

Systemic Classism, Systemic Racism: Are Social and Racial Justice Achievable in the United States?

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I. INTRODUCTION

The thesis of this article is that the United States is systemically a highly classist and racist society, that classism and racism are interrelated and overlapping phenomena, and that the achievement of a non-classist/non-racist society requires a mass movement of working-class people of all ethnicities for social and racial justice for all.

By systemic classism/racism I mean that the political and economic institutions of the society are structured and operate to systematically disadvantage working-class people in general, and ethnic minorities in particular, and to systematically advantage a relatively small and largely white upper elite class, and a rather substantial and predominantly white upper middle class. By systemic advantage/disadvantage I mean that the opportunities to succeed in life are unequally distributed along class and racial lines, and that society's institutions produce and perpetuate this class/race hierarchy.

The discussion of race focuses primarily on African Americans and Hispanics, both of whom have been systematically disadvantaged on account of ethnicity.¹ As the society's largest disadvantaged minorities,

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¹ Race and ethnicity are contestable and mutable concepts, and I use the terms somewhat interchangeably. Cf. Linda Martín Alcoff, *Is Latina/o Identity a Racial Identity?*, in *HISPANICS/LATINOS IN THE UNITED STATES* 23, 42 (Jorge J.E. Gracia & Pablo de Greiff eds., 2000) (arguing that neither race as based on biological homogeneity nor ethnicity as based on common cultural traits fully captures Latina/o identity in the context of the United States, and suggesting a concept of "ethnorace" as a helpful way of characterizing Latina/o identity); ORLANDO PATTERSON, *THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA'S "RACIAL" CRISIS* x-xi, 173 (1997) (arguing that "Afro-Americans are not a 'race' in any meaningful sense, but an aggregate of 33 million people that is better described as an ethnic group if one must speak of the entire collectivity," and that "the distinction between 'race' and ethnicity should be abandoned as meaningless and potentially dangerous"). I adhere to the view that race and ethnicity are socially constructed and historically contingent concepts, and that they are typically used to establish and

comprising together more than a quarter of the population² and an even larger segment of the working class,³ the participation of substantial numbers of African Americans and Hispanics is essential to a successful mass movement for social and racial justice. A successful movement also requires the participation of substantial numbers of working-class whites, who comprise a majority of the working class⁴ and who, along with the working class as a whole, have been systematically disadvantaged on account of their class status.

identify individuals' and groups' positions in a society's social hierarchy. As such, they have been used, in ways particular to each group and differing over time, to disproportionately relegate African Americans and Hispanics to the lower rungs of American society. Cf. Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994) (describing race as social groups "bound together by historically contingent, socially significant elements of their morphology and/or ancestry"); THOMAS C. HOLT, THE PROBLEM OF RACE IN THE TWENTY-FIRST CENTURY 22 (2000) ("[T]he meaning of race and the nature of racism articulate with (perhaps even are defined by) the given social formation of a particular historical moment . . . [including] all the interrelated structures of economic, political, and social power, as well as the systems of signification (that is, cultural systems) that give rise to and/or reflect those structures.").

² As of the 2000 Census, the black share of the population was 12.3% and the Hispanic share was 12.5%. ELIZABETH N. GRIECO & RACHEL C. CASSIDY, U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2000 3 tbl.1 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf>. As of 2007, the figures were estimated to be 12.8% black and 15.1% Hispanic. U.S. CENSUS BUREAU, STATE AND COUNTY QUICKFACTS, available at <http://quickfacts.census.gov/qfd/states/00000.html> [hereinafter STATE AND COUNTY QUICKFACTS] (last visited May 16, 2009). Since black Hispanics are included in both categories, these numbers overstate the combined black and Hispanic share of the population, though not significantly since most Hispanics classify themselves as white.

³ I estimate the working class to comprise between two-thirds to three-fourths of the population. The working class can be defined in a number of ways—based, for example, on job classification, income, or level of education. While not identical, these categories substantially overlap, meaning that working-class jobs tend to produce lower incomes and to be associated with lower levels of education. Extrapolating from gross numbers reported by the Census Bureau, I calculate that as of 2000 about 68% of all workers fell into the working class, and that about 25% of the working class were non-Hispanic black and Hispanic. U.S. CENSUS BUREAU, CENSUS 2000 EEO DATA TOOL, EMPLOYMENT BY EEO-1 JOB CATEGORIES, <http://www.census.gov/eo2000/index.html> [hereinafter CENSUS 2000 EEO DATA TOOL] (including sales, administrative support, craft, operatives, laborers, service workers and long-term unemployed as working-class jobs, but excluding officials and managers, professionals, and technicians). The non-Hispanic black and Hispanic figures should be nominally higher today in light of the increase in the black and Hispanic share of the population since 2000. Furthermore, I calculate that as of 2000, 69.5% of households had annual incomes under \$75,000 (in 2006 dollars); of these households, 14.5% were black (including black Hispanic) and 10.8% were Hispanic (of all races), increasing in 2006 to 14.8% black and 13.0% Hispanic. U.S. CENSUS BUREAU, THE 2009 STATISTICAL ABSTRACT tbl.668, available at <http://www.census.gov/compendia/statab/tables/09s0668.pdf> [hereinafter 2009 STATISTICAL ABSTRACT]. For education statistics, see *infra* notes 20-22 and accompanying text.

⁴ Extrapolating from gross numbers contained in the CENSUS 2000 EEO DATA TOOL, *supra* note 3, I calculate that non-Hispanic whites held about 69% of working-class jobs. Based on the 2009 STATISTICAL ABSTRACT, *supra* note 3, I calculate that in 2000, 81.2% of households earning less than \$75,000 were white, and that in 2006 this figure decreased to 79.8%. However, because the 2009 STATISTICAL ABSTRACT does not show non-Hispanic whites as a separate category, and since most Hispanics classify themselves as white, the actual household income figures for non-Hispanic whites are likely substantially lower than my calculations. *Id.*

Class and race, while not identical, are intimately interrelated and cannot be fully disentangled. A racist society will inevitably be a classist society because racist practices contribute to class distinctions. Conversely, a classist society produces racism. In this society, for example, where all have an incentive to protect themselves from falling to the bottom of the class hierarchy, the white majority benefits when racial and ethnic minorities are disproportionately less well off. And, in turn, the elite class benefits from, and has the incentive to promote, ethnic divisions within the working class so as to impede alliances that might challenge its predominance.

Consequently, I argue that a non-classist society—a society in which the opportunities to succeed in life are not dependent on one's class status—is a prerequisite for the achievement of a non-racist society. Concomitantly, a non-racist society—a society in which the opportunities to succeed in life are not dependent on one's race or ethnicity—is a prerequisite for the achievement of a non-classist society. Further, I argue that the achievement of a non-classist/non-racist society requires a mass movement of working-class people of all ethnicities. The question, in light of the racist incentives inherent in a classist society, is how to overcome ethnic divisions and mobilize such a movement.

Part II of this article examines how this society's institutions produce and perpetuate a class/race hierarchy. Part II.A focuses on the economic system, Part II.B on the local governmental structure, and Part II.C on the political process. Part III explores the possibilities for systemic reform. Part III.A outlines some of the key elements of a reform program for social and racial justice. Part III.B examines the need for an inter-ethnic mass movement for social and racial justice and the conditions under which it might arise. Part III.C speculates about the possibilities of a mass movement at this historical juncture, in light of the current economic crisis and Barack Obama's election as President. The Conclusion asserts that without such a mass movement this will remain a highly classist and racist society for the foreseeable future.

II. HOW SOCIETY'S INSTITUTIONS PRODUCE AND PERPETUATE CLASS AND RACIAL HIERARCHY

A. The Economic System

Systemic classism and racism are reflected in the entrenched socio-economic inequalities that seem endemic to an economic system organized primarily on the basis of competition for profit. In the United States, in particular, the distribution of wealth and income is highly skewed in general and along ethnic lines. These inequalities are substantial, ranging

from super rich to abject poverty, and have increased over the past generation or two.

Those in the top 20% of the earnings, income, and/or wealth distributions, what I refer to as the “better off,” are the major beneficiaries of the society’s hierarchical class/race structure, while those at the very top of the class hierarchy consist of a small and extremely wealthy economic elite. As of the early 2000s, the top 1% of households had about 33% of the total net worth and about 20% of the total income, the top 20% of households had about 84% of the total net worth and about 59% of the total income, while the bottom 40% had less than 1% of the net worth and only about 10% of the income.⁵ These disparities have grown since the 1960s, since which time only the top 5% to 20% of households have seen their share of wealth and income rise while the share of all other segments has declined,⁶ and are at their highest level since before the Great Depression.⁷ Meanwhile, as of the early 2000s, the mean net worth of black families was only 14% of white families, while the mean family income of African Americans was only 48% of whites.⁸ Hispanics faced comparable disparities, with family net worth of only 17% and family income of only 50% of whites.⁹

At the bottom of the class hierarchy a substantial segment of the population, among whom African Americans and Hispanics are disproportionately represented, lives in poverty. As of 2005, almost 13% of the population fell below the official poverty line,¹⁰ which was then about \$20,000 for a family of four;¹¹ for non-Hispanic whites, the poverty rate was about 8%, for African Americans about 25%, and for Hispanics

⁵ Edward N. Wolff, *Changes in Household Wealth in the 1980s and 1990s in the U.S.* 30 tbl.2 (Levy Econ. Inst. of Bard College, Working Paper No. 407, 2004), available at <http://www.levy.org/pubs/wp/407.pdf>. The mean net worth of households in the top 1% was about \$12.7 million and the mean income was approximately \$1.1 million. *Id.* at 31 tbl.3.

⁶ *Id.*; LISA A. KEISTER, *WEALTH IN AMERICA* 58 tbl.3-2 (2000). As of 1995, 19% of households had zero or negative net worth, up from 11% in 1962. *Id.* at 59 tbl.3-1.

⁷ Edward N. Wolff, *Recent Trends in the Distribution of Household Wealth*, in *BACK TO SHARED PROSPERITY: THE GROWING INEQUALITY OF WEALTH AND INCOME IN AMERICA* 57, 59-60 (Ray Marshall ed., 2000).

⁸ Wolff, *supra* note 5, at 35 tbl.7. Disparities in family income and wealth between non-Hispanic whites and non-Hispanic African Americans have increased since the 1980s. *Id.*

⁹ *Id.* at 36 tbl.8. In 2006, 20.2% of white households had incomes over \$100,000, compared to 9.1% of black and 10.5% of Hispanic households. In that same year, 39.6% of black and 31.8% of Hispanic households, compared to 23.3% of white households, had incomes less than \$25,000. 2009 STATISTICAL ABSTRACT tbl. 668, *supra* note 3.

¹⁰ CARMEN DEHAVAS-WALT ET AL., *U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2005*, at 46 tbl.B-1 (2006), <http://www.census.gov/prod/2006pubs/p60-231.pdf>.

¹¹ BUREAU OF LABOR STATISTICS & U.S. CENSUS BUREAU, *ANNUAL DEMOGRAPHIC SURVEY*, at tbl.POV35 (2006), available at http://pubdb3.census.gov/macro/032006/pov/new35_000.htm [hereinafter *ANNUAL DEMOGRAPHIC SURVEY*].

about 22%.¹² After falling substantially from more than 22% in 1959 to about 12% in 1972, the poverty rate has leveled off over the past thirty years.¹³ On the other hand, the disparity between African Americans and whites has decreased significantly since 1959, when the poverty rate among African Americans was about 55% and among whites about 18%.¹⁴ In light of the discussion which follows, however, it seems doubtful that this trend will continue without a restructuring of the economic system.

Two factors, unemployment and level of education, explain much of these inequalities. Over the past thirty-five years, the official unemployment rate has fluctuated between 4.0% and 9.7% annually, and has averaged about 6%.¹⁵ As many as twice the annual rate experience unemployment at some point during the year.¹⁶ The unemployment rate among African Americans has consistently been at least twice that of whites,¹⁷ among Hispanics it has averaged about 50% higher than for whites,¹⁸ and there is reason to think the disparities would be even greater if those not looking for jobs were counted.¹⁹ Since most people rely on their jobs as their main source of income, unemployment usually means severe economic hardship.

Conversely, incomes increase dramatically with the level of educational attainment. In 2003, for example, the median income of workers eighteen and older with high school degrees was almost 70% greater than non-high school graduates, the median income of those with a bachelor's degree was about 85% higher than that of high school graduates, and the median income of those with doctorates or professional degrees was about 75% and 90% higher, respectively, than college

¹² DENAVAS-WALT ET AL., *supra* note 10, at 46 tbl.B-1.

¹³ *Id.*

¹⁴ *Id.* at 47, 49 tbl.B-1. The poverty rate for Hispanics, available only since 1972, has fluctuated over the years between 21% and 31%. *Id.* at 51 tbl.B-1.

¹⁵ BUREAU OF LABOR STATISTICS, HOUSEHOLD DATA ANNUAL AVERAGES, at 194 tbl.1 (2009), <http://www.bls.gov/cps/cpsaat1.pdf>.

¹⁶ For example, in 2006 and 2007, when the annual unemployment rate was 4.6%, *id.*, more than 9.0% of those who worked or looked for work experienced unemployment averaging 13.8 weeks. BUREAU OF LABOR STATISTICS, EXTENT OF UNEMPLOYMENT DURING THE YEAR BY SEX: 2006-07, at tbl.3, available at <http://www.bls.gov/news.release/work.t03.htm> (last visited May 1, 2009).

¹⁷ BUREAU OF LABOR STATISTICS, LABOR STATISTICS FROM THE CURRENT POPULATION SURVEY, <http://data.bls.gov/cgi-bin/surveymost?ln> (last visited May 1, 2009) (select Unemployment Rate-White; Unemployment Rate-Black or African American; Unemployment Rate-Hispanic or Latino).

¹⁸ *Id.*

¹⁹ William J. Wilson, *Jobless Ghettos: The Social Implications of the Disappearance of Work in Segregated Neighborhoods*, in BACK TO SHARED PROSPERITY, *supra* note 7, at 85 (reporting that, as of 1990, an estimated six million unemployed males between the ages of twenty-five and sixty, disproportionately from inner city ghettos, did not appear in the unemployment data because they were not actively looking for work).

graduates.²⁰ While approximately 84% of those eighteen and older were high school graduates, only about 25% had a bachelor's degree or higher.²¹ Again, there are substantial ethnic disparities. Almost 90% of whites, but only about 80% of African Americans and 60% of Hispanics, were high school graduates, while about 28% of whites and only about 16% of African Americans and 10% of Hispanics had a bachelor's degree or higher.²²

If race were a neutral factor in this society, one would expect rough equality of socio-economic status among all ethnic groups. Since, in fact, whites as a whole are substantially better off than African Americans and Hispanics, somehow ethnicity must be at play. If class were a neutral factor, one would expect rough equality of socio-economic status as adults irrespective of class status at birth. In fact, that is not the case. While analysts disagree over the extent of intra and intergenerational mobility, there are indications that the ability to climb the class hierarchy has diminished over time and that economic inequalities have become increasingly entrenched.²³ For example, access to college education, which

²⁰ U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2004, at tbl.8 (2005), available at <http://www.census.gov/population/socdemo/education/cps2004/tab08-1.pdf> [hereinafter EDUCATIONAL ATTAINMENT].

²¹ *Id.* tbl.1a, available at <http://www.census.gov/population/socdemo/education/cps2004/tab01a-01.pdf>.

²² *Id.* tbl.8, available at <http://www.census.gov/population/socdemo/education/cps2004/tab08-1.pdf>. In 2005, the high school drop out rate of sixteen to twenty-four year olds was about 6% for whites, 10% for African Americans, and 22% for Hispanics. NAT'L CTR. FOR EDUC. STATISTICS, DROPOUT RATES IN THE U.S.: 2005, at 29 tbl.8 (2007), available at <http://nces.ed.gov/pubs2007/2007059.pdf>.

²³ See, e.g., Julia B. Isaacs, Brookings Inst., *Economic Mobility of Families Across Generations*, in GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA 19 fig.4 (Julia B. Isaacs et al. eds., 2007), available at http://www.brookings.edu/~media/Files/rc/papers/2007/11_generations_isaacs/11_generations_isaacs.pdf. The PEW Economic Mobility Project study of families between 1969 and 2004 found that 42% of children born into the bottom income quintile remained there as adults, while only 17% moved into the top two quintiles. *Id.* Comparatively, of children born into the top income quintile, 39% remained there as adults, while only 24% fell to the bottom two quintiles. *Id.* In light of these and other statistics, the report concluded that "[e]conomic position is strongly influenced by parental economic standing." *Id.* at 7. See also Julia B. Isaacs, Brookings Inst., *Economic Mobility of Black and White Families*, in GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA 7 (Julia B. Isaacs et al. eds., 2007), available at http://www.brookings.edu/~media/Files/rc/papers/2007/11_blackwhite_isaacs/11_blackwhite_isaacs.pdf (finding that "white children have substantially more upward mobility than black children of comparable incomes"); KEISTER, *supra* note 6, at 79 tbl.3-7, 233-58 (calculating, per simulation modeling, that 89% of those in the top 5% of wealth in 1975 were in the top 10% in 1995, and that 61% of those in the bottom 25% of wealth in 1975 were still in the bottom quarter of the wealth distribution in 1995; and concluding that the odds of moving into the top 10% have been substantially greater for whites than non-whites, that college graduates have considerably higher odds of upward mobility, and that the importance of education for upward mobility has increased over time); Eileen Appelbaum et al., *Low Wage America: An Overview*, in LOW-WAGE AMERICA: HOW EMPLOYERS ARE RESHAPING OPPORTUNITY IN THE WORKPLACE (Eileen Appelbaum et al. eds., 2003) (a series of studies analyzing the increasing inequality and decreasing mobility in the U.S. due to

is integrally related to success in life, is significantly and increasingly impacted by class status.²⁴

The thesis of this article is that the great inequalities produced by this society's economic system give rise to classism and racism as a means to preserve the status of the better off and prevent movements to restructure society along more egalitarian lines. To the extent a segment of society remains trapped at the bottom of the class hierarchy, that helps cushion the better off from falling to the bottom and having to endure its hardships. To the extent those trapped at the bottom are disproportionately minority, that helps cushion whites from falling to the bottom. Consequently, the better off and the white majority have an incentive to try to structure the system so as to maintain their superior status for themselves, their families and others who are similarly situated.

There are possible reforms of the economic system that might reduce the incentive to entrench inequality. One is a minimum wage at a level sufficient to maintain a decent life;²⁵ another is a guaranteed job for all who want to but cannot find work due to structural unemployment;²⁶ yet another is to tax income and wealth at rates high enough to reduce economic inequalities to a level consistent with substantial equality of opportunity for all.²⁷ Society's economic elites, who have the most to lose

globalization, technology, deregulation, changes in financial markets, and the decline in labor unions); Daniel P. McMurrer & Isabel V. Sawhill, *The Effects of Economic Growth and Inequality on Opportunity*, in BACK TO SHARED PROSPERITY, *supra* note 7, at 64 (concluding that, while there is "considerable" intra and intergenerational mobility in the U.S., "[t]he period since the early 1970s has been marked by a decline in opportunity for many, especially young men without college degrees.").

