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**CLASS-BASED AFFIRMATIVE ACTION, OR  
THE LIES THAT WE TELL ABOUT THE INSIGNIFICANCE  
OF RACE**

**KHIARA M. BRIDGES\***

INTRODUCTION .....	56
I. ....	61
A. <i>The “Suspect Class” to “Suspect Classification” Shift</i> .....	64
B. <i>The Effects of the Class-to-Classification Shift</i> .....	67
C. <i>Lies about Race that the Class-to-Classification Shift Tells</i> .....	69
II. ....	78
A. <i>The Shared Infirmities of Race-Based and Class-Based             Affirmative Action</i> .....	80
1. Meritocracy Perversion .....	80
2. Inefficacy .....	81
3. Resentment .....	83
4. Denial of Individuality .....	84
5. Unfair Burdens .....	87
6. Undeserving Beneficiaries.....	88
B. <i>The Story that Class-Based Affirmative Action Tells about             Race</i> .....	94
C. <i>Just Saying: How Conservatism Tends to Explain Poverty             and Conceptualize Income Inequality</i> .....	98
D. <i>The Dangers of Political Expediency, or Why Class-Based             Affirmative Action is Immoral</i> .....	106
CONCLUSION.....	108

*This Article conducts a critique of class-based affirmative action, identifying and problematizing the narrative that it tells about racial progress. The Article argues that class-based affirmative action denies that race is a significant feature of American life. It denies that individuals—and groups—continue to*

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\* Professor of Law, Boston University. I would like to thank Russell Robinson, Al Klevorick, and those who attended a faculty workshop at the UC Irvine School of Law, who offered helpful comments on various drafts of this Article. Many thanks to my wonderful research assistants, Kyra Berasi, Mike Garry, and Aaron Horth. Thanks are also owed to Ellen Richardson and Jenna Fegreus in the BU Law Library, who make all my research dreams come true.

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*be advantaged and disadvantaged on account of race. It denies that there is such a thing called race privilege that materially impacts people's worlds. Moreover, this Article suggests that at least part of the reason why class-based affirmative action has been embraced by those who oppose race-based affirmative action is precisely because it denies that race matters, has mattered, and probably will continue to matter unless we make conscious efforts to make race matter less.*

*The Article proceeds in two Parts. Part I locates class-based affirmative action doctrinally. Specifically, this Part identifies class-based affirmative action as the heir of the "suspect class" to "suspect classification" shift—a shift that tells its own lie about race. The substance of this lie is that those who exist at the top of racial hierarchies are as vulnerable to denigration, stigmatization, and subordination on account of race as are those who exist at the bottom of racial hierarchies. Part II goes on to demonstrate that class-based affirmative action suffers from the same infirmities from which race-based affirmative action is charged to suffer. It argues that the reason why proponents of class-based affirmative action are sanguine about these infirmities when they are present in class-based programs, but loathe them when they are present in race-based programs, is because their opposition to race-based affirmative action is not due to these infirmities. Rather, it is due to their disdain of the work that race-based affirmative action performs. That is, race-based programs function to assert, loudly, that race still matters and does so in powerful ways. Many proponents of class-based affirmative action resist this function.*

*Moreover, class-based affirmative action functions to assert that we, as a society, have entered a post-racial future. That is, class-based affirmative action tells a lie about the insignificance of race. Many proponents of class-based programs likely find these programs attractive and comforting for that very reason. The importance of this Article is that it uncovers the narrative work that class-based affirmative action performs, and it argues that those who are interested in racial justice ought to resist these programs because of their dangerous discursive effects.*

#### INTRODUCTION

Shortly after the Supreme Court announced its decision in *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN)*,<sup>1</sup> upholding an amendment to the Michigan state constitution that prohibited "all sex- and race-based preferences in public education, public employment, and public contracting,"<sup>2</sup> Richard Kahlenberg, one of the most prolific proponents of

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<sup>1</sup> 134 S. Ct. 1623 (2014).

<sup>2</sup> MICH. CONST. art. I, § 26; *Schuette*, 134 S. Ct. at 1638 (holding that nothing in the

class-based affirmative action, published an editorial with the *New York Times*.<sup>3</sup> In the piece, Kahlenberg, writing with co-author Halley Potter, attempts to assure those who are interested in seeing racial minorities attend institutions at which they would be grossly underrepresented absent race-conscious admissions programs that *Schuette* did not mean that all hope was lost.<sup>4</sup> The authors explain that, post-*Schuette*, racial minorities will not necessarily disappear from elite universities, which are finding it more and more difficult to implement race-based affirmative action.<sup>5</sup> Quite the contrary. They suggest that the only thing that these schools need to do in order to maintain the numbers of racial minorities enrolled there is to grant preferences in admissions to those from socioeconomically challenged backgrounds.<sup>6</sup> Class-based affirmative action, they argue, could function (and, in several jurisdictions that have experimented with it, has already functioned) to facilitate racial minorities' admission to schools that they would otherwise be unable to access.<sup>7</sup> Further, they write, class-based affirmative action could actually be better than race-based affirmative action at ensuring that racial minorities are represented at these universities:

If a socioeconomic plan is designed well, it can even achieve greater levels of minority representation than a race-only program. A class-based admissions program at the University of Colorado Boulder that considers multiple socioeconomic and academic factors increased admit rates for not only low-income students but also underrepresented minorities, as compared to race-only affirmative action.<sup>8</sup>

Yet, despite Kahlenberg and Potter's assurances, this Article argues that class-based affirmative action is not the saving grace to *all* of those who want to increase the enrollment of racial minorities at institutions from which they have been excluded historically (and from which they are presently underrepresented). Many people who want to see racial minorities at these institutions of higher learning are not interested in getting them there by hook or by crook. Rather, we are interested in racial justice. And pursuant to our thick understanding of racial justice, it is not enough that racial minorities merely are present at schools from which they have been excluded. Equally if

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United States Constitution, or in the Court's precedents, allow "the Judiciary to set aside Michigan laws that commit this policy determination to the voters").

<sup>3</sup> Richard D. Kahlenberg & Halley Potter, *Class-Based Affirmative Action Works*, N.Y. TIMES: ROOM FOR DEBATE (Apr. 27, 2014, 7:01 PM), <http://www.nytimes.com/roomfordebate/2014/04/27/should-affirmative-action-be-based-on-income/class-based-affirmative-action-works> [http://perma.cc/LSB4-69LY].

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

not more important are the stories that we tell about *why* they are there. And class-based affirmative action tells a wholly unfulfilling story about why racial minorities are, and ought to be, at these institutions.

