America Is Not Yet Post-Racial

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Since America elected Barack Hussein Obama president, many seem to believe the United States has entered a post-racial era, where race is no longer salient. To be sure, the notion that America has moved beyond its racist past and the need for legal protection based on race is nothing new.

Eighteen short years after the 13th Amendment, which abolished slavery, was adopted, the U.S. Supreme Court was already well on its way to embracing post-racialism. In Civil Rights Cases (1883), the court invalidated the Civil Rights Act of 1875, which was intended to prevent racial discrimination in public accommodations. Although the court recognized that Congress could eliminate the "badges and incidents of slavery," Justice Joseph Bradley, writing for the 8-1 majority, indicated that as former slaves had emerged from slavery and "shaken off" the burdens of that status, "there must be some state in the progress of his elevation when he [the former slave] takes the rank of mere citizen and ceases to be the special favorite of the laws." Since then, our Congress and courts have had a complicated history with race, so much so that the message to get beyond race has even accompanied cases legally sanctioning the consideration of race. For example, in 2003, in Grutter v. Bollinger, the court upheld the constitutionality of a narrowly tailored consideration of race in law school admissions, but speaking for the majority, Justice Sandra Day O'Connor also surmised, "The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

Obama's ascension to the presidency, supported by many white voters, seems to have revitalized the post-race idea and to have given it additional traction with a significant number of people. Since November, Americans, specifically African-Americans, have been repeatedly told: "There are no more excuses. The American dream is possible for everyone regardless of race, color or creed."

Of course, purveyors of this message conveniently overlook the sometimes-overt, sometimes-subtle racism that both liberals and conservatives engaged in during the 2008 election. First, as Shelby Steele wrote in the L.A. Times following the election, those who embraced President Obama as a symbol of post-racialism "unwittingly embrace race as their primary motivation." Additionally, who can forget the monkey cartoons; the unflattering depictions of the candidate on T-shirts, a box of waffles and a $10 food stamp; the description of Obama as "the first mainstream African-American who is articulate and bright and clean and a nice-looking guy;" and the fixation with Obama's connection to Reverend Jeremiah Wright, among other things. These suggest that Obama succeeded despite racism, not because of it. But those skeptical about a post-race America need not look to the run-up to the election for evidence that America's social mythology has not become reality; recent events provide ample fodder.

Exhibit one: The Birther Movement. Birthers claim Obama was not born in the U.S. and therefore is not lawfully president. A subtext to the Birthers' argument - were it true - is that because Obama has not been naturalized, not only is he not a U.S. citizen, he is not even entitled to be in this country. The president is an undocumented person! To be sure, the Birthers' claims are unlikely to gain traction given that Hawaii has released a birth certificate showing that the president was in fact
born on Oahu on Aug. 4, 1961, an announcement of his birth appeared in the Honolulu Advertiser nine days later, and documents evidencing a birth in Kenya have been proven fraudulent. Could it be, however, that the Birthers' real goal is to undermine Obama's leadership by playing upon a racist stereotype - one that is usually leveled at Asian-Americans - that the president is foreign? For example, defining Japanese-American citizens as foreign and presumptively disloyal contributed to the World War II internment challenged in the 1944 case Korematsu v. United States. More recently, legal scholars such as UC Berkeley School of Law professor Leti Volpp and Iowa College of Law professor Adrien Wing have pointed out a similar process being deployed against Arab-Americans who have been "racialized" as terrorists since Sept. 11, 2001. Birthers are using a familiar tactic, the exploitation of presumed foreignness of citizens, against the president in order to infer he is not one of "us" and therefore he (and his policies) are not to be trusted.

Exhibit two: The town hall brawls. Unlike the Birther Movement, whose reliance on the significance of race is not even thinly veiled, understanding what has been transpiring at congressional town hall meetings across the country is more complicated. Clearly, some of the disruptive behavior has been carefully orchestrated by and to protect the interests of private health insurers. Undoubtedly, some of the vitriol is a reflection of fears fueled by rumors of "death panels" and other misinformation. And some of the passion is likely caused by uncertainty concerning the effects of various proposals and legitimate questions about whether the country can bear the costs of a public option. But one cannot help but also wonder if health care reform is the real target of some of the angry hysteria. Strident cries to "take my country back" frequently sound more like frustrated anger over the fact that liberals are running the federal government, and this time there is added tension related to the fact that their leader is black. After all, does one really need to take a loaded gun to a town hall attended by the president if purpose is merely to question the wisdom of health care reform?

To be sure, many maintain that the Birther Movement and the brouhahas at town hall meetings are perpetuated by a radical fringe not representative of average Americans' beliefs. However, the unwillingness of Republican legislators and mainstream conservative organizations to do more to squelch the zeal of Birthers' and the most virulent town hall protestors suggests that these ideas resonate with mainstream America more than many care to admit.

Exhibit three: The Sonia Sotomayor confirmation hearings. In July, the Senate Judiciary Committee held confirmation hearings for Sotomayor, the first Latina nominee to the U.S. Supreme Court. Like other confirmation proceedings in recent decades, the Sotomayor hearings were a missed opportunity. Driven by political expediency, liberals failed to seize the moment to educate the public about the complexities of judicial decision-making and various approaches to constitutional and statutory interpretation. Conservatives, on the other hand, engaged in grandstanding that was racial and political in nature. In their efforts to defeat her nomination, Senate Republicans seized on Sotomayor's singular comment from a speech in which she espoused the comparative benefits of being a wise Latina judge. What was alarming about the senators' questions was their insinuation, ostensibly based on Sotomayor's comment, that nominees of color, because of their race, are incapable of being impartial. The hearings were a blazing display of one of the hallmarks of the unidirectional application of the concept of race - that is, the privilege of white males to ignore that they have a race and that their racial experiences shape who they are and how they view the world. Justices John Roberts and Samuel Alito enjoyed the presumption that their race did not matter during their confirmations. While one could argue it was because they never publicly commented on the virtues of race to their role as judges, the real point is that they never had to. One of the privileges of whiteness is the imposition of colorblindness as the only acceptable framework to discuss race, even as people of color deal with the experience of being marked by racial difference on a daily basis. To have the mere mention of that experience be equated with bias in favor of one's own minority group is another form of racialized unfairness. Can a society that is incapable of acknowledging that race matters, that experience matters - really be beyond race?