²⁴ In 2005, for example, entering college freshmen came from households with median parental incomes 60% higher than the national average, the largest gap in thirty-five years. Press Release, UCLA, Today's College Freshmen Have Family Income 60% Above National Average, UCLA Survey Reveals (Apr. 9, 2007), available at http://www.gseis.ucla.edu/heri/PFDs/PR_TRENDS_40YR.pdf.

²⁵ In May 2007, Congress voted to increase the federal minimum wage over a two-year period from \$5.15 per hour, where it had remained for ten years, to \$7.25 per hour. Stephen Labaton, *Congress Passes Increase in the Minimum Wage*, N.Y. TIMES, May 25, 2007, at A12. At the new minimum wage, a full time worker with a family of three or more would still fall below the official poverty line for 2006. ANNUAL DEMOGRAPHIC SURVEY, *supra* note 11, at tbl.POV35. As of July 2008, nine states had minimum wages higher than the new federal minimum. ECONOMIC POLICY INSTITUTE, STATE MINIMUM WAGES GREATER THAN THE FEDERAL MINIMUM WAGE tbl.5 (2008), available at <http://www.epi.org/issueguides/minwage/table5.pdf>. In addition, many local governments have living wage ordinances at a higher level than the federal minimum for public employees and private employers with governmental contracts. Living Wage Resource Center: Living Wage Successes, <http://www.livingwagecampaign.org/index.php?id=1958> (last visited May 1, 2009).

²⁶ See, e.g., PHILIP HARVEY, SECURING THE RIGHT TO EMPLOYMENT: SOCIAL WELFARE POLICY AND THE UNEMPLOYED IN THE UNITED STATES 3-6 (1989) (arguing for and detailing a program to guarantee a right to employment for all in the United States with the government as the employer of last resort).

²⁷ Socio-economic inequalities are not necessarily indicative of classism and racism. A society is conceivable, for example, in which inequalities are proportionately distributed among the various ethnic groups and in which individuals succeed or fail based solely on their merits. To the extent that class is equated with inequality, such a society would not be classless. But as defined here, it would be both non-racist and non-classist in that people's opportunities in life are not adversely affected by their ethnicity or class status, and that outcomes are a function of individual talent and initiative.

from a less hierarchical system, have consistently opposed such measures.²⁸ Their attainment requires a movement, strong enough to counter elite political power, of those who stand to gain from a more egalitarian system—namely, those who now endure unemployment and poverty, or those among the vast middle segment of society whose chances of upward mobility are increasingly limited and who might come to view a more egalitarian system as preferable to the risks of falling to the bottom of today's more hierarchical system.

Society's economic elites, being in the minority and benefiting most from the hierarchical economic system, have an interest in forestalling a unified working class, and have historically used their disproportionate political and cultural power to achieve this aim. One way is through structuring the law to inhibit workers from organizing. In the early years of the union movement, collective action by workers was banned—first as a criminal conspiracy and then as a restraint of trade.²⁹ Today, employers have the right to permanently replace striking workers, which strengthens employers' position in collective bargaining.³⁰ For the most part, employers have the right to fire workers for any reason at all, as long as they do not violate anti-discrimination laws, collective bargaining agreements or individual employment contracts.³¹ Structural

²⁸ HARVEY, *supra* note 26, at 99-117.

²⁹ See, e.g., WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 59-97 (1991) (depicting the history of the declining use of criminal conspiracy prosecutions and the increasing use of anti-strike injunctions as a principal means of impeding worker organization in the late nineteenth and early twentieth centuries); CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 101-14, 128-52, 160-79 (1993) (setting forth the history of the use of common-law criminal conspiracy prosecutions as a means of impeding worker organization during the first half of the nineteenth century).

³⁰ See, e.g., James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004) (discussing a series of Supreme Court rulings elevating employers' rights over those of workers, including the imposition of limits on the right to strike, the limitation of remedies for unlawful labor practices, and the recognition of an employer's right to permanently replace lawful strikers).

³¹ See, e.g., Kenneth G. Dau-Schmidt & Timothy A. Haley, *Governance of the Workplace: The Contemporary Regime of Individual Contract*, 28 COMP. LAB. L. & POL'Y J. 313 (2007) (reporting that, with the decline of unions and the increase of individual employment contracts as a consequence of globalization and related workplace changes, about 85% of non-union employees are at-will, as compared to the near universality of just-cause requirements in collective bargaining contracts; and surveying measures adopted by many state courts and legislatures to protect workers' jobs, including exceptions to the at-will doctrine to prevent discharges in violation of public policy, as well as implied contracts and implied covenants of good faith and fair dealing, although noting that this process has slowed in recent years and that the at-will doctrine continues to serve as the default rule); Sally C. Gertz, *At-Will Employment: Origins, Applications, Exceptions, and Expansions in Public Service*, in *AMERICAN PUBLIC SERVICE: RADICAL REFORM AND THE MERIT SYSTEM* 47 (James S. Bowman & Jonathan P. West eds., 2007) (providing a history of the development of, and the limited exceptions to, the at-will standard as the default position with regard to employment contracts); Daniel J. Libenson, *Leasing Human Capital: Toward A New Foundation for Employment Termination Law*, 27 BERKELEY J. EMP. & LAB. L. 111, 114 (2006) (discussing scholarly arguments for replacing the current at-will employment approach with a good cause requirement for termination, noting that only one state has

unemployment makes the threat of replacement or termination real, and creates divisions between workers who have jobs and those who do not.³²

Racism readily flows from this scenario. When African Americans and Hispanics are disproportionately unemployed and relegated to lower paying jobs, this benefits white workers, as long as the economic system remains hierarchical. White workers have an incentive to strike a bargain with their employers: if you agree to favor white workers, we will agree to moderate our wage demands. This arrangement would seem to underlie the explicitly discriminatory employment practices in the Jim Crow South, as well as throughout the country, prior to being banned by the Civil Rights Act of 1964.³³ And though now unlawful, such an understanding might operate on a tacit or unconscious level that is difficult to identify or prove.³⁴

But while the interests of white workers and the economic elite may at times converge, they also conflict. They diverge most when workers act collectively to counter the power the economic elite has to dominate workers through its control of access to jobs. One way to deter collective action is to use race to divide workers.³⁵ While it may be that workers of

such a requirement, and advocating as an alternative a requirement that employers ordinarily give employees adequate advance notice of termination).

³² Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws,"* 1990 WIS. L. REV. 1 (1990) (arguing that American labor law, in conjunction with the economic and political systems, is structured to strengthen the hand of employers against workers and to fragment the labor movement as a whole, and that worker self-limitation to short-term material benefits, as compared to more collective ends such as increasing social welfare benefits for all, is a rational response to these structures absent a movement to change them that is inhibited by those very structures).

³³ 42 U.S.C. § 2000e-2 (2000).

³⁴ On unconscious racism, see, e.g., Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006) (discussing studies showing that implicit bias exists and produces discriminatory behavior, that it is pervasive and tilted toward advantaged and against disadvantaged groups, and that it is at least somewhat malleable); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005) (discussing studies of unconscious bias, arguing that, properly interpreted, Title VII of the Civil Rights Act of 1964 prohibits unconscious discrimination in employment, and suggesting ways of proving unconscious bias in particular cases, while acknowledging the proof problems when subjective decisionmaking is involved); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 329-44 (1987) (discussing the impact of society's culturally racist belief system in producing unconscious racist attitudes and actions); Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913 (1999) (discussing studies showing the existence of unconscious bias and the possibility of reversing it when people hold egalitarian views on a conscious level, and arguing for a limited evidentiary privilege against disclosure of voluntary testing by employers to encourage the development of preventative and rehabilitative measures).

³⁵ See, e.g., PHILIP S. FONER, *ORGANIZED LABOR AND THE BLACK WORKER: 1619-1973*, at ix (1974) (discussing the history of the exclusion and segregation of black workers by organized labor through the mid-1930s, noting the entry of substantial numbers of rank-and-file black workers into traditional unions from the New Deal era through the early 1980s, while still being excluded from leadership positions and disproportionately relegated to the lowest level jobs, and concluding that "the racist policies and practices of organized labor created a privileged group of white workers at the

all ethnicities would be better off joining together and confronting employers as a united front, as evidenced by gains workers achieved when they have done so,³⁶ there are obstacles to unity.

One obstacle, discussed in Part II.C, is that the political system is structured to minimize the power of the working class and ethnic minorities, stymieing reform efforts and contributing to conflicts among various segments of the working class who are trying to maintain their positions in the economic hierarchy. Secondly, as discussed in Part III.B, the racist ideology of prior eras may become culturally entrenched and lead people to react in ways that are contrary to what they might otherwise determine to be in their best interests. Part III.B also addresses what it would take to overcome the obstacles to inter-ethnic alliances among working-class people and to forge a unified reform movement.

B. The Local Governmental Structure

State government in the United States is decentralized. In most if not all states, there is a multiplicity of local governments that have a degree of autonomy to manage and finance their own affairs.³⁷ The theory is that local autonomy enhances democracy by bringing government closer to the people, thereby producing a government more responsive to their needs.³⁸

expense of black workers and thus strengthened the employers' ability to divide the working class and weaken efforts to unionize major industries"); MICHAEL REICH, RACIAL INEQUALITY: A POLITICAL-ECONOMIC ANALYSIS 269 (1981) (arguing, on the basis of historical evidence and econometric analyses, that racial inequality hurts most white workers while benefiting capitalists and high-income whites, that "[r]acial inequality exacerbates inequality among whites because racial antagonisms inhibit union bargaining strength and militancy, thereby reducing the total income share of labor," and that the capitalist class has been able to forestall inter-ethnic solidarity among workers by using its economic and political power to create racially hierarchical workplaces that inhibit solidarity by leading white workers to fear the loss of their privileged status).

³⁶ See, e.g., Michael Goldfield, *Achilles' Heel and the Tortoise: Race and the Labor Movement in the United States of America*, in RACE AND LABOR MATTERS IN THE NEW U.S. ECONOMY 71, 71-95 (Manning Marable et al. eds., 2006) (concluding that workers have fared better through interracial solidarity, citing in particular the period after the Civil War in some parts of the South and the Congress of Industrial Organization's (CIO) organizational efforts in the 1930s and 1940s, and attributing the post-World War II union decline in large part to a retreat on racial issues); REICH, *supra* note 35, at 216-67 (discussing the advances made by the labor movement in eras of racial solidarity and the lack of success when employers were able to divide workers by exploiting racist attitudes and fears between 1865-1975). For examples of particular union struggles where interracial solidarity led to success and interracial division to defeat, see generally RICK HALPERN, DOWN ON THE KILLING FLOOR: BLACK AND WHITE WORKERS IN CHICAGO'S PACKINGHOUSES, 1904-54 (1997); MICHAEL K. HONEY, SOUTHERN LABOR AND BLACK CIVIL RIGHTS: ORGANIZING MEMPHIS WORKERS (1993); J. CRAIG JENKINS, THE POLITICS OF INSURGENCY: THE FARM WORKER MOVEMENT IN THE 1960S (1985); DANIEL ROSENBERG, NEW ORLEANS DOCKWORKERS: RACE, LABOR, AND UNIONISM, 1892-1923 (1988).

³⁷ As of 2002, there were 19,429 municipal governments included in the U.S. Census. U.S. CENSUS BUREAU, 2002 CENSUS OF GOVERNMENTS, at v (2002), <http://www.census.gov/prod/2003pubs/gc021x1.pdf>.

³⁸ See, e.g., Richard Briffault, *Home Rule for the Twenty-first Century*, 36 URB. LAW. 253, 258-60 (2004); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1067-73 (1980).

Local autonomy also promotes pluralism as a democratic value by enabling smaller groups of people to pursue common interests that might otherwise be overwhelmed in larger and more heterogeneous settings.³⁹ But local control also gives rise to self-interested behavior that adversely affects the less-well-off and ethnic minorities.⁴⁰ When this happens, it contributes to systemic classism and racism.

Most people in the United States now live in urban areas.⁴¹ The dominant pattern is that of a core city surrounded by suburban communities with their own city governments.⁴² By and large, disproportionate numbers of the working class, ethnic minorities and lower income people inhabit the core cities and some nearby suburbs, while suburbia as a whole is more affluent and predominantly white.⁴³ There is an increasing economic hierarchy within suburbia as well, with communities ranging from highly exclusive to middle income to poor.⁴⁴

Generally, cities must rely heavily on their own finances to pay for public services.⁴⁵ This enables suburban communities with higher tax bases and lower service needs to provide a higher level of services than the core cities and less-well-off suburbs.⁴⁶ In particular, the better-off suburbs

³⁹ Briffault, *supra* note 38, at 258-60; Frug, *supra* note 38, at 1067-73.

⁴⁰ See *infra* note 50 and accompanying text.

⁴¹ On the pattern of urban development described in this paragraph, see generally JASON C. BOOZA ET AL., BROOKINGS INST., WHERE DID THEY GO? THE DECLINE OF MIDDLE-INCOME NEIGHBORHOODS IN METROPOLITAN AMERICA (2006), http://www.brookings.edu/metro/pubs/20060622_middleclass.pdf; ROBERT PUENTES & DAVID WARREN, BROOKINGS INST., ONE-FIFTH OF AMERICA: A COMPREHENSIVE GUIDE TO AMERICA'S FIRST SUBURBS (2006), http://www.brookings.edu/metro/pubs/20060215_FirstSuburbs.pdf; TODD SWANSTROM ET AL., BROOKINGS INST., PULLING APART: ECONOMIC SEGREGATION AMONG SUBURBS AND CENTRAL CITIES IN MAJOR METROPOLITAN AREAS (2004), http://www.brookings.edu/metro/pubs/20041018_econsegregation.pdf.

⁴² See SWANSTROM ET AL., *supra* note 41, at 2.

⁴³ See *id.*

⁴⁴ *Id.* at 7. Generally speaking, and with some regional differences, this metropolitan pattern began to take shape following World War II, whose aftermath saw a great movement of white middle- and upper-class people to what are now the inner-ring suburbs. In recent decades an outer-ring of suburbs has developed, where the rate of growth is now twice that of the inner-ring suburbs. Development within central cities, whose growth rate lags far behind that of suburbia, consists largely of housing for younger professionals who prefer the city to suburbia. Both within and between communities there is a high degree of racial and class separation, and this separation has increased in recent years. Ethnic minorities and lower income people are concentrated in central cities, within central cities in largely lower income neighborhoods, and in some nearby suburbs that have become heavily and increasingly lower income and to which their movement has been fueled in large part by central-city gentrification. See *infra* note 52.

⁴⁵ See, e.g., Robert P. Inman & Daniel L. Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 HARV. L. REV. 1662, 1671-84 (1979); MYRON ORFIELD, AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY 23-64, 93-95 (2002).

⁴⁶ See Inman & Rubinfeld, *supra* note 45 (developing an economic model explaining why taxes as a percentage of family income tend to be lowest in areas of high levels of service and highest in areas with low to adequate levels of service); ORFIELD, *supra* note 45, at 94-95 (concluding that as of 1998 about 7% of the people in the twenty-five largest metropolitan areas lived in suburbs with high tax capacity and low service needs, about 25% lived in suburbs that were holding their own, about 40%

spend substantially more money on their children's education than other communities are able to afford.⁴⁷ Given the critical importance of education to life chances,⁴⁸ this arrangement advantages suburban children over inner-city children, and children in better-off suburbs over children in less-well-off suburbs.⁴⁹

This governmental structure creates an incentive for lower income people to move to better-off suburban communities in order to benefit from their higher level of services. Those communities have a corresponding incentive to limit the influx of lower income people. One such limit has been through the enactment of zoning ordinances that push housing prices above the means of lower income people.⁵⁰ Exclusionary zoning has been

lived in suburbs with low tax capacity and increasing service needs, and about 30% lived in central cities with about average tax bases and a grossly disproportionate share of service demands associated with high concentrations of poverty).

⁴⁷ Educational expenditures vary greatly among and within states. In 2005-06, the average elementary and secondary school per pupil expenditure in the U.S. was \$9,138, ranging from a high of \$14,884 in New York to a low of \$5,437 in Utah. U.S. CENSUS BUREAU, PUBLIC EDUCATION FINANCES 2006, at 8 tbl.8 (2008), available at <http://ftp2.census.gov/govs/school/06f33pub.pdf>. The highs and lows for school systems with enrollment exceeding 10,000 students in selected states were as follows: California: \$12,264/\$5,817; Florida: \$9,546/\$6,677; New York: \$16,942/\$11,180; Texas: \$9,096/\$6,091. *Id.* at 97-99, 104, 107-08 tbl.17. See CARMEN G. ARROYO, EDUC. TRUST, THE FUNDING GAP 6-7 tbls.5 & 6 (2008), available at http://www.nvasb.org/Publications/Research_Data/the_funding_gap.pdf (finding that, as of 2005, on average, high-poverty districts received \$938 less per pupil than low-poverty districts and that high-minority districts received \$877 less than low-minority districts); BRUCE J. BIDDLE & DAVID C. BERLINER, WESTED, WHAT RESEARCH SAYS ABOUT UNEQUAL FUNDING FOR SCHOOLS IN AMERICA (2003), available at http://www.wested.org/online_pubs/pp-03-01.pdf (documenting large funding differences between wealthy and impoverished communities, and attributing the gaps to the heavy reliance on local property taxes).

⁴⁸ See *supra* note 20 and accompanying text.

⁴⁹ While the link between educational expenditures and outcomes has been contested, and while factors other than expenditures are related to outcomes, the available evidence suggests a significant connection. See, e.g., James P. Pinkerton, *A Grand Compromise: Saving American Education Requires Ending the Reliance on Public Schools on Local Property-Tax Bases*, 291 ATLANTIC MONTHLY 115, 115-16 (2003) (reporting on a study of National Association of Educational Progress (NAEP) test results in thirty states showing that nine of the eleven states spending more than the national per pupil average had average or better test results, while twelve of the nineteen states spending less than the national average had less than average results); HAROLD WENGLINSKY, NAT'L CTR. FOR EDUC. STATISTICS, SCHOOL DISTRICT EXPENDITURES, SCHOOL RESOURCES AND STUDENT ACHIEVEMENT: MODELING THE PRODUCTION FUNCTION (1997), available at <http://nces.ed.gov/pubs98/dev97/98212h.asp> (concluding that there is a positive link between instructional expenditures and performance based on an evaluation of the 1992 NAEP mathematics test results). Even those who emphasize the primary importance of factors other than educational expenditures in determining student performance acknowledge that increased funding may contribute to the success of other types of reforms in improving performance. See, e.g., Eric A. Hanushek, *Spending on Schools*, in A PRIMER ON AMERICA'S SCHOOLS 69, 81-82 (Terry Moe ed., 2001) (citing studies showing "no systematic relationship between resources and outcomes once one considers families and other factors that determine achievement," while acknowledging that "[t]he studies, of course, do not indicate that resources could not make a difference. . . . Instead they demonstrate that one cannot expect to see much if any improvement simply by adding resources to the current schools.").