This Article argues that class-based affirmative action denies the continuing relevance of race. This, of course, explains why it is popular among those who contend that the nation is, finally, post-race. Post-racialism can be described as the sense that race simply does not matter as much as it mattered in the past.<sup>9</sup> According to the ideology of post-racialism, if the telos of the nation is one where racial differences, if they exist, are completely irrelevant to social, cultural, and political life, then we are almost there. It contends that we are closer to that halcyon racial destination than we are to our horrific racial origins, where race over-determined individuals' lives and did so in frequently brutal ways.<sup>10</sup> Post-racialism refuses to recognize our current proximity to that historical past. It argues instead that, today, racism is an aberration, a rarity.<sup>11</sup> It posits that enduring racial inequality is not the effect of race or racism, but rather is the effect of other forces, like class or individual behavior.<sup>12</sup> And it posits that given the insignificance of race, institutional actors act culpably, even immorally, when they make race significant in their decision-making processes.<sup>13</sup>

Class-based affirmative action is consistent with post-racialism's ideology of racial progress. It denies that race is a significant feature of American life. Class-based affirmative action denies that individuals—and groups—continue to be advantaged and disadvantaged on account of race. It denies that there is such a thing called race privilege that materially impacts people's worlds. Moreover, this Article suggests that at least part of the reason why class-based affirmative action has been embraced by those who oppose race-based affirmative action is precisely because it denies that race matters, has mattered,

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<sup>9</sup> See Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 968 (2010).

<sup>10</sup> See Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1601 (2009) (observing that post-racialism contends that the nation has “transcended racial divisions of past generations”).

<sup>11</sup> See Barnes et al., *supra* note 9, at 968 (“[P]ost-racialism is a set of beliefs that coalesce to posit that racial discrimination is rare and aberrant behavior as evidenced by America’s and Americans’ pronounced racial progress.”).

<sup>12</sup> See Cho, *supra* note 10, at 1602 (“Theoretical post-racialists reject race-based remedies because they believe that such remedies obscure a more fundamental problem, typically one of class-based injuries.”).

<sup>13</sup> See Barnes et al., *supra* note 9 at 975 (“If society is *post-racial*, then race-based remedies are undesirable as a lingering remnant of less enlightened times. Affirmative action programs or other race-conscious remedies are, by definition, inconsistent with a *post-racial* ‘reality.’” (emphasis added)).

and probably will continue to matter unless we make conscious efforts to make race matter less.

This Article proceeds in two Parts. Part I locates class-based affirmative action doctrinally. Specifically, this Part identifies class-based affirmative action as the heir of the “suspect class” to “suspect classification” shift—a shift that tells its own lies about race. To explain, race-based affirmative action programs necessarily contain a racial classification, and, since the Supreme Court’s decision in *Adarand Constructors, Inc. v. Peña*,<sup>14</sup> the Court has reviewed all laws that contain racial classifications with strict scrutiny—even those laws that are designed to benefit historically disadvantaged racial groups.<sup>15</sup> Thus, instead of using strict scrutiny to protect suspect *classes* from discrimination, the Court now uses strict scrutiny when reviewing laws that contain suspect *classifications*.<sup>16</sup> Race, of course, is the paradigmatic suspect classification. The result is that state efforts to remedy racial stratification, when they explicitly mention race, are constitutionally suspicious; since *Adarand*, courts are required to be predisposed to striking them down. Class-based affirmative action avoids this problem by not mentioning race—by not containing a racial classification. In this way, it avoids analysis under strict scrutiny, and its constitutionality is more secure.<sup>17</sup> Yet, it tells the problematic story described above about the irrelevance of race—although it is true that this country’s history of racial disenfranchisement has enduring effects.

Part II then conducts a critique of class-based affirmative action. This Part demonstrates that it suffers from the same infirmities from which race-based affirmative action is charged to suffer. It argues that the reason why proponents of class-based affirmative action are sanguine about these infirmities when they are present in class-based programs, but loathe them when they are present in race-based programs, is because their opposition to race-based affirmative action is not due to these infirmities. Rather, it is due to their disdain of the work that race-based affirmative action performs. That is, race-based programs function to assert, loudly, that race still matters and does so in powerful ways. Many proponents of class-based affirmative action resist this function. Moreover, class-based affirmative action functions to assert that we, as a society, have entered a post-racial future. That is, class-based affirmative action also tells a lie about the insignificance of race. Many proponents of

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<sup>14</sup> 515 U.S. 200 (1995).

<sup>15</sup> See *infra* notes 53-56 and accompanying text (explaining that the implication of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the doctrinal predecessor to *Adarand*, was that the potential for racial discrimination against whites was of sufficient concern to render all racial classifications subject to heightened scrutiny).

<sup>16</sup> See *infra* notes 40-58 and accompanying text.

<sup>17</sup> See *infra* notes 38-39 and accompanying text (asserting that because the Supreme Court has never found income-based classifications to be suspect, they are not subject to strict scrutiny and thus are more likely to be held constitutional).

class-based programs likely find them attractive and comforting for that very reason. The importance of this Article is that it uncovers the narrative work that class-based affirmative action performs, and it argues that those who are interested in racial justice ought to resist these programs because of their dangerous discursive effects.

Before beginning the exploration, it bears noting an infirmity from which class-based affirmative action suffers that is not shared by race-conscious programs—a lack of candor. That is, if schools use class-based affirmative action as a vehicle for admitting racial minorities who would not be admitted otherwise, then those schools are involved in a project of mystification. Several Justices have articulated their discomfort with class-based affirmative action programs when they are instituted as indirect attempts to address minority enrollment levels. In *Gratz v. Bollinger*,<sup>18</sup> the Court struck down the University of Michigan’s race-conscious admissions program, which attempted to enroll more students from historically disadvantaged racial groups by giving those students, by virtue of their status as a racial minority, a fifth of the points necessary to guarantee admission.<sup>19</sup> In dissent, Justice Souter noted his disquietude with programs that attempt to address racial issues with non-racial means.<sup>20</sup> As an example of such a program, he looked to admissions programs like Texas’s “Ten Percent Plan” that achieve a racially diverse student body by guaranteeing admission to all top-ranked students from each high school in the state.<sup>21</sup> Because high schools in Texas are racially segregated—a consequence of racial segregation in housing—many of the top students guaranteed admission to Texas’s public colleges are racial minorities.<sup>22</sup> Justice Souter writes:

While there is nothing unconstitutional about such a practice, it nonetheless suffers from a serious disadvantage. It is the disadvantage of deliberate obfuscation. The ‘percentage plans’ are just as race conscious as the point scheme (and fairly so), but they get their racially diverse results without saying directly what they are doing or why they are doing it. In contrast, Michigan states its purpose directly and, if this were a

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<sup>18</sup> 539 U.S. 244 (2003).