Exhibit four: The Gates arrest. Few will forget the arrest of Harvard professor Henry Louis "Skip"
Gates by Sgt. James Crowley, a Cambridge police officer, after a neighbor reported what she thought was a break-in at Gates' home. When questioned about the incident during a primetime news conference on health care, Obama said, "the Cambridge police acted stupidly in arresting someone when there was already proof they were in their own home." For days, the national conversation on health care was derailed as the nation debated Obama's statement and whether the president was a racist. For some people, Obama's comment seemed to confirm what they had suspected all along - that beneath the veneer of mainstream acceptability, Obama was just another black man who could not be trusted to protect the interest of all citizens. Might this explain why Obama mostly avoided discussions of race during the election? To speak of race, to identify with a race, means you are racist? This reading of race is devoid of history and context. Much like the Civil Rights Cases, it ignores the country's history of racial oppression and the slow progression toward full racial inclusion. One need only look to the races of the 110 U.S. Supreme Court justices before Sotomayor and the 43 U.S. presidents before Obama, to see that race has mattered.

More important perhaps than the nation's reaction to Obama's observation was its response to the question of whether Gates was racially profiled. No one other than Gates and Crowley were present, and the two men initially had very different accounts of what occurred. Yet, Americans seemed split over whether the arrest was racially motivated. The popular post-race understanding of Gates' arrest was that it was an isolated incident, a misunderstanding, that should not be given too much weight. Those who believe in the salience of race professed more suspicion about whether race played a role in the arrest. To reach a firm conclusion without all the facts is, of course, problematic. But equally troubling is the presumption, fueled by a post-race ideology, that race was not involved. This presumption is counter to the deeply troubled history between law enforcement and people of color in this country. Professor Kaaryn Gustafson of the University of Connecticut Law School, who is conducting an empirical project on racial difference with police interactions in Los Angeles, claims that incidents like those involving Gates rarely come to the public's attention although empirical research suggests that blacks and Latinos have very different experiences with police than do members of other races. The race-neutral explanation for the Gates incident ignores this, as well as the instances of racial profiling recounted by both Harvard students and professors in recent years, and the disproportionate number of people of color incarcerated in this country.

Proponents of a post-race America seem to have a form of selective amnesia. They have forgotten (or perhaps in some cases have never known) the history of people of color in this country, or maybe they simply do not want to remember that Africans were dragged to American shores in chains, and sold into one of the most brutal and dehumanizing institutions known to man. Slavery was codified in and protected by the U.S. Constitution and fueled American economic development and expansion for centuries. Even after the Civil War and emancipation, any rights afforded African-Americans were quickly eroded by Supreme Court interpretations of post-war constitutional and statutory enactments. After the 1896 Plessy v. Ferguson Supreme Court decision upholding "separate but equal" rail accommodations for blacks and whites, the system of Jim Crow racism and state-sponsored segregation became further entrenched. This lasted until the civil rights protests of the 1950s and '60s, which produced much of modern U.S. anti-discrimination law (that many suggest we now do not need). Native Americans, Asian Americans and Latinos also have had deeply troubled histories of exclusion and subordination in this country that cannot be forgotten.

Today, glaring evidence of racial inequality still exists. People of color are more likely to be impoverished, unemployed, uninsured and incarcerated than whites. In 2007, the poverty rate was 8.2 percent for non-Hispanic whites, 24.5 percent for blacks, 10.2 percent for Asians, and 21.5 percent for Hispanics; the unemployment rate was 4.1 percent for non-Hispanic whites, 8.3 percent for blacks, 3.2 percent for Asians, and 5.6 percent for Hispanics or Latinos; and the uninsured rate was 10.4 percent for non-Hispanic whites, 19.5 percent for blacks, 16.8 percent for Asians, and 32.1 percent for Hispanics. According to the Bureau of Justice Statistics, at the end of 2007, non-Hispanic white males accounted for 33 percent of the males sentenced to prison; Black males
made up 39 percent of this population; and Hispanic males made up 20 percent (no separate statistics were provided for Asian men). Certainly these numbers have worsened in our present economic crisis. Although other factors no doubt contribute to racial inequality, given the history of this country it would be illogical to assume that structural racism is not a critical contributing factor.

In the law, a presumption is an assumption that something is true until it is proven otherwise. The burden is on the party who would challenge the presumption. Ahistorical and acontextual analyses produce counterintuitive presumptions. It seems almost a truism to say that 45 years cannot wipe out 350 years of bondage, subordination and exclusion. With glaring evidence of continuing racial inequality, we need more than a few Oprahs, Condis, Lebrons, Kobes, Collins, and, yes, even Obamas before we presume racism is a thing of the past. This is something that Sen. Ted Kennedy understood and so passionately reminded us and why the passing of his generation is such a profound national loss.

Change is coming to America. But in 2009, a post-racial America we are not.