.⁶²

This marginalization and invisibility of LGBTs of color is particularly stark when exploring the demographics of LGBTs with children. While the typical representation of LGBTs with children are often white and middle class, the reality is that a significant percentage of LGBTs with children are people of color.

In the very state in which Prop 8 was passed, a recent study found that the 26,000 gay and lesbian couples raising an estimated 70,000 children are “more likely to be people of color and that their median household income is 17% lower than the income of married couples with children.”⁶³ In Alameda County, California, the demographic breakdown of the 1,400 same-gender couples with children yielded the following: 29% were Latino parents, 13% African-American, 12% Asian/Pacific Islander, 1% Native American or other, and 45% white.⁶⁴ Further, 69% of the same-sex parents in Alameda County are women.⁶⁵ It is important to note that these numbers do not include individual gays and lesbians of all demographics raising children, nor does it include white same-gender couples raising children of color.⁶⁶

Despite the data, gays and lesbians are often viewed as white (and affluent). And this representation of gayness as whiteness is the result of racism and white privilege on the right and the left.⁶⁷ On the right, the Traditional Values Coalition’s film, *Gay Rights, Special Rights: Inside the Homosexual Agenda*—a video that is used specifically to recruit African-American supporters into the anti-gay movement—accuses gay and lesbian activists of “highjacking” the Civil Rights Movement. It also casts LGBTs as economically affluent, showing the alleged disparities

62. Hutchinson, *supra* note 61, at 1370-1371. As Darren Hutchinson explains in the context of the predominately white LGBT push for gay marriage:

[Sociological] data demonstrate that heterosexuals of color, particularly blacks and Latinos, exercise their existing right to marry at rates far lower than those of whites. Sociologists attribute these differences to cultural norms among persons of color that place greater importance on extended, rather than nuclear, family arrangements and to economic hardships that diminish the financial incentives traditionally associated with marriage. Thus, economic and cultural realities may render marriage less attractive and less financially advantageous for gay, lesbian, bisexual, and transgendered persons of color and the poor. Furthermore, because women, people of color, and the poor within gay and lesbian communities experience subordination from gender, racial, and economic hierarchies, in addition to heterosexism, the achievement of formal sexual equality, including the right to same-sex marriage, will not completely insulate them from oppression.

Id.

63. Tyche Hendricks, *A New Family Portrait: Same-sex Couples Raising Children Less Likely to be White, Wealthy, Study Finds*, S.F. CHRON., Oct. 31, 2007, at A1.

64. *Id.*; BIANCA D.M. WILSON, PHD, LGBT FAMILY COLLABORATIVE, OUR FAMILIES: ATTRIBUTES OF BAY AREA LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PARENTS AND THEIR CHILDREN 7 (2007), available at <http://www.sfcenter.org/pdf/OurFamilyReport.pdf>.

65. See Hendricks, *supra* note 63.

66. See WILSON, *supra* note 64, at 6-7.

67. See Hutchinson, *supra* note 61, at 1362-68.

between LGBTs and African-Americans and asserting that LGBTs have higher incomes and are employed in upper management and frequently travel.⁶⁸

On the left, the limited power that LGBT communities manage to harness typically replicates the political power of the white majority by advancing a white image and white interests—it fails to identify and demonstrate the diversity within the LGBT community. It is a tactical decision perhaps: the best way to sway the white power elite is to demonstrate how “like them” we are, and being like them means being white. Still, this form of racism, while seeking to challenge homophobia, ends up perpetuating it. It deters blacks and other people of color from recognizing their collective interest in gay rights, as it signals to them that, even an Obama-esque coalition’s anti-subordination efforts, “of color” interests will be subverted to white interests yet again.

The evolving ideals of equality demand a focus on systems of oppression in myriad forms. Over the past forty years the landscape of the black civil rights struggle has shifted as other social change movements have emerged nationally and globally, including the immigrants’ rights movement and the gay rights movements. These movements are often portrayed as antagonistic to, or in competition with, black equality—a “divide-and-conquer tactic” leveraged by the power elite to deflect attention away from systems of power and privilege, much like what we saw during the firestorm of Prop 8’s passage. To undo oppression, however, people of color and gays and lesbians (as well as members of other subordinated groups) must recognize, even anticipate, this divisive technique and ready ourselves with a new paradigm to attack the concentration of power, wealth and domination that keeps all of us subjugated on some axes.

Marginalized groups must strive to see what our interests share in common. In his historic speech on race, Obama asserted that anger in the black community over racism, and the resentment of whites over affirmative action, “distract attention from the real culprits of the middle class squeeze—a corporate culture rife with inside dealing, questionable accounting practices, and short-term greed; a Washington dominated by lobbyists and special interests; economic policies that favor a few over the many.”⁶⁹ This reality came home to roost just months after the speech, as the nation fell into the abyss of a staggering economic crisis: the Dow losing roughly 40% of its value;⁷⁰ home prices falling to historic

68. NICOLAS RAY, NAT. GAY AND LESBIAN TASK FORCE POLICY INC., FALSE PROMISES, HOW THE RIGHT DEPLOYS HOMOPHOBIA TO WIN SUPPORT FROM AFRICAN AMERICANS, 22-23 (2006), available at <http://www.thetaskforce.org/downloads/reports/reports/FalsePromises.pdf>.