<sup>19</sup> *Id.* at 275 (holding that the university’s policy was not narrowly tailored to achieve its compelling interest in diversity and therefore violated the Equal Protection Clause).

<sup>20</sup> *See id.* at 297-98 (Souter, J., dissenting) (contending that the “percentage plans” used by other universities suffer from the “serious disadvantage . . . of deliberate obfuscation”).

<sup>21</sup> *Id.* at 297 (citing California, Florida, and Texas as examples of states that have initiated programs guaranteeing admissions to the top percentage of students in each public high school).

<sup>22</sup> *See* Richard Rothstein, *The Colorblind Bind*, THE AMERICAN PROSPECT, July-Aug. 2014, at 71 (“Because so many Texas African Americans attend predominantly black schools (in predominantly low-income neighborhoods), the plan generated a 2003 freshman class that was 4.5 percent black.”).

doubtful case for me, I would be tempted to give Michigan an extra point of its own for its frankness. Equal protection cannot become an exercise in which the winners are the ones who hide the ball.<sup>23</sup>

Justice Ginsburg has seconded Souter's objection, most recently in her dissent in *Fisher v. University of Texas at Austin*.<sup>24</sup> The Court was called upon to review the constitutionality of the explicitly race-conscious portion of Texas's Ten Percent Plan—an addendum to the plan that the University of Texas made<sup>25</sup> after the Court's decision in *Grutter v. Bollinger*<sup>26</sup> suggested that explicitly race-conscious admissions programs could satisfy the demands of the Equal Protection Clause when done right.<sup>27</sup> Disagreeing with the characterization of the Ten Percent Plan as a "race-neutral" alternative to explicitly race-conscious programs, Justice Ginsburg wrote, "I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious."<sup>28</sup>

The lack of candor that class-based affirmative action programs embody is an obvious, but serious, deficiency. Institutions of higher learning ought to be open about their intentions to enroll students from historically disadvantaged racial groups. Those honest, frank declarations of intent are also honest, frank declarations of the continuing significance of race. They are declarations that the society that we inhabit is far from a post-racial one. It is one where our life chances—including our chances of gaining admission to an elite institution of higher learning—are heavily influenced by race. We should encourage these declarations. This is a point to which the Conclusion will return.

## I.

Historically speaking, interest in class-conscious admissions programs seems to arise whenever it appears that race-conscious admissions programs will become impossible to implement—either because it seems that the Court will strike down race-based programs as violating the Equal Protection Clause as a matter of course, or because a jurisdiction has prohibited such programs as a matter of state law.<sup>29</sup> Thus, in the years following *Regents of the University*

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<sup>23</sup> *Gratz*, 539 U.S. at 297-98 (Souter, J., dissenting).

<sup>24</sup> 133 S. Ct. 2411 (2013).

<sup>25</sup> *Id.* at 2416 (explaining that the university returned to using an explicitly race-conscious admissions program in 2004).

<sup>26</sup> 539 U.S. 306 (2003).

<sup>27</sup> *Id.* at 334 ("Universities can . . . consider race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant.").

<sup>28</sup> *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting).

<sup>29</sup> Justice Kennedy, for one, conceptualizes the move toward class-based (or otherwise non-race-based) avenues as a means to remedy the race-salient problem of the underrepresentation of racial minorities in academic classes to be an intended and desired

of *California v. Bakke*,<sup>30</sup> when a majority of the Court refused to declare the constitutionality of race-based affirmative action and when the legality of such programs hung by the delicate thread that was Justice Powell's lone opinion,<sup>31</sup> there was a spate of calls for class-based affirmative action.<sup>32</sup> Calls for class-conscious programs got more numerous and strident in the 1990s: that decade witnessed not only the passage of Proposition 209 in California, which prohibited the consideration of race in university admissions in the state,<sup>33</sup> but also the Fifth Circuit's decision in *Hopwood v. Texas*,<sup>34</sup> which declared that Powell's opinion in *Bakke* was not binding and that the Constitution forbade race-conscious admissions programs.<sup>35</sup> Similarly, interest in class-conscious programs multiplied after *Fisher* was decided, and it appeared that, while the Court was willing to declare that race-conscious programs could in theory be constitutional, jurisdictions might find it impossible to construct an actual program that would pass strict scrutiny.<sup>36</sup> And once again, in the wake of

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eventuality—and not a guileful effort to duck the requirements of the Constitution. See *Grutter*, 539 U.S. at 394 (Kennedy, J., concurring) (“Were the courts to apply a searching standard to race-based admissions schemes, that would force educational institutions to seriously explore race-neutral alternatives.”).

<sup>30</sup> 438 U.S. 265 (1978).

<sup>31</sup> See *id.* at 317 (opinion of Powell, J.) (holding that race may be considered as a “plus” factor in admissions policies as long as “it does not insulate the individual from comparison with all other candidates”); *id.* at 325 (Brennan, J., concurring in part and dissenting in part) (holding, on behalf of three other Justices, that states may take race into account to remedy the disadvantages of past discrimination); *id.* at 421 (Stevens, J., concurring in part and dissenting in part) (holding, on behalf of three other Justices, that the race-based admissions policy violated Title VI of the Civil Rights Act of 1964).

<sup>32</sup> See Chapin Cimino, Comment, *Class-Based Preferences in Affirmative Action Programs After Miller v. Johnson: A Race-Neutral Option, or Subterfuge?*, 64 U. CHI. L. REV. 1289, 1293 (1997).

<sup>33</sup> See CAL. CONST. art. 1, § 31(a) (“The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”).

<sup>34</sup> 78 F.3d 932 (5th Cir. 1996), *abrogated by* *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>35</sup> *Id.* at 945 (indicating that Justice Powell's opinion in *Bakke* garnered no support from the rest of the Court, and holding that “the use of race in admissions for diversity in higher education contradicts . . . the aims of equal protection”); see Ben Gose, *The Chorus Grows Louder for Class-Based Affirmative Action*, CHRON. HIGHER EDUC., Feb. 25, 2005, Special Supp. at 5 (“Broad interest in class-based affirmative action arose in the 1990s as a strategy to help identify an overlapping pool of minority students when affirmative action based on race came under legal attack.”); Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472, 472 n.1 (1997) (noting that interest in class-based affirmative action increased subsequent to the passage of Proposition 209 and the Fifth Circuit's opinion in *Hopwood v. Texas*).