⁵⁰ See, e.g., MICHAEL N. DANIELSON, THE POLITICS OF EXCLUSION 50-106 (1976) (discussing the incentives for and practices of exclusionary zoning); ORFIELD, *supra* note 45, at 49-64, 88-95

a major contributor to the class/race division between and among core cities and surrounding suburbs—a pattern that began in earnest in the mid-twentieth century and is still on-going,⁵¹ although in recent years gentrification has ameliorated the process somewhat in some locales.⁵²

Countering the systemic classism and racism of the local governmental structure requires the intervention of higher levels of government.⁵³

(discussing the use of fiscal zoning to attract commercial, industrial and high-end residential development that generates relatively low service demands and to avoid lower priced residential uses with higher service needs, and noting the racial and social segregation among communities to which fiscal zoning contributes); Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. AM. PLAN. ASS'N 125 (2000), available at <http://www.preservationist.net/library/zoning/japa.pdf> (concluding, based on a study of the twenty-five largest metropolitan areas, that low-density zoning which restricts development to less than eight units per acre reduces the development of rental housing and limits the number of minority residents in communities that practice it).

⁵¹ See *supra* note 43.

⁵² Gentrification refers to the redevelopment of parts of core cities for young professionals who prefer a cosmopolitan lifestyle. While gentrification could potentially reduce the inequalities between core cities and suburbia, in many instances it appears to have displaced minority and lower income residents who, due to rising costs, are forced to move to nearby suburbs where housing is more affordable, but where they may be even more isolated than before. See, e.g., J. Peter Byrne, *Two Cheers for Gentrification*, 46 HOW. L.J. 405, 405-06 (2003) (arguing that, on balance, gentrification is good for both central cities and for the poor and ethnic minorities, at least if accompanied by affordable housing programs for displaced residents); LORETTA LEES ET AL., GENTRIFICATION, at xv-xxi (2008) (arguing that policy makers have largely ignored the negative aspects of gentrification, and the need for resistance movements to push for equitable development accompanying gentrification); john a. powell & Marguerite L. Spencer, *Giving Them the Old "One-Two": Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 HOW. L.J. 433 (2003) (arguing that gentrification displaces and damages the quality of life of urban dwellers of color, and recommending policies for addressing these harms); Mary Jo Wiggins, *Race, Class, and Suburbia: The Modern Black Suburb as a 'Race-Making Situation'*, 35 U. MICH. J.L. REFORM 749 (2002) (discussing the movement of African Americans to suburbia and examining the causes, racist and otherwise, of economic disinvestment in suburban black communities); JOHN LOGAN, LEWIS MUMFORD CENTER, THE NEW ETHNIC ENCLAVES IN AMERICA'S SUBURBS (2001), available at <http://mumford1.dyndns.org/cen2000/suburban/SuburbanReport/SubReport.pdf> (reporting on the rapid increase in black and Latino suburbanization in the 1990s, with a very high degree of segregation, especially for African Americans).

⁵³ While historically the judiciary has contributed somewhat to the amelioration of racial and social injustice regarding such issues as school segregation, exclusionary zoning and school finance, the solution to such momentous social issues must rest largely with the political process. See, e.g., Inman & Rubinfeld, *supra* note 45, at 1731-43 (concluding that judicial efforts to promote a more egalitarian distribution of local services by reforming exclusionary zoning and school finance, even if vigorously pursued, would likely be undercut by "antiequalizing," *id.* at 1735, economic adjustments by the well-off in the private sector); David Kairys, *A Brief History of Race and the Supreme Court*, 79 TEMP. L. REV. 751 (2006) (arguing that, historically, the Supreme Court has largely been a conservative institution and has only infrequently been solicitous of minority rights, namely during the New Deal and Civil Rights eras when progressive political movements were influential, and that the Court's conservative drift since the early 1970s reflects the country's concurrent conservative political drift); Molly S. McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, in LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 88, 90 (Jay P. Heubert ed., 1999) (noting that "despite litigation in nearly every state over the past two decades, interdistrict disparities in the United States have not diminished," and advocating class integration and an adequate educational standard as the most viable solutions); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (arguing that courts are highly limited in their ability to bring about meaningful social change due to a lack of independence from other branches of government on whose support they depend to implement

Possible measures include state superintendence of exclusionary zoning,⁵⁴ state subsidization of low-cost suburban housing,⁵⁵ state financing of public education,⁵⁶ and state imposition on urban areas of regional governments with the power to equalize resources among local governments and to prevent them from engaging in overly self-protective behavior.⁵⁷ While some such measures have been adopted, by and large the efforts have been modest at best. Moreover, without even more systemic reform, these alternatives are likely to ameliorate only partially the classist and racist aspects of the local governmental structure, due to the continuing incentive and ability of the better-off suburbanites to find ways to maintain their advantaged status.

their rulings, that reliance on courts often produces symbolic victories that stop short of and mobilize opposition to real reform, and that courts are most effective when they follow rather than lead political reform); Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1 (2001) (arguing that, to date, the few state court and legislative efforts to combat exclusionary zoning have had only modest success and have resulted in minimal racial or socio-economic integration, that the solution must be primarily a political one due to courts' inability to manage the issue remedially, but that in light of the political obstacles to reform, courts should more aggressively try to force legislatures to address the issue).

⁵⁴ For a discussion of state regulation of local zoning to address exclusionary impacts and other issues of statewide concern, see Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 54-56, 64-72 (1990); Span, *supra* note 53, at 59-65, 72-85.

⁵⁵ See, e.g., Michelle Adams, *Separate and [Un]equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413 (1996) (discussing the historical practice of discrimination in subsidized housing programs and how it confines low-income blacks and Hispanics in declining inner-city neighborhoods, and advocating giving recipients a choice between upgraded housing in enriched predominantly minority areas or moving to non-racially impacted communities); Philip D. Tegeler et al., *Transforming Section 8: Using Federal Housing Subsidies to Promote Individual Housing Choice and Desegregation*, 30 HARV. C.R.-C.L. L. REV. 451 (1995) (discussing Section 8's stated goal of enhancing regional housing mobility, analyzing bureaucratic obstacles to realizing that goal, and recommending measures to achieve it).

⁵⁶ Nationally, as of 2004-05, states provided about 56% and local governments about 33% of public school funding. NAT'L CTR. FOR EDUC. STATISTICS, CHANGES IN SOURCES OF PUBLIC SCHOOL REVENUE, at 167 tbl.34-2 (2008), available at <http://nces.ed.gov/pubs2008/2008031.pdf>.

⁵⁷ See, e.g., Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2048 (2000) (noting the existence in most metropolitan areas of affluent suburbs that represent about a quarter of the regional population yet receive the lion's share of public investment in infrastructure and job growth, advocating regional governance that retains but reduces the power of local governments, and suggesting that "grassroots coalition building . . . is the best, or only, route to regional equity"); ORFIELD, *supra* note 45, at 111-50 (advocating regional planning and governance as a means of addressing stratification and sprawl); john a. powell, *Addressing Regional Dilemmas for Minority Communities*, in REFLECTIONS ON REGIONALISM 218, 220, 226 (Bruce Katz ed., 2000), available at <http://www.brook.edu/es/urban/reflections/essay8.pdf> (advocating a "federated regionalism . . . that gives cities or communities a way to maintain appropriate control of their political and cultural institutions while sharing in regional resources and balancing participants' concerns," discussing regions within the U.S. that employ forms of federated regionalism, and noting some successes in reducing fiscal disparities among municipalities and in expanding housing opportunities); DAVID RUSK, CITIES WITHOUT SUBURBS 85 (1999) (arguing that "reversing the fragmentation of urban areas is an essential step in ending severe racial and economic segregation," and advocating forms of regional government both with and without subunits of government).

For example, the better off may use privatized means that achieve the same results as exclusionary zoning and local funding of public services, and that are therefore themselves forms of systematic classism and racism. If higher levels of government require local zoning ordinances to make the construction of lower cost housing permissible, housing developers responding to the exclusionary interests of their clientele might use deed restrictions that enable only expensive housing to be built. If the demand is sufficient, entire communities could develop in this fashion and be every bit as exclusionary as cities using zoning to achieve that end.⁵⁸ And if higher levels of government try to close that door by regulating overly exclusionary deed restrictions,⁵⁹ those wishing to insulate themselves in suburbia might yet accomplish that objective by paying a premium for their housing so as to push the cost above what lower income people can afford.⁶⁰

Similarly, if higher levels of government take steps to equalize the financing of public education, better-off suburbanites wishing to maintain an educational advantage for their children might place them in private schools beyond the means of lower income people—much like whites who could afford to do in the past to avoid school desegregation and like more affluent core city dwellers do today in order to avoid the public school system.⁶¹ Since those who choose the private school option must still pay taxes to support public schools, the effect would be to pay a premium for their children's education and their incentive would be to keep that premium at a minimum. The end result could be a dual system of education, with the more affluent purchasing a relatively high level of private school education while the less-well-off are relegated to poorly,

⁵⁸ See, e.g., ROBERT E. LANG & DAWN DHAVALA, METROPOLITAN INST. AT VA. TECH, RELUCTANT CITIES? EXPLORING BIG UNINCORPORATED CENSUS DESIGNATED PLACES 7 tbl.1 (2003), available at http://www.mi.vt.edu/Census2000/PDFfiles/Reluctant_Cities_Census_Note_final.pdf (identifying forty-one locales in the U.S. with populations of more than 50,000 that are not incorporated cities and are governed by private homeowners associations).

⁵⁹ See, e.g., Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1 (1989) (advocating judicial oversight of residential association rules pursuant to a reasonableness standard so as to police overly exclusionary restrictions).

⁶⁰ See, e.g., Daria Roithmayr, *Locked In Segregation*, 12 VA. J. SOC. POL'Y & L. 197 (2004) (arguing that white privilege is maintained by monopoly power attained through historically racist practices and perpetuated through a resultant ability to price minorities out of white areas, and advocating that anti-discrimination law focus more on the effects of monopoly power than on an individual discrimination model as a means of attacking institutionalized segregation).

⁶¹ See, e.g., DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 176-80 (1995) (discussing several studies finding that school desegregation efforts caused significant white flight from public schools); ROBERT W. FAIRLIE, NAT'L CTR. FOR THE STUDY OF PRIVATIZATION IN EDUC., RACIAL SEGREGATION AND THE PRIVATE/PUBLIC SCHOOL CHOICE (2006), available at http://www.ncspe.org/publications_files/OP124.pdf (finding that blacks and Hispanics are substantially under-represented in private schools, that whites and Hispanics enroll in private school in response to high concentrations of black students in public schools, and that family income is directly related to, and a major determinant of, who attends private school).

albeit equally, funded public schools that provide a lower level of education.⁶²

A second way the economically privileged might try to maintain their advantaged status is to use their disproportionate political power to impede reforms of the local governmental structure and other forms of systemic classism and racism. The systemic classism/racism of the political process, to be discussed next, has enabled them to do just that.

C. The Political Process

The systemic classism and racism of the political process is reflected in the under-representation of working-class people and ethnic minorities in federal and state elected bodies and in the under-responsiveness of these bodies to the interests of those groups.

If class and race were truly neutral factors in elections to public bodies, then over time the number of representatives of various economic strata and ethnicities should closely parallel their percentages of the population. In fact, however, elective bodies in the United States are heavily dominated by the economically better off and by whites. In the Senate, for example, as of 2003 at least forty Senators were millionaires,⁶³ and there is reason to think that most other elective bodies are similarly skewed.⁶⁴ Likewise, the number of African Americans and Hispanics serving in elective bodies in this country has historically been and remains far lower than their proportion of the overall population. African Americans currently comprise about 12.8%, and Hispanics about 15.1%, of the population.⁶⁵ Yet, in 2001 African Americans represented only 1.8% of all elected officials, which was then an all time high,⁶⁶ and as of 2007

⁶² Similarly, school vouchers, which are touted as a way to improve educational opportunities for all by enhancing choice and competition, might actually foster a hierarchical system that favors the more affluent. For example, if parents were allowed to supplement the voucher, then the more affluent could afford higher quality schools that charged more than the voucher, while the less-well-off are relegated to lower quality schools willing to accept vouchers as the full tuition. See, e.g., James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2047-48 (2002) (arguing that, just as suburban political power has thwarted efforts to equalize school funding and the extension of desegregation beyond core cities, “unless the politics surrounding school choice are altered, school choice plans will continue to be structured in ways that protect the physical and financial independence of suburban public schools . . . [and] will lead to, at best, limited academic improvement [and] little or no gain in racial and socioeconomic integration”).

⁶³ Sean Loughlin & Robert Yoon, *Millionaires Populate U.S. Senate*, CNN, June 13, 2003, www.CNN.com/2003/ALL POLITICS/06/13/senators.finances (last visited May 1, 2009). Only ten Senators reported a net worth of less than \$100,000. *Id.* By contrast, the median household net worth in the U.S. in 2001 was \$73,500. Wolff, *supra* note 5, at 29 tbl.1.

⁶⁴ See, e.g., Halimah Abdullah, *11 of 14 Ga. Legislators Millionaires*, MCCLATCHY NEWSPAPERS, July 31, 2007, <http://www.mcclatchydc.com/230/story/18666.html> (reporting that, as of 2007, eleven of Georgia’s fourteen members in the House of Representatives were millionaires).

⁶⁵ See STATE AND COUNTY QUICKFACTS, *supra* note 2.

⁶⁶ DAVID A. BOSITIS, JOINT CTR. FOR POL. & ECON. STUDIES, BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY 2001 5, 16 tbl.3 (2001), available at

Hispanic representation was well below that.⁶⁷ Prior to the 2008 elections there were only one African American and three Hispanics in the U.S. Senate,⁶⁸ only forty-three or about 10% of the 435 members of the House of Representatives were African American, and only twenty-three or about 5% were Hispanic.⁶⁹

One factor contributing to under-representation and under-responsiveness is the influence of money in the political process. First, there is the great expense of running for office, and especially so for higher office.⁷⁰ This results from an electoral process in which individuals compete for particular positions in single-member-district, winner-take-all elections while having to raise money to finance their own campaigns.⁷¹ This disadvantages the working class as a whole, and African Americans

<http://www.jointcenter.org/publications1/publication-PDFs/BEO-pdfs/2001-BEO.pdf>. As of 2001, there were 9,101 black elected officials nationwide out of a total of 513,236 elected officials. *Id.* at 16 tbl.3.

⁶⁷ As of June 2007, there were only 5,129 Latino elected officials. NALEO EDUC. FUND, A PROFILE OF LATINO ELECTED OFFICIALS IN THE UNITED STATES AND THEIR PROGRESS SINCE 1996 1 (2007), available at <http://www.naleo.org/downloads/NALEOFactSheet07.pdf> [hereinafter A PROFILE OF LATINO ELECTED OFFICIALS].

⁶⁸ See Black Americans in Congress, Historical Data: Black American Representatives and Senators by Congress, 1870-Present, <http://baic.house.gov/historical-data/representatives-senators-by-congress.html> [hereinafter Black Americans in Congress] (last visited May 1, 2009); A PROFILE OF LATINO ELECTED OFFICIALS, *supra* note 67, at 3.

⁶⁹ See Black Americans in Congress, *supra* note 68, <http://baic.house.gov/historical-data/representatives-senators-by-congress.html?congress=110> (last visited May 1, 2009); A PROFILE OF LATINO ELECTED OFFICIALS, *supra* note 67, at 3. African Americans and Hispanics are also under-represented in state legislatures, comprising only about 8% and 3%, respectively, of state legislators as of 2003. Nat'l Conference of State Legislatures, Numbers of African-American Legislators: 2007, available at <http://www.ncsl.org/programs/legismgt/about/afrAmer2007.htm> [hereinafter Numbers of African-American Legislators: 2007] (last visited May 1, 2009); Nat'l Conference of State Legislatures, Latino Legislators: 2007, available at <http://www.ncsl.org/programs/legismgt/about/Latino2007.htm> [hereinafter Latino Legislators: 2007] (last visited May 1, 2009).

⁷⁰ Between 1976 and 2000, the estimated expenditures on all elections in the U.S. rose from \$540 million to \$3.9 billion. JOSEPH E. CANTOR, CONG. RES. SERVICE, CRS REPORT FOR CONGRESS, CAMPAIGN FINANCE: AN OVERVIEW 2 (2007), available at http://assets.opencrs.com/rpts/RL33580_20070420.pdf [hereinafter CAMPAIGN FINANCE: AN OVERVIEW]. Between 1976 and 2004, the aggregate cost of Senate and House campaigns rose ten-fold, with the average cost of winning Senate candidates in 2004 being \$7.0 million, and of winning House candidates being \$1.0 million. *Id.* An estimated \$3.9 billion was spent on all federal elections in 2004. *Id.*

⁷¹ While some states previously used at-large or multi-member systems for the House of Representatives, by the early 1960s almost all states used single-member districts and are now required to by law. ANDREW HACKER, CONGRESSIONAL DISTRICTING: THE ISSUE OF EQUAL REPRESENTATION 48-49 (1964); James Thomas Tucker, *Redefining American Democracy: Do Alternative Voting Systems Capture the True Meaning of "Representation"?*, 7 MICH. J. RACE & L. 357, 375-76 (2002). On the state and local level, the at-large approach was historically dominant. Currently, most state legislatures use single-member districts, while both approaches are widely used at the local level. Nat'l Conference of State Legislatures, Constituents per State Legislative District, available at <http://www.ncsl.org/programs/legman/elect/cnstprst.htm> (last visited May 1, 2009); Nat'l League of Cities, About Cities: Cities 101: Local Elections, http://www.nlc.org/about_cities/cities_101/168.aspx (last visited May 1, 2009).

and Hispanics as groups, due to their generally lower economic status, and greatly favors those who have the time to run and the ability to help fund their own campaigns. It also favors those able to contribute substantial amounts to the campaigns of the candidates they support, who are likely to be people who share their political views and socio-economic status.⁷²

Money also impacts the law-making process, in that elected officials may feel beholden to those who finance their campaigns and in that moneyed interests are better able to finance the lobbying efforts that so heavily influence law making.⁷³ The importance of money in all aspects of the political process, as well as the generally well off status of elected officials, will often (if not usually) translate into greater responsiveness to the interests of the better off than to the working-class majority.⁷⁴

⁷² On the predominant influence of moneyed interests in the electoral process, *see generally* DAN CLAWSON ET AL., *DOLLARS AND VOTES: HOW BUSINESS CAMPAIGN CONTRIBUTIONS SUBVERT DEMOCRACY* (1998); MARK GREEN, *SELLING OUT: HOW BIG CORPORATE MONEY BUYS ELECTIONS, RAMS THROUGH LEGISLATION, AND BETRAYS OUR DEMOCRACY* (2002). On who contributes to the financing of elections, *see, e.g.*, PETER L. FRANCA ET AL., *THE FINANCIERS OF CONGRESSIONAL ELECTIONS: INVESTORS, IDEOLOGUES, AND INTIMATES* 4-5, 15-16, 22, 27-29, 70-73, 161 (2003) (finding, based on surveys of the habits of contributors to the 1996 congressional election, that more than half the money raised for congressional elections comes from individual donors; that two-thirds of that comes from significant donors who contribute more than \$200 and major donors who contribute more than \$8,000 and provide more than one-third of all contributions; that the significant and major contributors are overwhelmingly wealthy and well-educated white male businessmen and professionals; that incumbents are the major recipients of these contributors; and that minor party and independent candidates receive few such contributions).