69. Barack Obama, A More Perfect Union (Mar. 18, 2008), available at <http://my.barackobama.com/page/content/hisownwords>.

70. Dow Jones Industrial Average Index, <http://data.cnbc.com/quotes/.DJIA/tab/2> (last visited Jan. 26, 2009).

lows⁷¹ and unemployment reaching a fifteen-year high.⁷² Blacks and whites share an interest in economic justice, even if they arrive at that need from different historical and contemporary realities, and we have a better chance of attaining meaningful change working together rather than as oppositional groups.

This is not to say that different forms of oppression are the “same” or that our experiences are parallel. Homophobia and racism surely are not “the same.”⁷³ They are neither rooted in the same histories, nor do they play out in the same way in day-to-day experiences. Racism as lived by black people is not “the same” as homophobia lived by lesbians, gays, bisexuals and transgendered people.⁷⁴ Yet in the political discourse individuals often fall into a sameness trap. Instead of exploring the harms of both racism and homophobia—as we saw in the Prop 8 debate—the conversation often goes point-counterpoint, something like this:

Person in Opposition to Gay Rights: *“Gays were never slaves”*

Person in Support of Gay Rights: *“While that may be true, gay people have been persecuted throughout history”*

Person in Opposition to Gay Rights: *“Gay people are not known as gay unless they tell someone; black people are immediately identified as black”*

Person in Support of Gay Rights: *“Some gay people can be identified as gay; even if they cannot, being closeted forces gay people to live a lie”*

Person in Opposition to Gay Rights: *“Blacks are born black; being gay is a choice”*

Person in Support of Gay Rights: *“Being gay is not a choice. Trust me, I would not choose to be gay to be discriminated against all of the time” or “Even if it is a choice, I should not be forced to choose a partner of the opposite sex”*⁷⁵

These types of exchanges are the rhetorical sheep that lull us to sleep during the revolution. They serve as convenient distractions for those seeking a larger social justice framework. Sameness is not the measure of equality. Just as Obama explained that the debates over racism and affirmative action among blacks and poor and middle class

71. Rex Nutting, *U.S. Homes Now Undervalued, Economists Say*, MARKET WATCH, Dec. 3, 2008, <http://tinyurl.com/ccr8ah> (last visited Mar. 25, 2009).

72. *US Unemployment Rises to 15-year High*, IRISH TIMES, Dec. 5, 2008, available at <http://www.irishtimes.com/newspaper/breaking/2008/1205/breaking53.htm>.

73. Jennifer Holladay, *Hesitation and Hope*, Spring 2009, <http://www.tolerance.org/teach/magazine/editorsnote.jsp?p=0&is=44>.

74. Catherine Smith, *Queer as Black Folk?*, 2007 WIS. L. REV. 379, 388 (2007).

75. *Id.* at 388-389.

whites “distract attention from the real culprits of the middle class squeeze,” the sameness trap distracts us from the difficult work of identifying how racism and homophobia (and sexism) are often linked to maintain systems of power and privilege. This trap too often prevents us from offering a counter-narrative, an alternative message that frames how our subordinations are related.⁷⁶

CONCLUSION

In his journey to the White House, Barack Obama demonstrated that he could be, in the words of Dr. King, not merely “a searcher for consensus but a molder of consensus,”⁷⁷ creating a coalition that called us to “look after not only ourselves but each other.”⁷⁸

To be sure, Obama’s coalition is an imperfect one.⁷⁹ Proposition 8’s passage reminds us that we still fall too readily into the categories of “us and them”—categories in which subjugated groups fight against each other, rather than alongside each other.

Still, Obama has set us on a new path in America’s long journey toward justice and equality for all. A path driven by the “common stake we all have in one another.”⁸⁰ His work is our work, and it is change we must build on. We must commit ourselves to a new kind of social justice movement in which our identities remain intact, but do not obscure our views of the larger picture where we can see, and unify around, anti-subordination principles with the power to liberate us all from the firm grasp of oppression.

76. *Id.* at 386.

77. Martin Luther King, Jr., *Domestic Impact of the War*, (Nov. 1967), available at http://www.aavw.org/special_features/speeches_speech_king03.html.

78. Transcript: ‘This is your victory,’ says Obama, CNN, Nov. 5, 2008, <http://www.cnn.com/2008/POLITICS/11/04/obama.transcript/>.

79. Many find Obama imperfect as well. His selection of evangelical minister Rick Warren—who has compared homosexuality to incest and pedophilia—to deliver the invocation at his inauguration angered many. See CNN.com, *Obama: Choice of Warren Reflects Diversity of Ideas*, Dec. 18, 2008, <http://www.cnn.com/2008/POLITICS/12/18/obama.warren/>; see also Jennifer Holladay, *Does Rick Warren Represent Diversity?*, Jan. 2009, <http://www.tolerance.org/teach/activities/activity.jsp?ar=1037>; see also Darren Hutchinson, *The Fallacy of Obama’s Diversity Defense: Rick Warren’s Views Already Have a Place at the Table*, Dec. 22, 2008, <http://dissentingjustice.blogspot.com/2008/12/fallacy-of-obamas-diversity-defense.html>.

80. Barack Obama, *A More Perfect Union* (Mar. 18, 2008), available at <http://my.barackobama.com/page/content/hisownwords>.