<sup>36</sup> See, e.g., Kimberlé Crenshaw, *The Court's Denial of Racial Societal Debt*, 40 HUM.

*Schuette* and the Court's upholding of Michigan's ban on race-consciousness in university admissions, we have seen attention turn toward class-based affirmative action.<sup>37</sup>

This history reveals why class-based affirmative action is attractive to some supporters of race-based affirmative action: it is a more tenable legal avenue than race-based affirmative action. Moreover, it is important to be clear about why it is a more tenable legal avenue than race-based affirmative action: the Court has never found that classifications on the basis of income are suspect. Yet, the Court has found, since *Adarand*, that all racial classifications are suspect. Because supporters of heightened scrutiny for laws that burden the poor lost their hard-fought battle in the 1960s and '70s,<sup>38</sup> it raises no constitutional eyebrows for admissions offices to consciously consider the socioeconomic status of the applicant when making admissions decisions.<sup>39</sup> This Part explores the jurisprudence.

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RTS. no. 1, 2013, at 12, 14 (“*Fisher* seems to preserve the shell of *Grutter*—race consciousness is fine so long as [the University] jumps through fiery hoop after fiery hoop to prove that race is in fact an appropriate factor to be taken into account. In effect, however, the Court has aggressively narrowed the space in which state actors can pursue a policy that addresses racial inclusion.”).

<sup>37</sup> See *Should Affirmative Action Be Based on Income?*, N.Y. TIMES: ROOM FOR DEBATE (Apr. 27, 2014), <http://www.nytimes.com/roomfordebate/2014/04/27/should-affirmative-action-be-based-on-income> [http://perma.cc/3HB7-4NKE].

<sup>38</sup> See, e.g., Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 20-21 (1969) (arguing that the Court ought to find that the poor are a “suspect class” and, consequently, use strict scrutiny to review laws that burden them).

<sup>39</sup> Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CALIF. L. REV. 1037, 1064 (1996) [hereinafter Kahlenberg, *Class-Based Affirmative Action*] (“[C]lass-based preferences are often described by members of the Supreme Court as a clearly constitutional alternative to racial preferences.”); Richard D. Kahlenberg, *Getting Beyond Racial Preferences: The Class-Based Compromise*, 45 AM. U. L. REV. 721, 725 (1996) (“Because the left lost the great effort to get ‘class’ categorized as suspect under Equal Protection jurisprudence, there is no double-edged sword with which conservatives can strike down benefits for the poor.” (footnote omitted)).

It bears noting that there are questions as to whether class-based affirmative action is actually constitutionally “safer” than race-based affirmative action. Since *Washington v. Davis*, the Court has stated that a facially neutral law that disparately impacts a racial group should only be found to contain a racial classification (and therefore be reviewed with strict scrutiny) if challengers can establish that the legislators who enacted the law did so with a “discriminatory purpose.” 426 U.S. 229, 239 (1976). As clarified in *Personnel Administrator of Massachusetts v. Feeney*, the “discriminatory purpose” test is “more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” 442 U.S. 256, 279 (1979) (citation omitted). It is hoped that class-based affirmative action,

A. *The “Suspect Class” to “Suspect Classification” Shift*

With respect to the Court’s race jurisprudence, the “suspect class” to “suspect classification” shift is one that has been studiously explored in the literature.<sup>40</sup> The story begins with the Court’s finding that those who have not historically enjoyed racial privilege in this country—racial minorities—needed to be protected from laws that perpetuated their lack of privilege and subordinated status.<sup>41</sup> The Court’s primary mechanism of protection was to require that laws that discriminated against racial minorities pass strict scrutiny.<sup>42</sup> A law that burdened racial minorities would be found to comport with the Fourteenth Amendment’s command that no State “deny to any person within its jurisdiction the equal protection of the laws”<sup>43</sup> only if the law was motivated by a compelling governmental interest and was narrowly tailored to promote that interest.<sup>44</sup> Thus, racial minorities (paradigmatically, black people)

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which is facially race-neutral, will disproportionately impact people of color and, therefore, have a disparate impact. Cimino, *supra* note 32, at 1290-91 (“By encouraging the use of race-neutral alternatives to what is primarily a race-based problem, the [Supreme] Court seems to imply that the government can do covertly what it cannot do overtly.”). The question then becomes: will decisionmakers have enacted the facially race-neutral programs or laws with a discriminatory purpose, i.e., with the intent to increase the number of racial minorities who attend the institution? Will they have pursued a class-conscious admissions policy that disparately impacts white and Asian applicants “because of,” not merely “in spite of,” its adverse effects upon white and Asian applicants? If decisionmakers pursued the class-based program *because* race-based programs were constitutionally vulnerable, and if they pursued the class-based program in order to achieve the same end as a race-based program without using suspect means, then the answer may be yes. See Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2348 (2000). Consequently, these programs might “trigger the same strict, and usually fatal, scrutiny applicable to admission policies that rely on racial classifications.” *Id.* at 2348.

<sup>40</sup> See, e.g., Darren L. Hutchinson, “Unexplainable on Grounds Other than Race:” *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 638-40 (2003); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 465 (1997); Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 40-41 (2013).

<sup>41</sup> See Rubenfeld, *supra* note 40, at 465 (“When laws explicitly imposed burdens on certain ‘suspect classes’ of persons, the Court held, the suspicion that something constitutionally forbidden was afoot justified more stringent scrutiny. Which classes of persons were ‘suspect’ in this way? One characteristic repeatedly held necessary to make a class ‘suspect’ was a ‘history of purposeful’ discrimination.”).

<sup>42</sup> See *id.* (“At this point in the doctrine’s development, strict scrutiny made sense. For when a state singles out a class of persons that has been subject to widespread, invidious prejudice and denies to members of this class rights or liberties that others enjoy, there is excellent reason to fear that the government has acted deliberately to reduce these persons to a second-class legal status.”).

<sup>43</sup> U.S. CONST. amend. XIV, § 1.