⁷³ On the disproportionate and corrupting impact of moneyed interests on law-making, *see, e.g.*, GREEN, *supra* note 72, at 161-92; *THE INTEREST GROUP CONNECTION: ELECTIONEERING, LOBBYING, AND POLICYMAKING IN WASHINGTON* 129-248 (Paul S. Herrnson et al. eds., 2d ed. 2005) (a series of articles on the impact of money in the law-making process); ANTHONY J. NOWNES, *TOTAL LOBBYING: WHAT LOBBYISTS WANT (AND HOW THEY TRY TO GET IT)* (2006); Gajan Retnasaba, *Do Campaign Contributions and Lobbying Corrupt? Evidence From Public Finance*, 2 J.L. ECON. & POL'Y 145 (2006).

⁷⁴ *See, e.g.*, AM. POL. SCI. ASS'N, *AMERICAN DEMOCRACY IN AN AGE OF RISING INEQUALITY* 1 (2004), available at <http://www.apsanet.org/imgtest/taskforcereport.pdf> (concluding that, as a result of rising inequalities and other aspects of the political process that favor the well-to-do, "[c]itizens with lower or moderate incomes speak with a whisper that is lost on the ears of inattentive government officials, while the advantaged roar with a clarity and consistency that policy-makers readily hear and routinely follow"); Larry M. Bartels, *Economic Inequality and Political Representation* (2005), available at <http://www.princeton.edu/~bartels/economic.pdf> (concluding, based on a statistical analysis of the responsiveness of U.S. Senators to the preferences of their constituents, that "[i]n almost every instance, senators appear to be considerably more responsive to the opinions of affluent constituents than to the opinions of middle-class constituents, while the opinions of constituents in the bottom third of the income distribution have no apparent statistical effect on their senators' roll call votes") (emphasis in original); Martin Gilens, *Public Opinion and Democratic Responsiveness: Who Gets What They Want from Government?* 16, 18, <http://www.princeton.edu/~csdp/events/pdfs/Gilens.pdf> (concluding, based on national survey questions, that the relationship between policy preferences and outcomes is "substantially stronger" for those at the ninetieth than at the tenth percentile, that those at the fiftieth percentile are "barely more likely" than those at the tenth percentile to have their policy preferences adopted, and that after controlling for shared preferences the link between preferences and outcomes is magnified for the rich and "wholly absent" for the poor).

Possible reforms that might reduce the impact of money in the electoral and legislative processes, and thereby enhance the political power of the working class and ethnic minorities, are limits on campaign contributions and expenditures, public financing of elections, and the regulation of lobbying activities.⁷⁵ However, the effectiveness of these reforms has been limited by U.S. Supreme Court rulings striking down some measures as violating free speech, inadequate enforcement of or loopholes in the laws, and the ability of moneyed interests to navigate around the rules.⁷⁶

A second factor contributing to the under-representation of and under-responsiveness to ethnic minorities has been the reluctance of many whites

⁷⁵ See CAMPAIGN FINANCE: AN OVERVIEW, *supra* note 70, at 1-2 (discussing the history of federal campaign finance laws); R. SAM GARRETT, CONG. RES. SERVICE, CRS REPORT FOR CONGRESS, PUBLIC FINANCING OF CONGRESSIONAL ELECTIONS: BACKGROUND AND ANALYSIS (2007), available at http://www.usembassy.at/en/download/pdf/elections_finance.pdf (discussing the history of public financing of federal and state elections).

⁷⁶ Whether campaign finance and lobbying reforms will level the playing field and thereby enhance democracy, or, as critics charge, will diminish democracy by entrenching incumbency and limiting competition, largely depends on how the rules are designed. See, e.g., ROBERT K. GOIDEL ET AL., MONEY MATTERS: CONSEQUENCES OF CAMPAIGN FINANCE REFORM IN U.S. HOUSE ELECTIONS 12 (1999) (concluding, based on simulation models of various types of reform measures, that “campaign finance reform with modest public subsidies and spending limits would enhance, rather than diminish, our system of democratic governance”); Richard L. Hasen, *Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31 (2004) (arguing that the Supreme Court’s recent campaign finance jurisprudence has been overly deferential to legislative limits on expenditures, thereby risking legislative self-dealing to protect incumbency, and concluding that the Court should be wary of expenditure limits not coupled with measures that limit the power of incumbency, such as public financing of elections); Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation*, 58 ALA. L. REV. 513 (2007) (arguing that Congress has consistently failed to enact effective lobbying reform by making lobbyists, rather than public officials, the focal point of regulation, and advocating the expansion of disclosure requirements to include legislative and executive officials, and the facilitation of interest group policing of competitors through fuller disclosure requirements of lobbying activities and structures); William V. Luneburg & Thomas M. Susman, *Lobbying Disclosure: A Recipe for Reform*, 33 J. LEGIS. 32 (2006) (advocating reforms of existing lobbying regulations to increase the collection of usable data, strengthen enforcement mechanisms, and improve mechanisms for making information available to the public); Michael A. Nemeroff, *The Limited Role of Campaign Finance Law in Reducing Corruption by Elected Public Officials*, 49 HOW. L.J. 687 (2006) (concluding that state laws regulating campaign contributions have little impact on the outcome of elections and play a limited role in controlling political corruption, and advocating reporting and disclosure requirements and prohibitions against bribery and the acceptance of gratuities as a better means of combating corruption); Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 105-06 (2004) (arguing that “[t]he goal of campaign reform should be to reduce the impact of disparities in wealth on the ability of different groups of citizens to participate in politics,” and advocating matching funds and tax credits for smaller contributors, rather than restrictions on spending and contributions, as a better means of reducing the impact of disparities in wealth on political influence) (emphasis omitted); Lori Ringhand, *Defining Democracy: The Supreme Court’s Campaign Finance Dilemma*, 56 HASTINGS L.J. 77 (2004) (arguing that underlying the Supreme Court’s campaign finance decisions are debatable theories of democracy and that, in balancing state interests against free speech concerns, the judiciary should defer to legislative visions of democracy, as long as those visions are constitutionally permissible).

to vote for minority candidates.⁷⁷ There can be no doubt that in the past many whites were unwilling to do so due to blatant bigotry.⁷⁸ Although opinion polls show a substantial diminution in the expression of such attitudes,⁷⁹ this does not necessarily mean racist thinking is absent from the electoral process. In particular, unconscious bias may still predispose whites to favor white candidates and to hold minorities to higher standards before they will vote for them.⁸⁰ That the vast majority of African-American and Hispanic congresspersons and state legislators come from predominantly minority districts,⁸¹ and that so few African Americans and Hispanics have been elected in statewide races,⁸² suggests that many

⁷⁷ It also seems likely that African Americans and Hispanics do not run for office in proportion to their share of the population. See, e.g., Ebonya Washington, *How Black Candidates Affect Voter Turnout*, 121 Q.J. Econ. 973, 978 tbl.1 (2006) (finding that between 1982 and 2000 there were only twelve races with at least one black candidate in 333 U.S. Senate elections, 389 races with at least one black candidate in 4350 elections to the House of Representatives, and four races with at least one black candidate in 239 gubernatorial elections). The data likely reflect systemic racism as well—that is, a lack of comparable access to money and a reluctance of ethnic minorities to run in predominantly white districts when they perceive white unwillingness to vote for them.

⁷⁸ Although minority voters frequently vote for white candidates and are often the deciding votes in elections among white candidates, African Americans and Hispanics tend to favor and vote overwhelmingly for African-American and Hispanic candidates when on the ballot. See, e.g., Michael C. Herron & Jasjeet S. Sekhon, *Black Candidates and Black Voters: Assessing the Impact of Candidate Race on Uncounted Vote Rates*, 67 J. POL. 154, 173 (2005) (noting that “the behavior of both African Americans and whites leads us to conclude that many voters would prefer to give up some substantive representation in order to elect officials who look like themselves”); Jonathan Nagler & R. Michael Alvarez, *Latinos, Anglos, Voters, Candidates, and Voting Rights*, 153 U. PA. L. REV. 393, 423 tbl.14 (2004) (data from California races on Latino support for Latino candidates). While the reasons for this phenomenon have not been widely studied, it seems reasonable to speculate that African Americans and Hispanics (1) trust minority elected officials to better represent their interests; and (2) are responding to the unwillingness of whites to vote for minority candidates and the under-representation of African Americans and Hispanics among elected officials. See, e.g., SHAUN BOWLER ET AL., *ELECTORAL REFORM AND MINORITY REPRESENTATION: LOCAL EXPERIMENTS WITH ALTERNATIVE ELECTIONS* 106-13 (2003) (finding that minority voters feel that they are more empowered and that government is more responsive to their interests when represented by minorities). In short, the preference of African Americans and Hispanics for minority candidates seems driven more by racist attitudes among whites than by racist thinking among African Americans and Hispanics.

⁷⁹ For example, in 1958, 63% of whites said they would not vote for a black presidential candidate, whereas in 1997 95% of whites said they would. HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATION* 106-07 (1997). Barack Obama’s election to the Senate from Illinois in 2004, and to the Presidency in 2008, Deval Patrick’s victory in the 2006 gubernatorial election in Massachusetts, and Harold Ford, Jr.’s near victory in the 2006 Tennessee senatorial race, all show some increased willingness of whites to vote for black candidates.

⁸⁰ Given all the evidence of the existence of unconscious bias, *supra* note 34, and despite the obvious difficulty of establishing how much it affects any given election or the electoral process in general, it would be surprising if it were not at play.

⁸¹ See David Lublin, *Redistricting in the 2000s* tbls.4 & 8 (2006), available at <http://www.american.edu/dlublin/redistricting/index.html> (last visited May 1, 2009) (as of the last elections prior to 2006, about 80% of all African American and Hispanics serving in the U.S. House of Representatives and in state legislatures were elected from districts with a majority of their respective ethnicities).

⁸² Only three African Americans have been elected to the U.S. Senate since Reconstruction. See Black Americans in Congress, *supra* note 68. Only two African Americans have ever been elected Governor. Glen Johnson, *First Black Governor of Mass. Sworn In*, S.F. CHRONICLE, Jan. 4, 2007,

whites are still reluctant to vote for minority candidates.⁸³ Whether the substantial, though less than majority, support Barack Obama received from white voters in the presidential race signals a change in attitude remains to be seen.⁸⁴

The major means of increasing the representation of minorities in this society's predominantly single-member district system has been to design districts with race in mind so as to create safe seats controlled by the minority community.⁸⁵ This practice, a primary electoral reform emanating from the Civil Rights Movement,⁸⁶ has substantially increased the number of African Americans and Hispanics in the House of Representatives and in state legislatures,⁸⁷ and is likely responsible for a

available at http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2007/01/04/national/a092601S09.DTL&type=politics. And as of 2002 only forty African Americans, and as of 2007 only six Hispanics, held elected statewide offices. BOSITIS, *supra* note 66, at 20 tbl.7; A PROFILE OF LATINO ELECTED OFFICIALS, *supra* note 67, at 1.

⁸³ See, e.g., Washington, *supra* note 77 (concluding, based on analyses of congressional and gubernatorial elections between 1982-2000, that black and white voter turnout increases when there are black Democratic but not black Republican candidates; that white voters of both parties are more likely to vote against their party's candidate when the candidate is black; and that these trends do not appear to be related to underlying political views, though indicating a need for additional data on this latter point due to a general perception that black Democrats are more liberal than their non-black counterparts). *But compare* Charles S. Bullock III & Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 EMORY L.J. 1209 (1999). In analyses of congressional and state legislative elections in several southern states in the 1990s, Professors Bullock and Dunn found that black Democratic candidates received about one-third of the white vote, and almost as large a share of the white vote as white Democrats, and suggest that the reluctance of whites to vote for black candidates may be based more on party affiliation than on race. *Id.* at 1213. But, if white voters vote against white Democrats because they perceive them as more likely to favor the interests of the black community, then party affiliation and race are interconnected, and white voters may be responding to white Democrats as if they were black, supporting the notion that whites are reluctant to vote for African Americans.

⁸⁴ According to exit polling, whites comprised 74% of the voters in the election. CNN Election Center, President National Exit Poll, <http://www.cnn.com/ELECTION/2008/results/polls/#USFP00p1> [hereinafter President National Exit Poll] (last visited May 1, 2009). Only 43% voted for Senator Obama, while 55% voted for Senator John McCain. *Id.* Of those white voters with incomes under \$50,000, 47% voted for Obama, while 51% voted for McCain. *Id.*

⁸⁵ See, e.g., Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383 (2001) (analyzing the factors relevant to determining the percentage of minorities needed to create safe districts, and finding that creating safe districts generally requires that minorities be in the majority).

⁸⁶ See, e.g., Grant M. Hayden, *Resolving the Dilemma of Minority Representation*, 92 CAL. L. REV. 1589 (2004) (discussing the use of the Voting Rights Act of 1965 to push for safe black districts); *Thornburg v. Gingles*, 478 U.S. 30 (1986) (upholding Voting Rights Act challenge to multi-member districts in state legislative redistricting plan based on "totality of circumstances" test demonstrating that multi-member district approach consistently impedes the ability of geographically insular and politically cohesive black voters to elect candidates of their choice); *White v. Regester*, 412 U.S. 755, 765-70 (1973) (upholding district court order invalidating state legislative redistricting plan and requiring that multi-member districts be redrawn as single-member districts, in light of the history of political discrimination against Negroes and Mexican Americans residing in those areas).

⁸⁷ From 1970 to 2006, the number of African Americans in the House of Representatives grew from ten to forty-three, while the number of Hispanics increased from five to twenty-three. See *supra* note 69 and accompanying text; BOSITIS, *supra* note 66; LIBR. OF CONG., HISPANIC AMERICANS IN CONGRESS, 1822-1995, <http://www.loc.gov/rr/hispanic/congress/chron.html> (last visited May 1, 2009).

large percentage of the increase in African-American and Hispanic elected officials overall. But since a significant segment of the African-American and Hispanic population is so widely dispersed as to thwart the creation of many more safe districts, this reform appears to have largely played itself out, at least at the federal and state legislative levels.⁸⁸ The use of safe districts has led to a substantial increase in the gross numbers of minority congresspersons and state legislators, but has still left the representation of African Americans and Hispanics in Congress and state legislatures at far less than their shares of the overall population. Moreover, the increased representation from safe districts may not yield greater responsiveness to the minority community, if the concentration of minorities in a few districts results in the election in other districts of officials who are less sensitive to their interests.⁸⁹

The number of African Americans in state legislatures increased from 169 (less a few statewide officials) in 1970 to 608 in 2007. DAVID A. BOSITIS, JOINT CTR. FOR POL. & ECON. STUDIES, BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY 2000 17 tbl.1 (2000), available at http://www.naacpldf.org/content/pdf/vra/Black_Elected_Officials_Statistical_Summary_2000.pdf; Numbers of African-American Legislators: 2007, *supra* note 69. The number of Hispanics serving as state executives and in state legislatures increased from 129 (including a few federal officials) in 1985 to 270 in 2007. 2009 STATISTICAL ABSTRACT, *supra* note 3, at tbl.399, <http://www.census.gov/compendia/statab/tables/09s0399.pdf>; Latino Legislators: 2007, *supra* note 69.

⁸⁸ See, e.g., Hayden, *supra* note 86, at 1617-37 (arguing that the enhancement of minority representation through safe districts has been constrained by Supreme Court rulings limiting the departure from traditional districting principles, such as geographical compactness, and advocating the modification of the one person, one vote principle as a means of increasing minority representation). Since Hispanics are even more under-represented than African Americans, it may still be possible to marginally enhance Hispanic representation through the use of safe districts. See Juan Cartagena, *Latinos and Section 5 of the Voting Rights Act: Beyond Black and White*, 18 NAT'L BLACK L.J. 201, 217 (2005) (emphasis in original) (citing Bernard Grofman, A Citizen's Dissent: Potential Long-Term Problems with the Approach to Section 5 taken in *Georgia v. Ashcroft* (May 25, 2004) (unpublished manuscript, on file with the Columbia Law Review)):

In Congress, and in state legislatures, most of the black majority (or near majority) districts that could have been created are already in place, and blacks are a declining proportion of the total electorate (except in a handful of states) so we should not expect to see new black majority seats created. For Hispanics (the fastest growing minority in the U.S.) in covered jurisdictions, such as Texas, that is not true. *A legal climate that discourages the creation of new majority-minority districts will have its greatest impact on Hispanic representation.*

In light of the gross under-representation of African Americans and Hispanics in locally elected bodies, see *supra* notes 66-67 and accompanying text, it does appear that more safe districts could be created at that level, although even with reform the demographics would likely result in under-representation there as well.

⁸⁹ See, e.g., LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 54-69, 73-86, 127-137 (1994) (arguing that while a districting system with safe minority districts may increase minority representation, it does not necessarily enhance the minority community's ability to influence the legislative process when the races are polarized, due to the potential marginalization of minority elected officials and the dilution of minority voters' influence in non-safe districts); Hayden, *supra* note 86, at 1607-14 (arguing that the push for safe minority districts, while increasing minority representation, has led to the election of more Republicans who tend to be less supportive of minority interests); L. Marvin Overby & Kenneth M. Cosgrove, *Unintended Consequences? Racial Redistricting and the Representation of Minority Interests*, 58 J. POL. 540 (1996) (concluding, based on analysis of 1992 congressional elections, that white incumbents

A third factor contributing to the under-responsiveness of the political process to the interests of the working class and ethnic minorities, also attributable to the single-member districting system that dominates federal and state elections, is the weak two-party system that prevails in the United States.⁹⁰ In order to gain a majority, a party must typically cobble together a coalition of diverse and sometimes conflicting interests. This practice forces compromises and makes it difficult to advocate and undertake comprehensive reform programs unless backed by a substantial majority of the electorate.⁹¹ Moreover, election by districts undermines party solidarity, which also impedes reform. Ultimately, in order to win election or reelection, a representative must satisfy his or her constituents and supporters, even if that means voting against the party's program.

A possible electoral reform that might enhance the political power of both the working class and ethnic minorities is proportional representation,⁹² forms of which are used in parliamentary systems and, to a limited extent, in the United States.⁹³ To illustrate, the focus here will be on classical proportional representation, which could be adapted to some legislative bodies in the United States. Under this system, voters vote for

who lost black constituents due to redistricting became less sensitive to the concerns of African Americans). *But compare* BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 134-37 (1992) (arguing the need for districts with minority elected officials in order to advance the interests of minority communities).

⁹⁰ *See, e.g.*, JOHN F. BIBBY & L. SANDY MAISEL, TWO PARTIES—OR MORE?: THE AMERICAN PARTY SYSTEM 53-68 (1998) (attributing the entrenchment of the two-party system to, in part, the prevailing single-member/winner-take-all districting system and, in addition, to a variety of historical, cultural and institutional factors, including: its origin in the early years of the republic as a result of the cleavage between agricultural and financial/mercantile interests; a broad agreement on basic values and the absence of blocs of people strongly committed to particular ideologies; the strong identification of large numbers of voters with one of the major parties; the separate election of the President and the need to win a majority in the Electoral College; and the primary election system of nominating candidates); ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 156-60 (1989) (noting the fragmented character of political parties in the U.S. and the argument that districting favors two-party and proportional representation multiparty systems, although also noting Britain's three-party districting system as a counterexample); DAVID M. FARRELL, ELECTORAL SYSTEMS: A COMPARATIVE INTRODUCTION 161-65 (2001) (concluding, based on an analysis of electoral systems throughout the world, that single-member districts tend toward two-party systems and that proportional representation tends toward multi-party systems); Rogers, *supra* note 32, at 47-54 (attributing the difficulty of building a united workers' movement in the U.S. to, in part, the absence of a successful workers' party, due to an electoral process that favors a weak two-party system and depends on a coalitional rather than programmatic approach to competition for political power).