<sup>44</sup> Rubenfeld, *supra* note 40, at 433 n.29.

became a suspect class.<sup>45</sup> As a suspect class, laws that burdened them would be subject to strict scrutiny.<sup>46</sup> The corollary to that proposition is that laws that benefited them, as well as laws that burdened racial groups that were not racial minorities, would *not* be subject to strict scrutiny.<sup>47</sup>

The “suspect class” to “suspect classification” shift, which was proposed initially in Justice Powell’s lone opinion in *Bakke* as a technique for protecting white people from harms that affirmative action programs may visit upon them,<sup>48</sup> first enjoyed a majority of the Court’s assent in *Croson*.<sup>49</sup> In *Croson*, the Court struck down a program implemented by the city of Richmond that required general contractors who had contracts with the city to subcontract thirty percent of the contract’s value to a minority-owned business.<sup>50</sup> The program was designed to remedy the fact that racial minorities received only 0.67% of city contracting dollars in a city in which black people were the majority racial group.<sup>51</sup> The Court subjected the law to strict scrutiny, although the law is comfortably and reasonably described as one that benefited racial minorities—a benign law.<sup>52</sup>

Importantly, the Court’s use of strict scrutiny was *not* the product of an articulated concern that, although the law seemed to benefit racial minorities, it might actually function to perpetuate their subordinated status (which was the avowed danger against which strict scrutiny was supposed to guard). Instead, the Court’s use of strict scrutiny was a product of an articulated concern that,

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<sup>45</sup> See Reginald C. Oh, *A Critical Linguistic Analysis of Equal Protection Doctrine: Are Whites a Suspect Class?*, 13 TEMP. POL. & CIV. RTS. L. REV. 583, 586 (2004) (“The term ‘suspect class,’ therefore, refers to a historically situated social group that has been disadvantaged and invidiously discriminated against in the political process. When the Court talks about suspect classes . . . it is referring to social groups, like racial minorities . . .” (footnote omitted)).

<sup>46</sup> See *id.* (explaining that a law is subject to a heightened level of review if the law can be shown to disadvantage a suspect class).

<sup>47</sup> See Rubinfeld, *supra* note 40, at 465.

<sup>48</sup> See Siegel, *supra* note 40, at 39 (“In *Bakke*, Justice Powell took thirteen pages to confront the argument that strict scrutiny ‘should be reserved for classifications that disadvantage “discrete and insular minorities”’ in the *Carolene Products* sense.”).

<sup>49</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); Oh, *supra* note 45, at 601.

<sup>50</sup> *Croson*, 488 U.S. at 511.

<sup>51</sup> *Id.* at 479-80.

<sup>52</sup> Some of the Justices who signed on to the majority opinion striking down the law voiced their concerns that the law actually did not benefit minorities inasmuch as the law constructed minorities as incapable of succeeding on their own merits and, consequently, were inherently or in practice inferior. See *id.* at 517 (Stevens, J., concurring) (“[E]ven though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race.” (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting))).

although the law benefitted racial minorities, it had the effect of burdening white people.<sup>53</sup> That is, the Court was concerned about racial discrimination against white people.<sup>54</sup> Thus, in holding that strict scrutiny was also appropriate for benign laws, the decision declared that the danger that white people *also* could be victims of racial discrimination was real enough that heightened review was apt and necessary. Indeed, the decision declared that the constitutional problem was not so much the passage of laws that harmed racial minorities; instead, the constitutional problem was the passage of laws that mentioned race.<sup>55</sup> Accordingly, racial minorities were no longer a suspect class. Instead, race was a suspect classification. Thus, the Court effected the class-to-classification shift.<sup>56</sup> After some waffling on the question of the

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<sup>53</sup> *Id.* at 474 (plurality opinion) (“[A]lthough the Plan unquestionably disadvantages some white contractors who are guilty of past discrimination against blacks, it also punishes some who discriminated only before it was forbidden by law and some who have never discriminated against anyone.”).

<sup>54</sup> See Siegel, *supra* note 40, at 30-31 (“The earliest arguments for applying strict scrutiny to ‘all classifications’ are concerned about harms to whites. Early affirmative action opinions argue for strict scrutiny of affirmative action as protecting ‘whites’ in ways the Court’s opinions no longer do today, when the Court explains the purpose of review in collective and universal, rather than group-conscious, terms.” (footnote omitted)). The Court in *Crosby* articulated other concerns that the use of racial classifications raised—including fears that racial classifications would have to be used in perpetuity, that they fomented racial violence and race hatred, and that they were immoral and, therefore, illegal. See, e.g., *Crosby*, 488 U.S. at 521 (Scalia, J., concurring) (asserting that discrimination on the basis of race is “illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society” (citation omitted)).

<sup>55</sup> *Crosby*, 488 U.S. at 494 (“[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.” (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279-80 (1989) (plurality opinion))).

<sup>56</sup> Some have argued that the class-to-classification shift is illegitimate because it makes irrelevant the famous footnote four in *Carolene Products*, in which Justice Stone said that heightened scrutiny should be reserved for laws that infringe on fundamental rights, restrict political processes, or (most relevant to this Article) reflect “prejudice against discrete and insular minorities.” *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Some have argued that, according to this footnote, heightened review should not be applied to laws that burden white people and other groups with racial privilege because such laws do not reflect “prejudice” and are not directed at discrete and insular “minorities.” See, e.g., Hutchinson, *supra* note 40, at 639 (“The application of heightened scrutiny to white plaintiffs is impossible to justify under the *Carolene Products* formulation. Whites are not a politically vulnerable class by any serious theory of political power.” (footnote omitted)).

Interestingly, Justice Scalia made a riposte to this argument in his concurrence in *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN)*, 134 S. Ct. 1623 (2014). He attempted to impeach the persuasiveness of the argument first by noting that the footnote was dictum in an opinion that was only joined by three other Justices. See *id.* at 1644 (Scalia, J.,

appropriate level of scrutiny for laws that benefit racial minorities,<sup>57</sup> the Court established the class-to-classification shift as the law of the land in *Adarand*.<sup>58</sup>

B. *The Effects of the Class-to-Classification Shift*

For those interested in racial justice, the class-to-classification shift is disturbing for many reasons. First, the shift makes it extremely difficult for governments to attempt to remedy the enduring subordination of racial minorities through race-conscious measures. Indeed, this is one of the *calculated* effects of the class-to-classification shift and the Court's subjection of all explicit considerations of race to strict scrutiny. In *Croson*, Justice O'Connor suggested that the race-salient issue that the city of Richmond attempted to confront with its race-conscious law—the spectacular underrepresentation of racial minorities in the lucrative construction industry—need not go unaddressed subsequent to the Court striking down the law as unconstitutional.<sup>59</sup> Instead, the city could attempt to address its race-salient issue with race-neutral means.<sup>60</sup> She wrote:

Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. . . . [They] would serve to increase the opportunities available to minority business without classifying individuals on the basis of race.<sup>61</sup>

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concurring). Moreover, he noted what others have observed about footnote four: it is not obvious that a minority group's discreteness and insularity are political liabilities. *Id.* at 1645. Indeed, these characteristics may make such groups more powerful politically. See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 723-24 (1985) ("Other things being equal, 'discreteness and insularity' will normally be a source of enormous bargaining advantage, not disadvantage, for a group engaged in pluralist American politics."). Of course, if discrete and insular minority groups possess political power, then there is no need for the judiciary to protect them with heightened scrutiny, thus rendering footnote four off-base and rightfully ignored.