⁹¹ *See, e.g.*, BIBBY & MAISEL, *supra* note 90, at 106 (noting that "the two-party system all but necessitates that the major parties be centrist and moderate").

⁹² On the workings of and variations among proportional representation systems, *see* FARRELL, *supra* note 90, at 45-47, 68-69, 126-39.

⁹³ On the support of the working class as the backbone of the historical success of social democratic parties in Europe, and on their declining success as a result of globalization and the increasing heterogeneity of the working class, *see* JOHN CALLAGHAN, THE RETREAT OF SOCIAL DEMOCRACY (2000); GERASSIMOS MOSCHONAS, IN THE NAME OF SOCIAL DEMOCRACY: THE GREAT TRANSFORMATION, 1945 TO THE PRESENT (Gregory Elliott trans., Verso 2002) (1945). On proportional representation in the United States, *see infra* note 96.

parties rather than individuals, parties are guaranteed representation in proportion to their shares of the overall vote,⁹⁴ and parties name who will serve from lists presented to the electorate in advance.⁹⁵ For example, if there are one hundred positions and a party gets 20% of the vote, it gets to fill twenty positions with the first twenty names on its list.⁹⁶

Depending on the circumstances, proportional representation could enhance both the representation of, and the responsiveness of the political process to, the working class and ethnic minorities as compared with a districting system.⁹⁷ Imagine a party created to promote social and racial

⁹⁴ Under classical proportional representation, parties must obtain some minimum percentage of the vote, which differs depending on the size of the elective body and other factors, in order to be guaranteed seats.

⁹⁵ A parliamentary system requires a legislative body large enough to make proportional representation viable. As such, it is an available reform for many state and local governing bodies. Although instituting it might require an amendment of the state constitution, this can usually be done fairly easily through a majority vote of the electorate. Without amending the U.S. Constitution, a parliamentary system could not be used for either houses of Congress as a whole. If the law requiring single-member districts for the House of Representatives were repealed, see *supra* note 71, states with large enough delegations could choose to convert to a parliamentary approach with a statewide election and seats allocated to parties in proportion to their shares of the overall vote.

⁹⁶ Modified forms of proportional representation have been proposed and tried on a limited scale in the United States as a means of enhancing the representation of under-represented groups. For examples, see Michael A. McCann, *A Vote Cast; A Vote Counted: Quantifying Voting Rights Through Proportional Representation in Congressional Elections*, 12 KAN. J.L. & PUB. POL'Y 191, 199, 205-06, 210-11 (2002); Steven J. Mulroy, *Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L. REV. 1867, 1878-79 (1999). Under cumulative voting candidates compete for individual seats, which may but need not be tied to geographical districts, and voters may allocate their votes among the candidates as they choose. For example, if there are ten open positions, a voter can vote ten times for one candidate. See, e.g., GUINIER, *supra* note 89, at 92-101, 137-55 (advocating cumulative voting as a means of equalizing the representation and political influence of minority voters and other cohesive groups, as well as of encouraging greater political participation and promoting consensus, and defending proportional representation against the critique that it balkanizes and destabilizes the political process). Under preference voting, voters rank candidates in order of preference, and excess votes are transferred, until all positions are filled, from higher to lower ranked candidates when the higher ones are elected or mathematically eliminated. See, e.g., Mary A. Inman, *C.P.R. (Change Through Proportional Representation): Resuscitating a Federal Electoral System*, 141 U. PA. L. REV. 1991 (1993) (advocating the "single transferable vote" preference system for the House of Representatives as a means of promoting political equality, and examining and refuting critiques of proportional representation as leading to political instability and as less responsive to local interests than districting); Mulroy, *supra*, at 1899-1906, 1908-16 (advocating preference voting as the best means of assuring minority representation, and as a means of promoting ideological and gender diversity, enhancing competitiveness, and more accurately reflecting popular will than through districting systems, as well as discussing and refuting objections to proportional representation as being remote from the electorate and as leading to the balkanization and instability of the political process).

⁹⁷ See, e.g., SHAUN BOWLER ET AL., *ELECTORAL REFORM AND MINORITY REPRESENTATION: LOCAL EXPERIMENTS WITH ALTERNATIVE ELECTIONS* (2003) (analyzing actual elections using forms of proportional representation, and concluding that these alternatives produce more minority representation than unmodified districting systems—especially for African Americans, but somewhat less so for Latinos—and about the same minority representation as districting systems that take race into account in order to create safe districts); LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, ENLISTING POWER, TRANSFORMING DEMOCRACY* 168-222 (2002) (arguing that winner-take-all single-member districting systems are inherently undemocratic, in that they effectively disenfranchise the losing "minority" in every district, and advocating forms of proportional

justice. Since the party is guaranteed proportionate representation as long as it obtains the required minimum vote, it might not have to water down its program in order to attract voters as much as in a two-party, winner-take-all districting system. As evidenced by the success of the Rainbow Coalition, the party might well garner a significant share of the vote.⁹⁸ Since its candidates would not have to finance their own races with the party running as a collective entity, that might enable the party to name mostly working-class people of all ethnicities to its candidate list, thereby increasing their numbers in office. Once in office, the party might succeed in getting portions of its program enacted through alliances with other parties, in using its visibility as an elected party to convince more and more people of the merits and viability of its program, and at some point in attaining majority support and being in a position to implement its program in full.

On the other hand, even with increased numbers of working-class and minority representatives, proportional representation might not enhance responsiveness if, over time, the reform party remained relatively small and marginalized in the law-making process. Conversely, even if under-represented, the party's supporters might be better able to influence policy in a two-party system whose parties must respond to a diversity of interests in order to attain a majority.⁹⁹ However, the interests of the reform party's working-class and minority supporters might be overlooked in a two-party system in which the parties do not need their support to attain a majority or

representation as a means of more fairly representing all voters); John R. Low-Beer, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163, 165 (1984) (arguing that proportional representation is constitutionally required as "the only electoral system that fully achieves the underlying values of majority rule and minority representation"); McCann, *supra* note 96, at 194-208 (2002) (advocating, for congressional elections, either classical proportional representation or the single transferable vote preference system as a means of enhancing coalition building, enhancing voter participation, and increasing minority representation, as well as discussing and responding to potential drawbacks to proportional representation as leading to the polarization of the political process, the representation of extremist groups, and the lack of responsiveness to local concerns). The Voting Rights Act of 1965 expressly rejects proportional representation as being required by the Act. 42 U.S.C. § 1973 (2000). Further, the Supreme Court has rejected proportional representation as a constitutional requirement. See *Vieth v. Jubelirer*, 541 U.S. 267, 288 (2004).

⁹⁸ In 1984 and 1988, Jesse Jackson campaigned for the presidential nomination of the Democratic Party, finishing third and second, respectively, under the banner of the Rainbow Coalition—a coalition of working-class people of all ethnicities and of supporters of progressive causes such as women's and gay rights. See JoAnn Wypijewski, *The Rainbow's Gravity*, THE NATION, July 15, 2004, available at <http://www.thenation.com/doc/20040802/wypijewski/print?rel=nofollow>. While it is impossible to know how the Rainbow Coalition would have fared as a separate party in a system with proportional representation, its success as a dissident faction within the Democratic Party suggests that it might well have been a significant force.

⁹⁹ See, e.g., Mark A. Graber, *Conflicting Representations: Lani Guinier and James Madison on Electoral Systems*, 13 CONST. COMMENT. 291 (1996) (arguing that while proportional representation may increase minority representation, it may weaken legislative support for egalitarian racial policies by yielding more conservative candidates in even greater numbers). A similar argument has been made regarding safe minority districts under districting systems. See GUINIER, *supra* note 89; Hayden, *supra* note 86.

ignore their interests despite their support.¹⁰⁰ Conversely, even though small, the reform party might at times have disproportionate influence in a multi-party parliamentary system when no party has a majority and deals must be made to attain majority support.

Under either a two-party districting system or proportional representation, the greatest obstacle in the United States to enhancing the political power of the working class and ethnic minorities and to systemic reform is a division between working-class whites and minorities. Since the existing districting system is under-representative of and under-responsive to both groups, this creates a potential conflict over access to public goods. To the extent that lesser responsiveness to the interests of the minority community means greater responsiveness to the interests of working-class whites, whites have an incentive not to vote for minority candidates and to favor representatives who will support their interests in the political process. This conflict, in turn, serves the interests of the moneyed elite, who disproportionately influence the political process, by forestalling political alliances among working-class whites and minorities.

A similar scenario could occur with proportional representation. For example, if there were a predominantly white workers' party, one or more ethnic minority parties, and a party of the socio-economically better off, and if working-class whites and ethnic minorities remained divided due to a perceived competition over scarce goods, then an alliance similar to that discussed above between white workers and employers might arise between the parties of the white working class and the better off.¹⁰¹ The party of the better off would agree to support some of the interests of the white working-class party, so as to protect its constituents' position in the socio-economic hierarchy, in return for an agreement by the working-class party not to challenge the system.

Nevertheless, minorities and working-class whites have a common interest in establishing a non-hierarchical political and economic system, and an incentive to coalesce as a political force in order to enhance the power and influence of both. If systemic change is to come about in a peaceful manner, it will require a united reform movement commencing within the existing political structure. The next section addresses the possibility of such a movement.

¹⁰⁰ For example, some argue that the Democratic Party takes African Americans for granted because they have had little choice but to vote Democratic, due to the fact that the Republican Party's program has been so antithetical to their interests, and that by being willing to vote Republican or form a separate party, African Americans could induce both parties to be more responsive to their interests. See, e.g., Commentary, *Black Democrats Urge Media Counteroffensive, But Media Is No Substitute for Substance*, THE BLACK COMMENTATOR, Nov. 28, 2002, http://www.blackcommentator.com/18_commentary_2.html; *The Time Has Come for Serious Consideration of an African-American Political Party*, 29 J. BLACKS IN HIGHER EDUC. 14 (2000).

¹⁰¹ See *supra* note 34 and accompanying text.

III. IS SYSTEMIC REFORM POSSIBLE?

A. *A Program for Social and Racial Justice*

This part outlines a few of the core elements of a program to advance social and racial justice, some of which are already in place. The purpose is not to present “the” comprehensive reform program, the details of which would have to be developed democratically in the course of a reform movement, but to note the extensiveness of the reforms necessary to create a non-classist/non-racist society.

I have defined systemic classism/racism as the arrangement of society’s institutions so as to deny equal opportunity to succeed in life on account of class status or ethnicity. A society based on equality of opportunity requires forced sharing when necessary to equalize opportunity, but does not require total equality in all aspects of social life.¹⁰² While I personally believe in a more egalitarian concept of social justice than equality of opportunity, I use it here for several reasons. First, it resonates with principles that are foundational in this society, notably, that all people are created equal and are entitled to equal protection of the laws. Second, it is widely accepted by the public, at least as an abstract proposition.¹⁰³ Third, taken seriously, it would require the elimination of systemic classism and racism, which by definition foster and are symptomatic of unequal opportunity.

The reforms needed to bring about a non-classist/non-racist society with equality of opportunity for all range from the eradication of classist and racist thinking to fundamental changes in the structure and operation of the economic, governmental and political systems. The focus here will be on inequalities related to employment, housing, education, the political process, and the distribution of wealth and income—inequalities that are central to the society’s class/race hierarchy.

¹⁰² See, e.g., JOHN BAKER, ARGUING FOR EQUALITY 49 (1987) (arguing that equal opportunity requires society “to give everyone the means to develop their capacities in a satisfying and fulfilling way,” and that this requires minimizing economic inequality and meeting every individual’s basic needs); CAROL GOULD, RETHINKING DEMOCRACY 35-71, 178-89 (1988) (arguing that democracy requires the affirmative right to the social and material conditions necessary for realizing individual self-development, and that this right must be equally available to all); David A. Strauss, *The Illusory Distinction Between Equality of Opportunity and Equality of Result*, 34 WM. & MARY L. REV. 171, 178 (1992) (arguing that, taken seriously, “equality of opportunity, understood as the requirement that fortunes not be determined by arbitrary factors, . . . would require something approaching equality of result”).

¹⁰³ See, e.g., THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, PEW VALUES UPDATE: AMERICAN SOCIAL BELIEFS 1997-1987, available at <http://people-press.org/reports/print.php3?PageID=580> (last visited May 1, 2009) (reporting that 90% or more of respondents consistently agreed “completely” or “mostly” that “our society should do what is necessary to make sure that everyone has an equal opportunity to succeed”).

With regard to employment, the basic measure needed to ensure equal opportunity is a requirement that all jobs pay a living wage,¹⁰⁴ coupled with a guaranteed job for all who want to work.¹⁰⁵ In addition to being a requirement of social justice for all, this measure should help win support from white workers who themselves are striving to get ahead for measures, such as affirmative action, that are needed to correct systemic racism and might otherwise lessen their opportunities.¹⁰⁶

Since racial discrimination continues to disadvantage ethnic minorities in obtaining work, the law must continue to prohibit such practices.¹⁰⁷ Discrimination must be defined to include both overt bigotry and unconscious bias, and means of identifying the presence of and combating unconscious bias must be explored.¹⁰⁸ Since racist thinking can be difficult to prove when groups that have historically been oppressed are under-represented, the presumption must be that intentional racism is occurring and employers should be required to prove that their practices are non-racist.¹⁰⁹ If under-representation exists despite non-racist employment

¹⁰⁴ On the living wage movement in the United States, see Living Wage Resource Center, <http://www.livingwagecampaign.org> (last visited May 1, 2009).

¹⁰⁵ See HARVEY, *supra* note 26.

¹⁰⁶ Maxine Burkett, *Reconciliation and Nonrepetition: A New Paradigm for African-American Reparations*, 86 OR. L. REV. 99 (2007) (arguing that the key element of a reparations campaign must be a “nonrepetition” component to reform the economic structures that entrench a racial and class hierarchy disadvantaging African Americans, other ethnic minorities and low-income people generally, and that a multi-ethnic and cross-class movement is vital to a successful campaign); Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 408, 458-91 (2001) (arguing the need for “broad-based economic reform,” and advocating “that poverty lawyers must move away from the current emphasis on injecting capital into geographically discrete, racially homogeneous communities, and instead embrace a politically engaged conception of [community economic development] that leverages the strength of multiracial coalitions to create greater equity for vulnerable workers” through campaigns for living wage requirements, worker co-ops and job-creation initiatives).

¹⁰⁷ See The U.S. Equal Employment Opportunity Commission, *Race-Based Charges*, <http://www.eeoc.gov/stats/race.html> (last visited May 1, 2009) (reporting an annual average of more than 29,000 complaints of race-based employment discrimination and an annual average of more than 5,000 meritorious resolutions during fiscal years 1997 to 2008).

¹⁰⁸ See *supra* note 34.

¹⁰⁹ Having adopted an intent test for establishing race discrimination under the Fourteenth and Fifteenth Amendments, the Supreme Court has rejected disproportionate impact as a basis for a constitutional violation, although Congress has used it as a factor in civil rights statutes relating to employment and in other contexts. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding Civil Rights Act of 1964 bans employment practices that disqualify African Americans at substantially higher rates than whites, unless shown to be significantly related to job performance). Compare *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (holding electoral process that effectively excludes African Americans from electing candidates of their choice not unconstitutional absent proof of purposeful discrimination), with *Thornburg v. Gingles*, 478 U.S. 30 (1986) (applying Voting Rights Act of 1965’s disproportionate impact test for establishing discrimination in the electoral process to at-large elections that dilute minority vote); and compare *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (holding local government land use practices that effectively exclude African Americans from community not unconstitutional absent proof of purposeful discrimination), with *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1285 (7th Cir. 1977) (holding Fair Housing Act bans zoning practices that effectively foreclose the construction of low-cost housing).

practices, the presumption must be that more generalized systemic racism is the cause and affirmative action should be mandatory¹¹⁰ and, if necessary, subsidized by the government.¹¹¹ Affirmative action in employment, as well as in other areas of social life, will have to remain in place until the need for it is obviated by other elements of the program to advance social and racial justice.¹¹²

With regard to housing opportunities, all communities, whether public or private, must provide for their fair share of regional housing needs for

¹¹⁰ See, e.g., Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 B.U. L. REV. 1089 (2002) (advocating affirmative action in order to counteract white social dominance resulting from prior racist institutions and maintained by anti-competitive conduct); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063, 1066, 1078-81 (2006) (discussing the inadequacy of intent-based anti-discrimination laws as a way to combat implicit bias in employment due to the difficulty of identifying and proving implicit bias in particular instances, and arguing for affirmative action as a counter to the "mismeasurement of merit" that results from implicit bias); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1302-17 (1998) (discussing the limitations of individualized disparate treatment lawsuits in the employment context due to proof problems when unconscious bias and biased standards of merit are at play, and arguing that, while affirmative action may exacerbate intergroup tensions, it should be continued due to the ineffectiveness of other means of combating discrimination and promoting equal opportunity).

¹¹¹ Whether employers or the public should bear the cost of affirmative action and other measures designed to ameliorate ethnic and other disparities in the workplace depends, in part, on the extent to which employers or society as a whole are deemed blameworthy for these disparities. Compare Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 40-47 (2006) (expressing skepticism toward the political acceptability of, and judicial willingness to enforce, a structural approach to workplace discrimination that imposes costs on employers for addressing "problems of society-wide scope for which many legal actors will find it difficult to attribute blame to any given employer"), with Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849 (2007) (advocating a structural approach to employment discrimination that would hold employers liable for the maintenance of workplace structures and environments that facilitate discriminatory bias in decision-making, and distinguishing this from holding employers responsible for generalized societal discrimination).

¹¹² Some have proposed class-based affirmative action as an alternative to race-based affirmative action. See, e.g., Eboni S. Nelson, *What Price Grutter?: We May Have Won the Battle, but Are We Losing the War?*, 32 J.C. & U.L. 1, 9 (2005); L. Darnell Weeden, *Employing Race-Neutral Affirmative Action to Create Educational Diversity While Attacking Socio-Economic Status Discrimination*, 19 ST. JOHN'S J. LEGAL COMMENT. 297 (2005). A possible advantage to a class-based approach is that it might reduce the inter-racial tension that has arisen over affirmative action and facilitate the inter-ethnic alliance that is needed in the struggle for racial and social justice. A possible disadvantage, however, is that it might leave in place the racial disparities underlying the need for affirmative action. Compare GUINIER & TORRES, *supra* note 97, at 72-74, 94, 106-07 (touting Texas's Ten Percent Plan, adopted as an alternative to race-based affirmative action and under which the top 10% of all high school graduates were guaranteed admission to the University of Texas, as a positive democratic reform resulting from a coalition among African Americans, Mexican Americans and poor rural whites), with Cheryl I. Harris, *Mining in Hard Ground*, 116 HARV. L. REV. 2487, 2517-28 (2003) (reviewing THE MINER'S CANARY) (citing studies showing that African Americans and Latinos do not fare as well under Texas's Ten Percent Plan and similar approaches in other states as they do under race-conscious measures; and critiquing the plans as relying on continued segregation in secondary education and as not addressing other issues of racial inequality, such as access to graduate school). This analysis reflects a major obstacle facing the organization of a mass movement for racial and social justice, namely, that the absence of equal opportunity for all may create divisions among those whose common effort is needed to bring it about. See *infra* Part III.C.

all economic segments of the population, and in particular must provide for least cost housing.¹¹³ At a minimum, zoning ordinances must permit the development of such housing, and if necessary to ensure that it is built, developers should be required to include a range of housing opportunities in their projects.¹¹⁴ If necessary to enable people to afford such housing, government subsidies of some type must be provided, although an appropriate living wage requirement should obviate much of the need for subsidies.