<sup>57</sup> See *Metro Broad. Inc. v. FCC*, 497 U.S. 547 (1990) (applying intermediate scrutiny to uphold a law that granted preferences to minorities in the dispensing of broadcast licenses), *overruled by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

<sup>58</sup> *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").

<sup>59</sup> See *Croson*, 488 U.S. at 509 ("Nor is local government powerless to deal with individual instances of racially motivated refusals to employ minority contractors.").

<sup>60</sup> See *id.*

<sup>61</sup> *Id.* at 509-10.

Indeed, subsequent to the class-to-classification shift, using paths of race-neutrality to solve race problems like the one existing in *Croson* is the most viable avenue open to governments.

By the time that *Grutter* was decided in 2003, the effect that the use of strict scrutiny had in compelling governments to attempt to achieve racial ends with race-neutral means had become explicitly part of the standard. Indeed, the Court in *Grutter* stated that, in order to pass strict scrutiny, governments that wanted to implement race-conscious laws had to show “serious, good faith consideration of workable race-neutral alternatives” and evidence that those race-neutral efforts would fail or had failed.<sup>62</sup> Thus, in *Parents Involved*, Justice Kennedy became the fifth vote to strike down the race-conscious school assignment plans implemented by school districts in Seattle and St. Louis—despite his refusal to concede that the Constitution required race neutrality at all times<sup>63</sup>—because of his sense that the school districts had not *really* contemplated the use of race-neutral means to solve the race problem that was massive racial segregation in their schools.<sup>64</sup> Justice Kennedy suggested to the school boards whose integration plans he had just voted to strike down, and to other school boards facing similar predicaments, that they could achieve the racial end of “bringing together students of diverse backgrounds and races” through race-neutral means such as “strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.”<sup>65</sup> Again, using paths of race-neutrality to solve race problems like the ones existing in Seattle in St. Louis is the most viable avenue open to governments subsequent to the class-to-classification shift.

To be clear, class-based affirmative action ought to be understood as exemplary—indeed, it is a manifestation *par excellence*—of what happens when the Court denies governments interested in addressing the continued subordination of racial minorities the ability to directly confront the racial issues that they seek to confront. Incapable of seeking to achieve the result of increasing the enrollment of racial minorities in institutions of higher learning by simply increasing the numbers of racial minorities admitted to institutions

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<sup>62</sup> *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

<sup>63</sup> *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring).

<sup>64</sup> *See id.* at 789 (“Each respondent has asserted that its assignment of individual students by race is permissible because there is no other way to avoid racial isolation in the school districts. Yet, as explained, each has failed to provide the support necessary for that proposition.”). Justice Breyer, writing in dissent, disputed Justice Kennedy’s contention that the school boards had not contemplated the race-neutral means that he suggested could solve the race problem the school boards faced. *Id.* at 851-52 (Breyer, J., dissenting).

<sup>65</sup> *Id.* at 789 (Kennedy, J., concurring).

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of higher learning, governments now have to attempt to achieve that same racial end through the race-neutral means of class-based affirmative action. As such, class-based affirmative action may be understood as a kind of ruse, an elision, and an elaborate distraction from the continuing fact of disadvantages experienced on account of race.

C. *Lies about Race that the Class-to-Classification Shift Tells*

The class-to-classification shift is also disturbing because of the work that it does to declare that those with racial privilege are similarly situated to those without such privilege. The shift declares that there is no disparity in power and privilege between the races. Indeed, it declares that there is actually symmetry between whiteness and nonwhiteness. Accordingly, white people are just as likely to be burdened by the use of race in law—and are as likely to be burdened *in the same way* by the use of race in law—as are non-white people. In treating burdens on white people as constitutionally equivalent to burdens on non-white people, the Court denies the fact that some burdens reinforce and reiterate racial subordination, while others do not. As Crenshaw describes the issue, the class-to-classification shift declares that the “constitutional injury [in *Brown v. Board of Education*] was not *what* the state was doing with racial classifications—namely racially subordinating black children as second-class citizens—but the fact that they were using racial classifications to do it. . . . Thus, Linda Brown, who had to walk over train tracks to the inferior black school, and the white children in the superior school were harmed in the same way as Linda walked by.”<sup>66</sup>

If a racial symmetry exists between white people and non-white people, then it would be fair to describe our society as one in which racism has ended; it would be fair to say that we have entered a post-racial utopia where race no longer matters.<sup>67</sup> And if racism is over and race no longer matters, then racial classifications in law must be presumptively illegitimate because they cannot, by definition, be efforts to address present racism and the enduring effects of historical racism. Moreover, if racial classifications are not addressing present racism and the enduring effects of historical racism, then what are they doing? If, in the absence of racism and the relevance of race, a racial classification burdens one race and benefits another, then the latter must be receiving an ill-gotten advantage while the former must be the victim of an undeserved disadvantage. Differently stated, if racism is over, then the races are operating on an even playing field. Accordingly, to the extent that a law burdens members of one race and benefits members of another, then it is *the law* that is

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<sup>66</sup> Crenshaw, *supra* note 36, at 13.

<sup>67</sup> See Oh, *supra* note 45, at 602 (“Moreover, the elimination of suspect class analysis suggests that the Court believes that racial minorities are no longer suspect classes deserving of special protection from the political process. Rather, the implication is that now, in the post-civil rights era, all racial groups stand on equal footing in the political process . . .”).

disrupting the levelness of the playing field. The law can only produce such a disruption illegitimately.

In this way, we can understand why those Justices who are presumptively opposed to all racial classifications in law characterize them as giving “special rights” or “special protection”—as opposed to *equal* rights or *equal* protection—to racial minorities.<sup>68</sup> Race-conscious policies such as affirmative action can only be understood as efforts to provide “equal” rights or “equal” protection to racial minorities if one assumes that the playing field on which the races are operating is unequal; accordingly, race-conscious measures would be efforts to correct the disadvantages that make it difficult for racial minorities to achieve at the same level as white people. However, if the playing field is already level, then race-conscious policies give something “special”—and illicit—to their beneficiaries.<sup>69</sup>

Accordingly, there is something prematurely celebratory about the class-to-classification shift. It celebrates society’s triumph over racism before society has actually triumphed over racism. It celebrates the insignificance of race before race has actually become insignificant.

There is another aspect of the class-to-classification shift that deserves mention: the story that the class-to-classification shift tells is one in which racism has been largely conquered and race has been made into an inconsequential fact of the body *because of law*. The class-to-classification shift suggests that racism has been defeated for the most part because the Constitution has been interpreted, and other laws have been passed, to produce that very result.

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<sup>68</sup> See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193, 218 (1979) (Burger, C.J., dissenting) (arguing that the affirmative action plan in question was unlawful because it violated Title VII’s prohibition of employers discriminating against some employees by giving preferential treatment to others).

<sup>69</sup> It is worth noting, however, that black people were accused of seeking “special rights” even before the Supreme Court held that they were a class worthy of heightened protection. In this way, “special rights” discourse is not tethered to black people’s status as a suspect class, but rather is detached from the actual level of legal protection that is afforded to them. To explain, black people were described as asking for something “special” by seeking civil rights protections in the years closely following their emergence from slavery—a time when no laws protected them and discrimination against them was a banal feature of American life. When invalidating a federal law that provided civil rights protections to newly emancipated former slaves, the Supreme Court wrote, just eighteen years after the formal end to the institution of chattel slavery in the United States:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the *special* favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected.

*The Civil Rights Cases*, 109 U.S. 3, 25 (1883) (emphasis added).

Consider the majority opinion in *Croson*. Five Justices were willing to declare that there was nothing constitutionally repugnant about a jurisdiction in which minorities had been effectively shut out of a lucrative industry.<sup>70</sup> Instead, the Court announced that it would only feel that something was amiss, indeed suspect, about the racial geography of Richmond and its construction industry if there was hard evidence that racial discrimination had produced that geography.<sup>71</sup> Moreover, the Court embraced a narrow definition of “racial discrimination.” Racial discrimination was not defined as the city’s embrace of policies and procedures that it knew were without utility but functioned to preclude racial minorities from entering and participating in the construction industry.<sup>72</sup> Instead, the Court defined racial discrimination as the “bad actor acting badly:”<sup>73</sup> the racist legislator who passes a law or implements a rule that

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<sup>70</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 529 (1989) (Marshall, J., dissenting) (stating that the majority disregarded Richmond’s history of discrimination as well as statistics suggesting that minority businesses had been shut out of the construction market).

<sup>71</sup> *See id.* at 510 (majority opinion).

<sup>72</sup> *See id.* (detailing several policies that functioned to exclude the entrance of new, smaller businesses into the Richmond construction industry and observing that “[m]any of the formal barriers to new entrants may be the product of bureaucratic inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms”).

Note as well that if racial discrimination was understood to include the continued use of ineffective, bureaucratic tools that functioned to exclude racial minorities (especially when the exclusionary effect of those tools are known to the institutions that use them), then racial discrimination might be found in law schools’ continued use of the LSAT in making admissions decisions. It is well-known both that the LSAT does not accurately predict future performance in law school or legal careers and that racial minorities underperform on the test. Anthony Peirson Xavier Bothwell, *The Law School Admission Test Scandal: Problems of Bias and Conflicts of Interest*, 27 T. MARSHALL L. REV. 1, 3 (2001). Indeed, this fact formed part of Justice Thomas’s discontent with the University of Michigan Law School’s race-conscious admissions program in *Grutter*:

[N]o modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the Law School Admission Test (LSAT). Nevertheless, law schools continue to use the test and then attempt to “correct” for black underperformance by using racial discrimination in admissions so as to obtain their aesthetic student body. The Law School’s continued adherence to measures it knows produce racially skewed results is not entitled to deference by this Court. The Law School itself admits that the test is imperfect, as it must, given that it regularly admits students who score at or below 150 (the national median) on the test. . . . And the Law School’s *amici* cannot seem to agree on the fundamental question whether the test itself is useful.

*Grutter v. Bollinger*, 539 U.S. 306, 369-70 (2003) (Thomas, J., dissenting) (citations omitted).

<sup>73</sup> Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1053 (1978)

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*formally* precludes racial minorities from receiving city contracting dollars; the prejudiced city employee who rejects the lowest bid because it was submitted by a qualified minority-owned firm and accepts a higher bid submitted by a white-owned firm; the bigoted union member who refuses to allow racial minorities to join the union; the biased prime contractor who simply refuses to hire minority subcontractors.<sup>74</sup>

It was significant to the Court that any private actor responsible for perpetrating bad acts in the private sector would have been subject to the city's local antidiscrimination laws.<sup>75</sup> Wrote the Court, "Since 1975 the city of Richmond has had an ordinance on the books prohibiting both discrimination in the award of public contracts and employment discrimination by public contractors. The city points to no evidence that its prime contractors have been violating the ordinance in either their employment or subcontracting practices."<sup>76</sup> The Court took the absence of any litigation under the ordinance as good evidence that there had been no racial discrimination in Richmond since the mid-1970s.<sup>77</sup> Moreover, in terms of bad actors acting in the public sector, the Court could not have been oblivious to the fact that any actor perpetrating bad acts in the public sector would have not only run afoul of the city's antidiscrimination law but also of the Equal Protection Clause.<sup>78</sup> Indeed, they would have been perpetrating the precise kind of racial discrimination that the Court has interpreted the Clause as distinctly prohibiting.<sup>79</sup>

Accordingly, if the Court limits its definition of racial discrimination to discrete acts of intentional racism, and if the Equal Protection Clause and other antidiscrimination laws are perfectly capable of addressing this type of racial discrimination, then it is entirely reasonable to conclude that the reason why the Court could not find any evidence of racial discrimination in Richmond

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("The perpetrator perspective sees racial discrimination not as conditions, but as actions, or series of actions, inflicted on the victim by the perpetrator. The focus is more on what particular perpetrators have done or are doing to some victims than it is on the overall life situation of the victim class.").

<sup>74</sup> See *Croson*, 488 U.S. at 502 (stating the assumption that "white prime contractors simply will not hire minority firms" was "unsupported"); *id.* at 510 ("[Richmond] points to no evidence that qualified minority contractors have been passed over for city contracts or subcontracts, either as a group or in any individual case.").

<sup>75</sup> See *id.* at 502 n.3.

<sup>76</sup> *Id.* (citation omitted).