With regard to education, since it is so central to assuring equal opportunity and since differential levels of education translate into unequal opportunity,¹¹⁵ comparable educational opportunities must be available to all. At a minimum, in order to ensure equitable funding, elementary and secondary education must be financed at a state or regional level—and ideally by the federal government, in light of differing fiscal capacities and educational quality among the states.¹¹⁶ In order to compensate for the educational disadvantages of birth into less-well-educated and less-well-off families, more money will likely have to be spent on children so circumstanced.¹¹⁷ Moreover, in light of the detrimental impact of inadequate food, clothing and shelter on children's opportunity to learn, those necessities of life may have to be subsidized until other elements of the program, such as the living wage requirement, obviate the need.¹¹⁸

¹¹³ On attempts to promote a fair share housing approach through litigation, *see, e.g.*, Briffault, *supra* note 54, at 48-54 (discussing New Jersey's Mount Laurel cases, representing the foremost attempt of the judiciary to impose a fair share requirement); Span, *supra* note 53, at 38-59 (discussing fair share litigation in New Jersey and several other states).

¹¹⁴ *See, e.g.*, Thomas Kleven, *Inclusionary Ordinances—Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 UCLA L. REV. 1432 (1974) (advocating inclusionary zoning); Barbara Ehrlich Kautz, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. REV. 971, 977-79 (2002) (surveying the history of inclusionary zoning efforts and concluding that it has potential as an approach to opening up suburbia).

¹¹⁵ *See supra* notes 20-22 and accompanying text.

¹¹⁶ *See supra* notes 47 & 49 on the disparities in educational expenditures among the states and the link between expenditures and performance. Historically, the federal government has contributed only minimally to the financing of elementary and secondary education with the federal share representing only 9.2% of total expenditures as of 2004-05. NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS: 2007, at tbl.162 (2007), available at http://nces.ed.gov/programs/digest/d07/tables/dt07_162.asp?referrer=list.

¹¹⁷ *See, e.g.*, William D. Dumcombe & John M. Yinger, *Performance Standards and Educational Cost Indexes: You Can't Have One Without the Other*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 260, 261 (Helen F. Ladd et al. eds., 1999) (arguing, in relation to the movement to implement performance standards as a school reform measure, that "a focus on performance is inevitably unfair unless it can somehow account for the impact on performance of factors that are outside the control of school officials[.] . . . [that a funding approach] that provides enough revenue for an average district to meet an adequate performance standard leaves a high-cost district short, often far short, of the revenue it needs[.] . . . [and that] the large central city districts must spend two to three times as much as the average district to reach the same performance standard").

¹¹⁸ *See, e.g.*, RICHARD ROTHSTEIN, CLASS AND SCHOOLS 8, 11 (2004) (arguing that social class factors cause much of the performance gap between lower-class and middle-class students, and that "raising the achievement of lower-class children requires ameliorating the social and economic

Equal educational opportunity also requires equal access to higher education, meaning it must be available for all who want to attend regardless of their economic situation.

Whether school integration measures will be needed depends on the circumstances.¹¹⁹ Under prevailing social conditions, there is evidence that ethnic and class integration improves educational opportunities for the disadvantaged,¹²⁰ and there is reason to think that it also helps counter racist thinking.¹²¹ Thus, integrative measures will likely be required, at least for a time. But as fair share housing and living wage measures are put in place, community and neighborhood integration should naturally produce more school integration than presently exists. And the more egalitarian society that a program for social and racial justice will produce should decrease the incentive for racist thinking and enable people to interact and learn to respect each other as equals in many areas of social life. In general, the goal should be to provide an education suited to the needs and interests of each individual child, which for some may mean an integrated and for others an ethnically homogeneous setting.¹²²

With regard to the political process, the goal must be comparable representation and comparable responsiveness to the needs and interests of all segments of the population. How much restructuring of the process will be needed depends on the circumstances. At a minimum, the

conditions of their lives” by means of “social and economic policies that enable children to attend school more equally ready to learn . . . [such as] health services for lower-class children and their families, stable housing for working families with children, and the narrowing of growing income inequalities in American society”).

¹¹⁹ Most African-American and Hispanic children attend largely segregated schools. After declining between the late 1960s and late 1980s, and following a series of Supreme Court rulings backing-off its earlier integrationist push, the segregation of African-American children in schools has since been on the increase nationwide. As of 2003-04, 73% of black students attended majority-minority schools and 38% attended schools more than 90% minority. See GARY ORFIELD & CHUNGMEI LEE, CIV. RTS. PROJECT AT HARV. U., RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 10 tbl.3 (2006), available at http://www.civilrightsproject.ucla.edu/research/deseg/Racial_Transformation.pdf. The segregation of Hispanic students has also been increasing, with 77% in majority-minority schools and 39% in schools that are more than 90% minority. *Id.* at 11 tbl.4. Predominantly minority schools also have high concentrations of poverty.

¹²⁰ See, e.g., Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1354-59 (2004).

¹²¹ This is the so-called “social contact hypothesis,” which posits that through interaction people learn to respect each other’s differences. Research indicates that this approach works best under egalitarian circumstances that minimize preexisting status differentials and enable cooperative behavior involving mutual interdependence and intimate interpersonal associations. As such, schools may be an ideal forum for it. See, e.g., Krieger, *supra* note 110, at nn.276-78 and accompanying text; GROUPS IN CONTACT: THE PSYCHOLOGY OF DESEGREGATION (Norman Miller & Marilyn B. Brewer eds., 1984).

¹²² For arguments in favor of a more Afro-centric education in light of dissatisfaction with the integrationist ideal and the failure of public schools to respond to the needs of black children, see, e.g., Eleanor Brown, *Black Like Me? “Gangsta” Culture, Clarence Thomas, and Afrocentric Academies*, 75 N.Y.U. L. REV. 308 (2000); Kevin D. Brown, *Reexamination of the Benefit of Publicly Funded Private Education for African-American Students in a Post-Desegregation Era*, 36 IND. L. REV. 477 (2003).

disproportionate influence of money must be curtailed by limiting political contributions and expenditures and public financing of elections,¹²³ equal time rules,¹²⁴ government subsidization of political speech,¹²⁵ and regulating lobbying activities.¹²⁶ Whether elections based on districting systems or forms of proportional representation are more appropriate depends on what works in practice. If financing reforms and a greater willingness of whites to vote for minority candidates yield increased numbers of working-class and minority representatives, then single-member districts may have merit as a means of giving voice to people on the local level. On the other hand, if proportional representation is the best way to ensure that legislative bodies reflect the society's class and ethnic diversity and to promote social and racial justice, then it may be required.

Finally, since entrenched concentrations of wealth and great disparities in income will likely impede efforts to equalize opportunities, and are in themselves aspects of systemic classism and racism, limitations on wealth and income inequalities will be necessary. Some redistribution of wealth may result naturally from reform measures such as equalized school financing and educational opportunity. On the other hand, a living wage requirement may not work if it leads to wage inflation, and progressive taxation or wage controls may be necessary to prevent an inflationary spiral. In general, wealth and income inequalities should be permitted only as needed to incentivize productivity that enhances the welfare of all.¹²⁷

B. On the Need of a Mass Movement for Systemic Reform

Some of the elements of a program to advance social and racial justice can be accomplished through legislation, while others may require

¹²³ See *supra* notes 75-76 and accompanying text.

¹²⁴ See, e.g., Anne Kramer Ricchiuto, *The End of Time for Equal Time?: Revealing the Statutory Myth of Fair Election Coverage*, 38 IND. L. REV. 267 (2005) (discussing the merits and demerits of the Communication Act's equal time rule, which requires that stations permitting candidates to appear on the airwaves allow equal time to opposing candidates, arguing that FCC and judicial interpretations of the exceptions to the rule have effectively eviscerated it, and advocating that the rule either be overhauled to make it effective or else abandoned).

¹²⁵ See, e.g., Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 788 (1987) (advocating state subsidization of the voice of the less powerful in order to "put on the agenda issues that are systematically ignored and slighted and allow us to hear voices and viewpoints that would otherwise be silenced or muffled").

¹²⁶ See, e.g., Krishnakumar, *supra* note 76; Luneburg & Susman, *supra* note 76; Ezekiel J. Emanuel & Dennis F. Thompson, Op-Ed., *Regulating Congress*, BOSTON GLOBE, Jan. 12, 2006, at A15 (advocating an independent congressional ethics board to propose ethics rules governing lobbying to become effective by default, absent an up-or-down vote, and to investigate ethics charges against congressional members and staff).

¹²⁷ Compare JOHN RAWLS, A THEORY OF JUSTICE 62 (1971) (advancing as a basic principle of social justice that "[a]ll social values—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage.").

constitutional amendments or reinterpretations.¹²⁸ And some reforms, such as a parliamentary system based on proportional representation, would entail so dramatic a departure from historical practice that they are hard to imagine at present.¹²⁹ As a practical matter, absent a revolution, systemic reform will have to emanate from the political process as it is presently constituted. But since systemic reform requires the elimination of the disproportionate political power of the society's economic elite, they can be expected to use their undue influence to resist needed reforms. Thus the need, in order to counter that power, for a working-class reform movement.¹³⁰

Fundamental systemic reform typically involves the confluence of three interrelated factors: (1) a critical historic moment that calls for reform; (2) a reform program that develops as the historic moment unfolds; and (3) a mass movement of some type that mobilizes people to struggle for reform. These factors are interrelated. On the one hand, the existence of an obvious crisis can stimulate a mass movement. On the other hand, a critical historic moment being in part a matter of perspective, a mass movement can help stimulate the perception that such a moment is at hand and that fundamental change is necessary. Three prior instances of systemic reform are instructive: the abolition of slavery, the New Deal, and the Civil Rights Era.¹³¹

¹²⁸ A parliamentary system in Congress, for example, would require a constitutional amendment. And ensuring equal opportunity may require reinterpreting the Constitution to declare education and housing as fundamental rights and low-income status as a suspect class. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (declining to hold education to be a fundamental right or low-income class status to be a suspect class); *Lindsey v. Normet*, 405 U.S. 56 (1972) (declining to hold housing to be a fundamental right).

¹²⁹ See, e.g., BIBBY & MAISEL, *supra* note 90, at 100 (noting that "the concept of calling on 'our own' representative to argue for the interests of our own area is deeply embedded in the American political psyche").

¹³⁰ To the extent that the existing system is so entrenched as to be resistant to needed reforms, full social and racial justice may be difficult to achieve through normal political processes even with a mass movement. If that turns out not to be possible, then a more revolutionary process cannot be discounted, however unlikely it may seem at this juncture.

¹³¹ Compare BRUCE ACKERMAN, *WE THE PEOPLE: 1-FOUNDATIONS* 3-162 (1991) (identifying three decisive transformative moments in U.S. constitutional history—the Founding, Reconstruction, and the New Deal—each resulting from a political struggle leading to a distinctive constitutional regime with a transformed view of the Constitution, in terms of the power of the federal government and the role of its three branches, and giving rise to distinctive interpretive issues in an effort to harmonize the tensions among the divergent constitutional principles emanating from these transformative moments); MICHAEL GOLDFIELD, *THE COLOR OF POLITICS: RACE AND THE MAINSPRINGS OF AMERICAN POLITICS* (1997) (arguing that the Civil Rights Movement and the conservative politics of the present grew out of five critical moments in American political history, that class conflict was at a high level during those periods, that race and white supremacy were central to the outcomes of those struggles, and that a primary purpose of the ideology of white supremacy has been to forestall working-class solidarity so as to control and exploit workers of all ethnicities; identifying the five periods as the colonial era when the southern colonies shifted from the indentured servitude of working people generally to slavery, the Revolutionary War era when slavery and states' rights were constitutionalized, the Civil War/Reconstruction era which ended slavery and established a

The critical moment regarding the abolition of slavery was the Civil War; the reform program was the Thirteenth through Fifteenth Amendments and related civil rights laws that accorded African Americans citizenship and the right to be treated equally under the law;¹³² and the mass movement was the Abolitionist Movement, which helped to mobilize Northern whites to oppose slavery and to fight and die in a war to end it.¹³³ The critical moment regarding the New Deal was the Great Depression;¹³⁴ the reform program consisted of the establishment of a federal safety net, including Social Security and other welfare-state measures, and the establishment of the federal administrative state to regulate and manage the economy so as to prevent such disasters in the future;¹³⁵ and the mass movement was the attraction of millions of voters to the Democratic Party as the vehicle for reform.¹³⁶

new system of labor in the South based in large part on a new form of white supremacy, the Populist era in the late nineteenth century resulting in the solidification of the rule of northern business, the restriction of the political power of the working class and the rigidification of segregation nationwide, and the New Deal era marked by the rise of industrial unions and of federal social and economic programs along with the beginning of the break-up of the Jim Crow system).

¹³² See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: 2-TRANSFORMATIONS* 99-252 (1998) (discussing the history of the Thirteenth and Fourteenth Amendments, concluding that their adoption did not conform with the amendment process prescribed by the Constitution, but arguing that they were nonetheless validated and legitimized by the People through an unconventional, yet ultimately democratic, mandate approving a revolutionary reform of the prior constitutional regime); JAMES M. MCPHERSON, *THE STRUGGLE FOR EQUALITY: ABOLITIONISTS AND THE NEGRO IN THE CIVIL WAR AND RECONSTRUCTION* 99-133, 341-66, 417-32 (1964) (recounting the history of the adoption of the Civil War amendments).

¹³³ See, e.g., HERBERT APTHEKER, *ABOLITIONISM: A REVOLUTIONARY MOVEMENT*, at xi (1989) (“Leading the momentous struggle against slavery, informing it, inspiring it, was the Abolitionist movement—the second successful revolutionary movement in the history of the United States.”); CLAUDINE L. FERRELL, *THE ABOLITIONIST MOVEMENT* (2006) (a history of abolitionist movements from colonial times through the end of slavery); MCPHERSON, *supra* note 132, at viii (“No claim will be made that the abolitionists were primarily responsible for the gains of the Negro in the war and reconstruction. Abolitionists did not forge or control events; but neither was their influence negligible. In many respects the abolitionists served as the conscience of the radical Republicans. They provided an idealistic-moral-humanitarian justification for the policies of the Republican Party—policies which were undertaken primarily for military or political reasons.”).

¹³⁴ See, e.g., WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940* 18-40 (1963) (on the collapse of the economy between the crash of 1929 and Roosevelt’s inauguration in 1933); ARTHUR M. SCHLESINGER, JR., *THE CRISIS OF THE OLD ORDER, 1919-1933* (1957) (history of the post-World War I era through the early years of the Depression and Roosevelt’s election).

¹³⁵ See, e.g., LEUCHTENBURG, *supra* note 134 (a general history of the New Deal); ARTHUR M. SCHLESINGER, JR., *THE COMING OF THE NEW DEAL* (1959) [hereinafter *THE COMING OF THE NEW DEAL*] (a history of the so-called “First New Deal” during Roosevelt’s first term); ARTHUR M. SCHLESINGER, JR., *THE POLITICS OF UPHEAVAL* 211-443 (1960) [hereinafter *THE POLITICS OF UPHEAVAL*] (a history of the so-called “Second New Deal” during Roosevelt’s second term).

¹³⁶ See, e.g., ANTHONY J. BADGER, *THE NEW DEAL: THE DEPRESSION YEARS, 1933-40* 245-60 (1989) (on the class-based focus of the Democratic Party coalition forged during the New Deal era with lower income workers in northern urban areas as its core, and including organized labor, African Americans and other ethnic minorities, farmers and women); *THE POLITICS OF UPHEAVAL*, *supra* note 135, at 409-43, 586-600 (on the Democratic Party coalition forged during the New Deal era consisting of organized labor, farmers, African Americans, other ethnic minorities, women and intellectuals).

During the Civil Rights Era, the critical moment was the threat of social upheaval resulting from the black community's demand for racial justice; the reform program was the dismantling of enforced segregation and the anti-discrimination laws of the mid-1960s; and the mass movement was the Civil Rights Movement, which helped raise people's consciousness to the obvious contradiction between the society's professed ideals and its unequal treatment of African Americans.¹³⁷ In the mid-1960s, in recognition of the interrelationship of race and class, some sought to push the Civil Rights Movement beyond a struggle for racial justice to a broader movement for social justice for all.¹³⁸ That did not happen, and the country moved instead in a more conservative direction over the following forty years or so.¹³⁹

History shows the importance of inter-ethnic working-class movements for the achievement of social and racial justice, and racist tactics have regularly been used to thwart such movements. Since most African Americans were then enslaved, whites played a leading role in the Abolitionist Movement alongside free blacks and escaped slaves.¹⁴⁰ Following the Civil War, there was an incipient movement of freed slaves and poor whites to counter the power of the South's elite class.¹⁴¹ But it was thwarted by the ability of the power elite to exploit and transform the

¹³⁷ For histories of the Civil Rights Era, *see, e.g.*, JACK M. BLOOM, *CLASS, RACE, AND THE CIVIL RIGHTS MOVEMENT* (1987); PETER B. LEVY, *THE CIVIL RIGHTS MOVEMENT* (1998); MANNING MARABLE, *REFORM AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945-1990* 228, 230 (2d ed. 1991) (concluding that the black elite were the primary beneficiaries of the gains of the Second Reconstruction, that "no truly anti-racist, democratic state could be developed unless its economic foundations involved to some extent a socialist pattern," and that to achieve that requires a "Third Reconstruction, which seeks to empower all people of color, working people and others experiencing discrimination, poverty, and oppression").

¹³⁸ *See, e.g.*, ROBERT F. KENNEDY, *MEETING THE URBAN CRISIS* (1968), *reprinted in* RFK: COLLECTED SPEECHES, at 391, 392-93 (Edwin Guthman & C. Richard Allen eds., 1993) ("[W]e must be willing to work together. . . . [N]o program to attack the problems of the inner city can be conducted in the isolation of the ghetto. Our efforts in urban America must be combined with programs to create opportunity for the poor on the farms and in small towns and suburban communities. Jobs, education, health care, housing—all must be provided for the poor wherever they live or want to live."); MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE?* (1967), *reprinted in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR., at 245, 247, 250 (James Melvin Washington ed., 1986) ("We must develop a program that will drive the nation to a guaranteed annual income. . . . 'Why are there forty million poor people in America?' And when you begin to ask that question, you are raising questions about the economic system, about a broader distribution of wealth. When you ask that question, you begin to question the capitalistic economy."); MALCOLM X, *INTERVIEW ON PIERRE BERTON SHOW* (1965), *reprinted in* MALCOLM X SPEAKS: SELECTED SPEECHES AND STATEMENTS, at 216 (George Breitman ed., 1989) ("I believe that there will ultimately be a clash between the oppressed and those who do the oppressing. I believe that there will be a clash between those who want freedom, justice and equality for everyone and those who want to continue the systems of exploitation. I believe that there will be that kind of clash, but I don't think it will be based upon the color of the skin . . .").

¹³⁹ *See infra* notes 150-57 and accompanying text.

¹⁴⁰ *See* APTHEKER, *supra* note 133; FERRELL, *supra* note 133.

¹⁴¹ *See generally* BLOOM, *supra* note 137, at 18-58; C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 3-95 (1957).

racist ideology of the slavery era, so as to divert attention from class issues and convince poor whites to support an apartheid system that divided whites and blacks for almost a century, and whose divisive impact persists today.¹⁴² During the Great Depression, when African Americans switched en masse from the Republican to the Democratic Party,¹⁴³ whites and blacks suffering economic hardships formed a voting bloc that helped the Democrats control the Presidency and Congress and institute the New Deal reforms.¹⁴⁴ Although the then solidly Democratic South was practicing apartheid, the New Deal era coalition was held together by the common interest of whites and blacks in combating the Depression.¹⁴⁵ And, in the course of the union movement, workers have been more successful in struggles against their bosses when they have been unified, and less successful when the bosses have been able to appeal to racist attitudes to foment division.¹⁴⁶

White participation in and support of the Civil Rights Movement also contributed significantly to the reforms of the Civil Rights Era.¹⁴⁷ Both those reforms and those of the New Deal resulted from the Democratic Party's control of the Presidency and Congress for the better part of thirty-six years, beginning with Franklin Roosevelt's election in 1932.¹⁴⁸ The

¹⁴² BLOOM, *supra* note 137; VANN WOODWARD, *supra* note 141.

¹⁴³ After voting massively Republican in Roosevelt's first election in 1932, African Americans voted overwhelmingly Democratic in the next two elections and have ever since. *See, e.g.*, HARVARD SITKOFF, *A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE: VOLUME I: THE DEPRESSION DECADE 84-97* (1978); NANCY J. WEISS, *FAREWELL TO THE PARTY OF LINCOLN: BLACK POLITICS IN THE AGE OF FDR 180-208, 267-95* (1983).

¹⁴⁴ *See* BADGER, *supra* note 136; THE POLITICS OF UPHEAVAL, *supra* note 135.

¹⁴⁵ The coalition held together, at least at the ballot box, despite substantial discrimination in New Deal programs and Roosevelt's unwillingness to adopt a civil rights agenda. Historians differ in their assessment of the long-term impact of the New Deal for African Americans. *See, e.g.*, SITKOFF, *supra* note 143, at 58, 75 (arguing that while the New Deal "perpetuated more of the discrimination and segregation inherited from previous decades than it ended," nonetheless "the New Deal's massive relief program meant relatively more to blacks than to whites"; and crediting the New Deal with "laying the foundations for the postwar advances in civil rights"); WEISS, *supra* note 143, at 212, 297-98 (arguing that African Americans supported the New Deal despite its inadequacies because "[t]he struggle to survive took precedence over the struggle for equality," and that while that support was "a realistic response to the political circumstances of the 1930s," the New Deal "did contribute in some respects to a longer-term worsening in the lot of black Americans" by accelerating their segregation in urban ghettos).

¹⁴⁶ *See, e.g.*, Goldfield, *supra* note 36; REICH, *supra* note 35; HALPERN, *supra* note 36; HONEY, *supra* note 36; JENKINS, *supra* note 36; ROSENBERG, *supra* note 36.

¹⁴⁷ *See, e.g.*, Sheryll D. Cashin, *The Civil Rights Act of 1964 and Coalition Politics*, 49 ST. LOUIS U. L.J. 1029, 1030 (2005) (arguing that "[w]ith rising diversity it is increasingly unlikely that a single racial group can succeed independently in pursuing a progressive policy agenda. In racially diverse contexts, coalition building is the only route to meaningful political power"; and citing the grass roots movement that led to the enactment of the Civil Rights Act despite initially reluctant political elites, and other instances on the local level, as examples of successful inter-ethnic coalitions); LEVY, *supra* note 137, at 24-25, 69 (discussing white participation in the Civil Rights Movement).

¹⁴⁸ During the thirty-six year period from 1932 to 1968, Democrats held the Presidency for twenty-eight years and had majorities (often in the 60%-75% range) in both houses of Congress for all but four years. For information regarding the Presidency, *see* The Presidents of the United States,

New Deal era coalition began to break down, however, when the Democratic Party supported the demands of the Civil Rights Movement for racial justice and as the movement's focus began to shift from demands for equal legal rights to demands for equal opportunity.¹⁴⁹

The shift began with Richard Nixon's election in 1968, following which Republicans held the Presidency for the better part of the succeeding forty years, and culminated with Republican control of Congress from 1994 until 2006.¹⁵⁰ The Republican Party's success was due, in large part, to its ability to win over the historically Democratic South¹⁵¹ and to appeal

<http://www.whitehouse.gov/history/presidents/index2.html> [hereinafter Presidents of the United States] (last visited May 1, 2009). For information regarding Congress, see United States Senate, Party Division in the Senate, 1789-Present, http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm [hereinafter Party Division in the Senate] (last visited May 1, 2009); Office of the Clerk, U.S. House of Representatives, Party Divisions of the House of Representatives (1789 to Present), http://clerk.house.gov/art_history/house_history/partyDiv.html [hereinafter Party Divisions of the House] (last visited May 1, 2009).

¹⁴⁹ See, e.g., GOLDFIELD, *supra* note 131, at 262-318 (discussing the political, economic and social factors underlying the success of the Civil Rights Movement in securing equal legal rights for African Americans, followed by the building of a white racist coalition that has since stalled the struggle for racial equality as the movement turned to the material and more class-like aspects of racial hierarchy and subordination); MAURICE ISSERMAN & MICHAEL KAZIN, *AMERICA DIVIDED: THE CIVIL WAR OF THE 1960S* 302-03 (2d ed. 2004) (concluding that “[t]he coalition of wage earners and intellectuals of all races and most regions that Franklin D. Roosevelt forged in the 1930s cracked apart during the late '60s and has not been rebuilt,” and attributing the cracking apart to a racist backlash arising from the effort to desegregate the South and from increasing competition for jobs as the post-war economic boom declined and the Civil Rights Movement extended to the North, as well as to the distraction and cost of the Vietnam War, the fragmentation of the liberal alliance into new social movements and identity politics, and a growing cultural conservatism); ALLEN J. MATUSOW, *THE UNRAVELING OF AMERICA: A HISTORY OF LIBERALISM IN THE 1960S*, at xiv, 395-440 (1984) (discussing the liberal achievements of the Kennedy and Johnson administrations regarding civil rights, the war on poverty and health care, followed by the stalling of the liberal program due to inflation and the Vietnam War, and the unraveling of the liberal movement resulting from “the great uprising against liberalism in the decade’s waning years by hippies, new leftists, black nationalists, and the anti-war movement”).

¹⁵⁰ During the forty-year period from 1968 to 2008, the Republicans held the Presidency for twenty-eight years. In 1994, the Republicans gained control of both houses of Congress for the first time since 1952-54, attaining a small majority that they maintained, except for two years when the Senate was evenly divided, until the 2006 elections. For information regarding the Presidency, see Presidents of the United States, *supra* note 148. For information regarding Congress, see Party Division in the Senate, *supra* note 148; Party Divisions of the House, *supra* note 148.

¹⁵¹ See, e.g., JOSEPH A. AISTRUP, *THE SOUTHERN STRATEGY REVISITED: REPUBLICAN TOP-DOWN ADVANCEMENT IN THE SOUTH* 3-64 (1996) (attributing Republican success in the South, first in presidential and then in congressional elections, to an ideology of economic conservatism appealing to the New South’s growing middle- and upper-classes, an ideology of social and racial conservatism appealing to religious fundamentalists and whites resentful of the Democratic Party’s support for desegregation and poverty programs perceived as disproportionately benefiting ethnic minorities, along with congressional redistricting to create more majority-minority districts that consequently produced more white-dominated districts and undermined coalitions of moderate whites and blacks that had contributed to the election of Democratic candidates); Matthew David Lassiter, *The Rise of the Suburban South: The “Silent Majority” and the Politics of Education, 1945-1975* 19, 45, 48 (May 1999) (unpublished Ph.D. dissertation, University of Virginia) (attributing Republican success to the South’s movement into the country’s political and economic mainstream, which has led to “the political ascendancy of the middle-class suburbs” and along with that to a shift from the overt racism of the past

generally to white working-class social conservatives.¹⁵² Although the economic agenda of the Republican Party, largely supportive of business interests and the financially better off who disproportionately benefit from the society's wealth and income disparities, seems contrary to the interests of the working class, the party has been able to capitalize on a backlash it helped foment among social conservatives against the reforms of the Civil Rights Era.¹⁵³ During this period, Republicans regularly used racist tactics to gain and maintain their advantage, from thinly veiled racist campaigns to efforts to prevent or discourage minorities from voting.¹⁵⁴

Although a majority of the working class and most African Americans and Hispanics have continued to support the Democratic Party,¹⁵⁵ it too has become more conservative in recent years.¹⁵⁶ Because the Democratic

to "a combination of overt class concerns and social morality and 'color-blind' conservatism . . . [intended] to preserve the basic educational and residential status quo marked by patterns of socioeconomic as well as racial separation"); BYRON E. SHAFER & RICHARD JOHNSTON, *THE END OF SOUTHERN EXCEPTIONALISM: CLASS, RACE, AND PARTISAN CHANGE IN THE POSTWAR SOUTH* 128 (2006) (attributing Republican success to "economic development as the dominant engine for partisan change in the postwar South and legal segregation as the more complex and conditional secondary influence, with their interaction effectively dictating the story of partisan change once both were let loose on the Southern political landscape").

¹⁵² See, e.g., GOLDFIELD, *supra* note 131; ISSERMAN & KAZIN, *supra* note 149; MATUSOW, *supra* note 149.

¹⁵³ See, e.g., AISTRUP, *supra* note 151; Lassiter, *supra* note 151; SHAFER & JOHNSTON, *supra* note 151.

¹⁵⁴ See, e.g., TALI MENDELBERG, *THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY* (2001) (discussing case studies throughout U.S. political history of formerly more explicit and now more implicit racial appeals, presenting experiments/surveys demonstrating the existence and effectiveness of implicit racial appeals, and arguing that implicit racial appeals are most effectively countered with antiracist messages); Eugene Robinson, *Will GOP's Racist Campaigns Work?*, *THE DECATUR DAILY*, Oct. 31, 2006, available at <http://legacy.decaturdaily.com/decaturdaily/opinion/other/061031a.shtml> (op-ed piece regarding racist tactics against Harold Ford, Jr. in the 2006 Tennessee Senate race); Jack White, *Lott, Reagan and Republican Racism*, *TIME*, Dec. 14, 2002, available at <http://www.time.com/time/nation/article/0,8599,399921,00.html> (article regarding the use of coded and racist messages by the Republican Party, in general, and by Ronald Reagan, in particular).

¹⁵⁵ For example, in the 2004 Presidential race an estimated 88% of African Americans, about 60% of union members and their families, and about 60% of those earning less than \$30,000 voted for Senator John Kerry. CNN Election Results, U.S. President/National/Exit Poll, www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html (last visited May 1, 2009). In the 2006 election for the House of Representatives, about 89% of African Americans, 65% of union members and their families, and 65% of those earning less than \$30,000 voted Democratic. CNN Election Results, U.S. House of Representatives/National/Exit Poll, www.cnn.com/ELECTION/2006/pages/results/states/US/H/00/epolls.0.html (last visited May 1, 2009). Hispanics have historically favored the Democratic over the Republican Party by substantial margins, although not as disproportionately as African Americans. James G. Gimpel & Karen Kaufmann, *Impossible Dream or Distant Reality? Republican Efforts to Attract Latino Voters*, *BACKGROUND*, Aug. 2001, <http://www.cis.org/articles/2001/back901.html>. For example, in the 2006 congressional and gubernatorial elections, about 70% of Hispanics voted Democratic. PEW HISPANIC CENTER, *LATINOS AND THE 2006 MID-TERM ELECTION 2* (2006), <http://pewhispanic.org/files/factsheets/26.pdf>.

¹⁵⁶ See, e.g., KENNETH S. BAER, *REINVENTING DEMOCRATS: THE POLITICS OF LIBERALISM FROM REAGAN TO CLINTON 2* (2000) (chronicling from the Reagan through the Clinton Administrations the rise of the "New Democrats" with a "new public philosophy" based less on "active social liberalism" and more on "the reinvention of government, welfare reform, fiscal restraint, economic growth, free

Party also relies heavily on the financial support of segments of the better off¹⁵⁷ and has feared alienating its predominantly white working-class base outside the South, many of whom may feel that measures to rectify racial injustice threaten their economic security, it has had difficulty countering the Republican appeal and has been unwilling or unable to advance a program for systemic reform. Whether the current economic crisis means a critical historic moment is now at hand, and whether the resurgence of the Democratic Party in Congress and the election of Barack Obama as President signal the emergence of a mass movement for systemic reform, remain to be seen.

C. *Systemic Reform and the Current Economic Crisis*

Only in the face of a major crisis whose solution is of overriding importance, of which the Great Depression is a classic example, has a major party been able to unite with voters behind a reform effort of the magnitude required of a program for social and racial justice. Although the current economic crisis has not reached the depths of the Great Depression, a collapse of that order is certainly conceivable. Those cautioning about it point to parallels between economic conditions now and those that preceded the Great Depression, in particular wealth inequalities and over-borrowing.¹⁵⁸ While the New Deal reforms seem to have protected against such a precipitous economic collapse, only time will tell whether the measures adopted to address the current crisis will revitalize the economy and whether it will be possible to successfully manage the economy indefinitely.

While the current measures, notably the effort to adopt some form of universal health care coverage,¹⁵⁹ include elements of a program for social justice, they do not as yet entail comprehensive systemic reform. Several scenarios could lead to a more comprehensive reform program. One is that

trade, and an internationalist foreign policy,” and arguing that “the New Democrats have become one of the most influential forces in the Democratic Party and in American politics”); JULES WITCOVER, *PARTY OF THE PEOPLE: A HISTORY OF THE DEMOCRATS 631-80* (2003) (chronicling the rise and increasing influence following the Reagan and Gingrich Revolutions and through the Clinton Administration of the “New Democrats,” with a more moderate to conservative approach than the Party’s traditional liberal democratic philosophy and with a greater emphasis on personal responsibility and decentralized government than on big government as the solution to societal ills).

¹⁵⁷ See AM. POLITICAL SCI. ASS’N, *supra* note 74, at 9-11 (discussing the reliance on moneyed interests of both the Republican and Democratic parties).

¹⁵⁸ See, e.g., Paul Krugman, *Fighting Off Depression*, N.Y. TIMES, Jan. 4, 2009, at A21 (opining that the current economic crisis “looks an awful lot like the beginning of a second Great Depression”); William K. Tabb, *The Financial Crisis of U.S. Capitalism*, MONTHLY REV., Oct. 28, 2008, available at <http://mzine.monthlyreview.org/tabb101008.html> (attributing the current financial crisis largely to over-borrowing); Wolff, *supra* note 7, at 59-60 (noting wealth inequalities that have grown to a level about as great as those preceding the Great Depression).

¹⁵⁹ See Plan for a Healthy America: Barack Obama and Joe Biden’s Plan, http://www.barackobama.com/issues/healthcare/#make_health_insurance_work (last visited May 1, 2009).

the measures fail, the country descends into a depression as great as or greater than the Great Depression, and a mass movement for more radical reform arises either within the Democratic Party or through the emergence of a viable third party. A second scenario is that the measures succeed in revitalizing the economy, but that over time comparable or increasingly severe crises give rise to the needed mass movement. A third is that the measures sufficiently stabilize the economy to pacify the public, but that a gradual economic decline resulting from an increasingly competitive global economy, coupled with escalating wealth disparities and an increasingly rigid class/race hierarchy, create the spark for systemic reform.

Whatever the scenario, the thesis of this article is that systemic reform will not occur until a mass, inter-ethnic, working-class movement makes it happen. While the Democratic Party's resurgence in the last two elections suggests some movement in that direction, we are not there yet. Thus, although Barack Obama received the white support he needed to be elected President, he still garnered less than a majority of the white vote, even among the working class.¹⁶⁰

At present, there seem to be several obstacles to such a mass movement. First, it will face staunch opposition from society's power elites. Eliminating systemic racism and affording full equality of opportunity to all require egalitarian reforms that would greatly reorder power relations in this society, substantially reduce wealth and income disparities, and make it far more difficult for a small minority of elites to predominate and to preserve their elite status. Today's elites would certainly try to use their disproportionate political, economic and cultural power to thwart such reforms.

In this regard, a major contrast between earlier systemic reforms and the requirements of a program for social and racial justice is that in the past there was more of a convergence of interests between mass reform movements and society's power elites, while the political and economic reforms needed now threaten to severely undermine the power of society's elites. At the time of the Civil War, the convergence of interests was between abolitionists, who supported the war as a means to end the evil of slavery, and Northern elites, who supported it for economic reasons and as a means to preserve the union.¹⁶¹ Similarly, during the Civil Rights Era

¹⁶⁰ See President National Exit Poll, *supra* note 84.

¹⁶¹ See, e.g., MCPHERSON, *supra* note 132, at 29-98 (characterizing the North prior to secession as largely antagonistic to the abolitionist movement and willing to compromise with the South over slavery, and as supportive of the war following secession in order to preserve the union and of emancipation primarily as a military necessity; and characterizing the abolitionist movement as largely supportive of the war as a moral necessity in order to do away with the evil of slavery, and as having increasing moral suasion in the North as the war progressed).

there was a convergence of interests between the black community and society's elites, whose desire to extend the United States' economic power and political influence world-wide would likely have been impeded by the country's practice of racial apartheid.¹⁶² During the Great Depression, while many business leaders opposed the New Deal,¹⁶³ both the masses suffering from the Depression and the business community as a whole benefited from the economic stabilization of the New Deal reforms.¹⁶⁴ Indeed, some credit the New Deal with saving capitalism from its self-destructive tendencies and forestalling yet more radical reform.¹⁶⁵ Achieving social and racial justice in this society requires just that—yet more radical reform.

A second obstacle to a successful mass movement is that while many people express dissatisfaction with the country's direction and their lot in life,¹⁶⁶ their level of dissatisfaction may not be high enough to outweigh fear of the unknown and averseness to change.¹⁶⁷ Or, while they may favor

¹⁶² See, e.g., Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000).

¹⁶³ See THE COMING OF THE NEW DEAL, *supra* note 135, at 423-507.

¹⁶⁴ See, e.g., BADGER, *supra* note 136, at 66-117 (arguing that the purpose of the New Deal's industrial recovery effort, though often bitterly opposed by the business community, was to restore the economic system, and that it succeeded as a holding action and set the stage for the post-World War II economic boom).

¹⁶⁵ *Id.* at 116 (arguing that "if the New Deal helped make the world safe for capitalism, that had always been Roosevelt's intention," and that subsequently the Second World War "restored popular legitimacy of corporate leaders and the close alliance of the industrial-military complex"); Barton J. Bernstein, *The New Deal: The Conservative Achievements of Liberal Reform*, in *TOWARDS A NEW PAST: DISSENTING ESSAYS IN AMERICAN HISTORY* 263, 264, 267 (Barton J. Bernstein ed., 1968) (concluding that "[t]he liberal reforms of the New Deal did not transform the American system; they conserved and protected American corporate capitalism, occasionally by absorbing parts of threatening programs"; and that the New Deal failed to threaten the preeminent political power of business and "sapped organized radicalism of its waning strength and of its potential constituency among the unorganized and discontented").

¹⁶⁶ See, e.g., "Right Track/Wrong Track" Poll, <http://www.pollingreport.com/right.htm> (last visited May 1, 2009) (reporting on longitudinal polls from 1997 to mid-2006 by various pollsters asking whether the country is heading in the right or wrong direction and whether respondents are satisfied or dissatisfied with the way things are going; over the years, wrong direction or dissatisfied has consistently polled in the mid-30% to high-60% range, with increasingly negative responses over the past five years). *But see* Harris Interactive, *Americans Remain More Optimistic and Satisfied with Life than Europeans* (2005), http://www.harrisinteractive.com/harris_poll/index.asp?PID=585 (measuring level of satisfaction with "the life you lead," in which 58% said very satisfied and 32% fairly satisfied, 56% said their situation had improved in the last five years and only 18% got worse, and 65% said they expected their situation to improve in the next five years and only 10% to get worse).

¹⁶⁷ See, e.g., Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119, 1119 (2006) (discussing scientific research revealing that underlying human behavior is a powerful motive "to defend and justify the social status quo, even among those who are seemingly most disadvantaged by it"; examining explanations for the phenomenon, including the need to manage uncertainty arising from perceived threats to themselves and the social order; and suggesting ways of responding to the phenomenon in various legal contexts, including advocacy for social change). Perhaps the most poignant riposte to aversion to change is President Roosevelt's famous statement in his first inaugural address, delivered at

change, they may sense that the political process is so stacked in favor of moneyed interests that the attempt would be useless, and that their efforts would be better spent in doing the best they can for themselves and their families.¹⁶⁸ Or, while dissatisfied, they may perceive systemic reform as contrary to the individualistic ethic and capitalist ideology that hold sway in this society and are promoted by its elites as a means of preserving their advantaged status.¹⁶⁹ A major task of a mass movement is to overcome such doubts, and to convince people that fundamental reform is needed and possible, that it is in their interests, and that it is consistent with the society's highest ideals.¹⁷⁰

the height of the Great Depression and designed to mobilize public support for the New Deal, that "the only thing we have to fear is fear itself." Inaugural Address, 2 PUB. PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 11 (Mar. 4, 1933).

¹⁶⁸ Compare Rogers, *supra* note 32 (offering a similar explanation for why the union movement in the U.S. has tended to limit its efforts to obtaining short-term material benefits, rather than systemic changes that might be of greater long-term benefit to the working class as a whole). Perhaps that feeling would change if a mass movement should develop, much like the Civil Rights Movement enabled the mobilization of masses of people who felt oppressed and were ready to act when the opportunity arose. But in the absence of such a movement, people may feel isolated and powerless, and so may turn inward and self-protective. This is a rational move when group action is unavailable, and is the essence of divide and rule.

¹⁶⁹ See, e.g., STUART EWEN, CAPTAINS OF CONSCIOUSNESS: ADVERTISING AND THE SOCIAL ROOTS OF THE CONSUMER CULTURE 189 (1976) (characterizing modern mass consumer culture as fueled by advertising and the mass media and as a means, in response to the monumental productive capacity of advanced capitalism and the ever more monotonous character of work, of creating a "realm within which gratification and excitement might be had—an alternative to more radical and anti-authoritarian prescriptions"); JOHN KENNETH GALBRAITH, THE AFFLUENT SOCIETY 152 (2d ed. 1969) (discussing the Dependence Effect by which the process of producing and marketing goods creates the desire for yet more goods); Susan Strasser, *Consumption*, in ENCYCLOPEDIA OF THE UNITED STATES IN THE TWENTIETH CENTURY 1017, 1017, 1034 (Stanley I. Kutler ed., 1995) ("Over the course of the twentieth century, consumption became fundamental to corporations and government agencies attempting to affect the activities of households in the interests of both corporate enterprise and economic growth. Marketing concerns came to dominate corporate decision making about production; the Great Depression brought consumption to the fore in considerations of economic policy; and, in public discourse, individuals' status as consumer came to rival and even surpass their status as workers. . . . By the end of the century, commercial culture no longer maintained a sharp distinction between products and the media that sold products."); Dalia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought*, 30 L. & SOC. INQUIRY 179 (2005) (citing ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1993)) (discussing changing scholarly conceptions of the corporation from the time of THE MODERN CORPORATION AND PRIVATE PROPERTY, which focused on the massive concentration of economic and political power in the emerging giant corporations and the need to constrain that power through government regulation to ensure that corporations operate in the public interest, to a late twentieth century more individualistic conception focusing on the corporation's role in maximizing profits for its shareholders and on market competition as a means of serving the public good).

¹⁷⁰ See, e.g., Linda M. Keller, *The American Rejection of Economic Rights as Human Rights & the Declaration of Independence: Does the Pursuit of Happiness Require Basic Economic Rights?*, 19 N.Y.L. SCH. J. HUM. RTS. 557, 560 (2003) (arguing that implicit in the Declaration of Independence is the government's "duty to facilitate the pursuit of happiness" by providing minimum economic means, including basic economic rights, now widely accepted in the international community, to food, shelter, education, employment and health care); CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER (2004) (arguing that Franklin Roosevelt's so-called "Second Bill of Rights," including the right to education, a job, a decent home

A third obstacle is a division among the working class due to racist attitudes and divergent interests,¹⁷¹ all of which may be promoted by society's elites to divert attention from issues of social and racial injustice. One area of potential division is over immigration and the treatment of immigrants. To the extent native-born workers feel that immigration, and in particular an influx of lower-paid Hispanics, threatens their livelihood, this may drive a wedge between black and white workers, on the one hand, and Hispanics, on the other.¹⁷² While there is some public sentiment that immigration hurts native workers,¹⁷³ and while the media has contributed

and adequate health care, merits the status of the Declaration of Independence as a statement of society's most fundamental principles).

¹⁷¹ See, e.g., Taunya Lovell Banks, *Both Edges of the Margin: Blacks and Asians in Mississippi* Masala, *Barriers to Coalition Building*, 5 *ASIAN L.J.* 7 (1998) (arguing that blacks and Asians often avoid coalescing with each other in an effort to appease whites and improve their relative positions in a racial hierarchy that favors whites generally, and that group insularity perpetuated by the dominant society through law and social practice is a barrier to coalition-building among non-whites); Richard Delgado, *Linking Arms: Recent Books on Interracial Coalitions as an Avenue of Social Reform*, 88 *CORNELL L. REV.* 855, 857 (2003) (reviewing LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002) and ERIC YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* (2001)) (arguing with respect to inter-minority coalitions that "when race is an element, coalition making becomes more, not less, problematic" in that "racial harms will vary from group to group and over time . . . [and] that redress for those harms will take culturally specific forms so that the collective dimension of struggle will very often take second place to the individual one"); Harris, *supra* note 112, at 2510-17 (arguing that there is a divergence of interests impeding coalitions between working-class whites and people of color "[b]ecause of the way that white racial privilege, in both material and psychological forms, is configured and structured into class hierarchy"); Victor C. Romero, *Rethinking Minority Coalition Building: Valuing Self-Sacrifice, Stewardship and Anti-Subordination*, 50 *VILL. L. REV.* 823, 827-829 (2005) (advocating as a means of maintaining minority coalitions an "anti-subordination" focus on "the alleviation of oppression in all its forms" and "the systemic closing of the gap between haves and have-nots").

¹⁷² See, e.g., Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 *UCLA L. REV.* 1161, 1235 (2008) (identifying as a potential source of division between African-American and Latino low-wage workers differing conceptions, deriving from differing historical experiences, of the relationship of low-wage work to citizenship and a sense of belonging to the greater society; examining workplace interaction and community organizing as means of enhancing solidarity and citing examples of inter-ethnic solidarity; and suggesting that "African Americans and new Latino immigrants will increasingly perceive common interests in improving their working conditions as migrants' time in the United States grows"); Kevin R. Johnson & Bill Ong Hing, *The Immigrants Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 *HARV. C.R.-C.L. REV.* 99 (2007) (analyzing the prospects for a multiracial movement for social justice from the perspective of the immigrants' rights movement; identifying as potential obstacles to such a movement an historic division among minority groups regarding immigration, perceived competition among disadvantaged minorities for jobs and political power, and racist sentiments among segments of the minority communities; and suggesting possible common grounds for struggle, in particular the common interest in combating ethnic discrimination, enhancing economic and educational opportunities, confronting entrenched power, and achieving "full membership in American society").

¹⁷³ See, e.g., THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *AMERICA'S IMMIGRATION QUANDARY* 15 (2006), available at <http://people-press.org/reports/pdf/274.pdf>. In a March 2006 poll 52% of persons surveyed, representing an increase from 38% in September 2000, agreed that immigrants burden other Americans by taking jobs, housing and health care. *Id.* at 1, 15, 60. In the 2006 poll, 55% of whites and 54% of blacks surveyed agreed that immigrants are a burden, while only 29% of Hispanics agreed, showing that this negative sentiment is far stronger among whites and blacks than among Hispanics. *Id.* at 15.

to the creation of inter-ethnic tension over the issue,¹⁷⁴ the scholarly evidence is inconclusive.¹⁷⁵ Even those who find negative effects acknowledge that wages and employment are greatly impacted by factors other than immigration.¹⁷⁶ Moreover, systemic reforms, such as equalized educational opportunity and guaranteed jobs at a living wage, would likely counter the negative effects.

A second area of potential division is racist attitudes on the part of the white working class, without whose involvement a successful mass movement seems unlikely. A major task in bringing about systemic reform is to help working-class whites understand that they have more in common

¹⁷⁴ See, e.g., Lou Dobbs, *The New Hard Line on Immigration; U.S. Policy on Immigration is a Tragic Joke*, ARIZ. REPUBLIC, Apr. 28, 2005, at 1V (“In the United States, an obscene alliance of corporate supremacists, desperate labor unions, certain ethnocentric Latino activist organizations and a majority of our elected officials in Washington works diligently to keep our borders open, wages suppressed and the American people all but helpless to resist the crushing financial and economic burden created by the millions of illegal aliens who crash our borders each year. They work just as hard to deny the truth to the American public. That’s why almost every evening on my CNN broadcast we report on this country’s ‘Broken Borders.’ The truth is that U.S. immigration policy is a tragic joke at the expense of hard-working middle-class Americans.”); Charles Krauthammer, *Immigrants Must Choose*, WASH. POST, Apr. 14, 2006, at A17 (comparing the Civil Rights Movement and the immigrants’ rights movement: “Americans instinctively know the difference between these two civil rights crusades. Blacks were owed. For centuries they had been the victims of a historic national crime. The principal crime involved in the immigration crusade is the violation of immigration laws by the illegals themselves.”).

¹⁷⁵ See, e.g., George J. Borjas et al., *Immigration and African-American Employment Opportunities: The Response of Wages, Employment, and Incarceration to Labor Supply Shocks* 4, 35 (Nat’l Bur. of Econ. Research, Working Paper No. 12518, 2006), available at <http://ksghome.harvard.edu/~GBorjas/Papers/Borjas,%20Grogger,%20Hanson,%202006.pdf> (concluding, based on projections derived from census data, that immigration between 1960-2000 reduced the wages of whites by 4.1% and blacks by 4.0%, reduced the employment rate of whites and blacks by 1.6% and 3.5%, respectively, and severely impacted black high school drop-outs, reducing their wages by 8.3% and their employment rate by 7.4%); George J. Borjas, *Increasing the Supply of Labor Through Immigration: Measuring the Impact on Native-born Workers*, BACKGROUND, May 2004, at 5-6, www.cis.org/articles/2004/back504.pdf (concluding, based on projections derived from census data, that immigration between 1980-2000 reduced the annual average earnings of native-born whites by 3.5%, of blacks by 4.5%, of Hispanics by 5.0%, and of high school drop-outs by 7.4%, and attributing more than half the overall reduction, and almost all of the reduction for high school drop-outs, to immigration from Mexico); David Card, *Is the New Immigration Really So Bad?*, 115 ECON. J. 300, 321-22 (2005) (concluding, based on projections derived from census data, that the evidence that immigration has harmed the opportunities of native-born workers is scant; and arguing, with regard to the methodological approach employed by studies finding otherwise, that “it is hard to argue that the aggregate time series evidence points to a negative impact of immigration unless one starts from that position *a priori*”); Stephen Raphael & Lucas Ronconi, *The Effects of Labor Market Competition with Immigrants on the Wages and Employment of Natives: What Does Existing Research Tell Us?*, 4 DU BOIS REV. 413, 414 (2007) (discussing various studies, noting that the differing results flow from the use of different methodological approaches, and concluding that “the research evidence suggests that recent immigration has had only a modest effect on the labor market prospects of native-born Americans”).

¹⁷⁶ See, e.g., Borjas et al., *supra* note 175, at 5 (“[A]lthough the evidence suggests that immigration played a role in generating these trends, much of the decline in employment or increase in incarceration in the black population remains unexplained. . . . [W]e would have witnessed a sizable decline in black employment and the concurrent increase in black incarceration rates even if there had been no immigration in the past few decades.”).

with their working-class brothers and sisters of all ethnicities than with the largely white power elite many now support, and that their interests would be better served by supporting systemic reform.¹⁷⁷ White working class support for systemic reform is particularly important in the South, where almost half the country's African Americans live,¹⁷⁸ which is considerably less well off than the rest of the country,¹⁷⁹ and which, if it returned to the Democratic Party, could produce Democratic dominance comparable to the New Deal era and sufficient to adopt more comprehensive reform. Perhaps the descendants of the freed slaves and poor whites, whose incipient alliance was thwarted following the Civil War, will one day unite and, together with similarly disadvantaged Hispanics, be the catalyst for a movement for social and racial justice for all.¹⁸⁰ Perhaps that day is at hand.

¹⁷⁷See, e.g., GUINIER & TORRES, *supra* note 97, at 12, 17 (advocating and envisioning the possibility of “a progressive democratic movement led by people of color but joined by others . . . [who] will want to follow if they can frame that movement to speak to conditions of justice that disfigure our social institutions more generally”); REICH, *supra* note 35 (showing how the racist attitudes of white workers actually lowers their wages). See also James Lindgren, *Studies in Historical, Legal, and Political Sociology: Guns, Model Minorities, and Social Dominance* 145-93 (2009) (unpublished Ph.D. dissertation, University of Chicago) (on file with the Connecticut Public Interest Law Journal). Lindgren’s study, based on an analysis of National Opinion Research Center surveys, found that, contrary to the prevailing wisdom, people who express traditionally racist views (e.g., opposition to integration and interracial marriage, belief in in-born racial differences in ability) tend to oppose capitalism and to support greater income redistribution and guaranteed employment. *Id.* Since these people also tend to be less-well-educated and less-well-off, this may help explain the ability of the Republican Party to attract less-well-off whites through appeals to racist attitudes. Yet, there is a seeming anomaly here. The support of less-well-off whites for economic reform suggests they would feel better off as a result. Why, then, does self-interest not lead them to abandon their racist views and ally with disadvantaged minorities who support reform? A possible explanation is that, not seeing reform as possible even with a coalition of interests, they retain racist views in recognition of the fact that, in the absence of reform, the society’s racist hierarchy helps cushion them from falling to the bottom. This sense of the impossibility of reform, because colored by racist attitudes, may well be incorrect. If so, the question is what it would take to convince them that their racism is misguided.

¹⁷⁸As of the 2000 Census, about 47% of African Americans lived in ten former confederate states, representing 20% of the population of these states. JESSE MCKINNON, U.S. CENSUS BUREAU, *THE BLACK POPULATION: 2000* 5 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf>. During the 1990s, there was a substantial migration of African Americans to the South from other areas of the country, all of which had a net black out-migration. WILLIAM H. FREY, *POPULATION STUDIES CTR., CENSUS 2000 SHOWS LARGE BLACK RETURN TO SOUTH, REINFORCING THE REGION’S “WHITE-BLACK” DEMOGRAPHIC PROFILE* (2001), <http://www.psc.isr.umich.edu/pubs/papers/rr01-473.pdf>.

¹⁷⁹As of 2005, the median household income in the U.S. was \$46,326 and the poverty rate was 12.6%, while in the South median income was only \$42,138 and the poverty rate was 14.0%. DENAVAS-WALT ET AL., *supra* note 10, at 6 tbl.1.

¹⁸⁰No doubt Martin Luther King was entertaining such thoughts when in his “I Have a Dream” speech he envisioned that “one day . . . the sons of former slaves and the sons of former slave owners will be able to sit down together at the table of brotherhood” and that “little black boys and black girls will be able to join hands with little white boys and white girls and walk together as sisters and brothers.” MARTIN LUTHER KING, JR., *I HAVE A DREAM* (1963), reprinted in *A DOCUMENTARY HISTORY OF THE UNITED STATES*, at 411 (Richard D. Heffner ed., 2002).

IV. CONCLUSION

While the United States may not be as racist as when it was practicing slavery and apartheid, it remains a deeply racist society. Racist thinking is still common, systemic racism perpetuates the inequalities produced by the country's racist history, and these factors deny African Americans and Hispanics an equal opportunity to succeed in life. Likewise, despite advances such as Social Security and workers' rights, the United States remains a deeply, systemically, and increasingly classist society. Wealth disparities have increased and become more entrenched, and the opportunities to succeed in life and to participate in the political process are highly skewed in favor of moneyed interests.

Classism and racism, though not identical phenomena, are highly interrelated. Reform measures that specifically address racism, like anti-discrimination laws and affirmative action, are unlikely to result in racial equality without class-based measures, such as a guaranteed job at a living wage. Moreover, many aspects of systemic classism and systemic racism overlap and must be addressed together. Opening up exclusionary suburbs or reforming the financing of education equalizes opportunities not only for African Americans and Hispanics, but for less-well-off people generally.

Systemic classism and racism must also be addressed together in order to organize a reform movement. African Americans, Hispanics and other ethnic minorities cannot be expected to support reforms of the classist aspects of social life if they leave white privilege intact, while whites who themselves lack equal opportunity cannot be expected to support reforms of the racist aspects of social life unless its classist aspects are also reformed. Moreover, a joint effort is needed to overcome the likely resistance to systemic reform of the power elite and other privileged segments of society that are advantaged by systemic classism/racism.

Historically, such movements have arisen at critical historic moments, when a crisis of some kind motivates people to reconsider society's direction, rethink their values, overcome differences and confront the unknown. Reform rarely comes all at once, however, but typically piecemeal over an extended period of time. Indeed, the reforms of the Civil War, New Deal and Civil Rights eras are themselves partial components of an as yet incomplete program for social and racial justice.

The current economic crisis offers the potential for more progress toward a non-classist/non-racist society. So far, the major thrust of the economic recovery plan is to use the tools developed during the New Deal era to revitalize the economy, reduce the inequalities that have developed over the past few decades, and institute universal health care. While, if successful, these measures will be significant achievements, without more they will still leave the society's class/race hierarchy in place. A more

comprehensive program for social and racial justice requires a mass, inter-ethnic, working-class movement that has not yet arisen but for which there seems to be some potential. Without such a movement, this is likely to remain a systemically classist and racist society for the foreseeable future.