<sup>77</sup> *Id.* (concluding that the "complete silence of the record concerning enforcement of the city's own antidiscrimination ordinance" is evidence that the construction industry is not one that has unfairly (read: illegally) excluded racial minorities).

<sup>78</sup> See *id.* at 494 (stating that state legislatures have "many legislative weapons at their disposal both to punish and prevent present discrimination").

<sup>79</sup> See *id.* at 509 (arguing that if the city could find evidence of minority exclusion, the city could take action because the Equal Protection Clause attempts to prohibit such exclusion).

was because the Equal Protection Clause and other antidiscrimination laws had effectively rid the city of racial discrimination.<sup>80</sup>

The Court's logic in *Croson* is important, and it is worth schematizing clearly: the elimination of *de jure* discrimination and the use of law to prohibit acts of discrimination by private and public actors meant to the Court that most discrimination—at least, most discrimination that the Court was willing to cognize as discrimination—had been defeated.<sup>81</sup> The fact of the defeat of discrimination *by law* justified the increased skepticism *of law*. In the case of the Equal Protection Clause, the increased skepticism of law took the form of the Court being as solicitous of laws that burdened white people as it is of laws that burdened racial minorities.<sup>82</sup> Moreover, that the Court would be equally solicitous of laws that burdened white people makes sense if racism is pretty much over and we have entered an era of post-racialism: as noted above,<sup>83</sup> if most discrimination has been defeated, which the Court assumes is true when *de jure* discrimination has been eliminated and the law prohibits acts of discrimination by private and public actors, then most laws that benefit racial minorities while burdening non-minorities cannot, by definition, be efforts to remedy discrimination. If discrimination has been effectively eliminated, then the playing field is, on the whole, level. Accordingly, any benefit given to

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<sup>80</sup> See generally Freeman, *supra* note 73, at 1054 (stating that those who adhere to the perpetrator perspective view “racial discrimination not as a social phenomenon, but merely as the misguided conduct of particular actors. It is a world where, but for the conduct of these misguided ones, the system of equality of opportunity would work to provide a distribution of the good things in life without racial disparities . . .” (footnote omitted)).

Of course, if racial discrimination is defined more broadly, and if institutional practices that have racially exclusionary effects are also understood to constitute racial discrimination, then one can see that the Equal Protection Clause and other antidiscrimination laws had worked to eliminate only one kind of racial discrimination, i.e., the egregious, spectacular, obvious racial discrimination that was the form that racial exclusion tended to take from the dawn of the nation to the 1960s. See William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L.J. 1, 3 (2011-2012) (“[Traditional racism is] the complex of social practices and legal constraints known as Jim Crow. It is these that modern equal protection doctrine has condemned.” (footnote omitted)). Enduring and untouched by the narrow interpretation of the Equal Protection Clause and many antidiscrimination statutes is structural racism. See *id.* at 5-6 (“Though the nation moved slowly away from Jim Crow, the structur[al racism] endured, as powerful as ever, even if no longer deliberately racist.”).

<sup>81</sup> See *Croson*, 488 U.S. at 502 (finding that because discrimination had been explicitly outlawed, there presumptively was no discrimination occurring).

<sup>82</sup> See, e.g., Crenshaw, *supra* note 36, at 14 (“Rather than conceptualizing racialized obstacles as inherently suspect, the Court has instead painted efforts to eliminate such barriers as suspect.”).

<sup>83</sup> See *supra* note 67 and accompanying text.

racial minorities is an illicit one that unjustly burdens non-minorities.<sup>84</sup> Hence, the Court's equal skepticism of laws that burden non-minorities.

The Court's recent decision in *Shelby County, Alabama v. Holder*<sup>85</sup> buttresses the above claim: the Court believes that racism is an aberration and race has been made into an inconsequential fact of the body *because of law* and, as a result, this justifies the increased skepticism *of law*. In the case of *Shelby County*, the increased skepticism of law took the form of the Court being as suspicious of a law that was designed to protect racial minorities' voting rights as it would have been suspicious of a law that was designed to burden racial minorities' voting rights.<sup>86</sup> In *Shelby*, a majority of the Court voted to strike down section 4(b) of the Voting Rights Act ("VRA"), which Justice Ginsburg describes as "one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation's history."<sup>87</sup> The VRA was passed to realize the promises of the Fifteenth Amendment by addressing rampant racial discrimination in voting.<sup>88</sup> Section

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<sup>84</sup> The Court contends that the only benefits given to racial minorities that do not unjustly burden non-minorities are those that are given after the jurisdiction has met evidentiary conditions that may be impossible to meet—"extreme" conditions that may have been possible to meet only prior to the civil rights revolution in the 1960s. The Court says:

If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.

*Croson*, 488 U.S. at 509. Only under those "extreme" circumstances—and not under the equally extreme circumstances that described the city of Richmond, wherein minorities represented less than one percent of those in a lucrative industry while comprising more than fifty percent of the total population—could a jurisdiction attempt to remedy the racial exclusion with race-conscious measures:

Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria. In the *extreme* case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.

*Id.* (emphasis added).

<sup>85</sup> 133 S. Ct. 2612 (2013).

<sup>86</sup> *Id.* at 2628-29 (finding that the Voting Rights Act needed recalibrating because it had done its job in creating parity between white and black voter turnout).

<sup>87</sup> *Id.* at 2634 (Ginsburg, J., dissenting).

<sup>88</sup> *Id.* at 2618 (majority opinion) (writing that the Voting Rights Act was passed to "address entrenched racial discrimination in voting, 'an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution'" (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966))).

4(b) of the VRA contained the formula that determined which jurisdictions (“covered jurisdictions”) would have to get preclearance by the Attorney General or a panel of three judges for any changes to their voting laws.<sup>89</sup> Covered jurisdictions were those that had a documented history of racial discrimination in voting.<sup>90</sup> At the time of the initial passage of section 4(b), these covered jurisdictions had deplorable statistics that clearly demonstrated the pervasiveness of racial discrimination in voting.<sup>91</sup> The Court found that “[s]hortly before enactment of the Voting Rights Act, only 19.4 percent of African-Americans of voting age were registered to vote in Alabama, only 31.8 percent in Louisiana, and only 6.4 percent in Mississippi. Those figures were roughly 50 percentage points or more below the figures for whites.”<sup>92</sup>

However, things had changed in the five decades that had elapsed since the Act’s passage: the statistics that the covered jurisdictions now boast tell a story in which racial discrimination in voting had declined significantly.<sup>93</sup> Moreover, “[b]latantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.”<sup>94</sup> The Court held that this was reason enough to strike down the formula for determining which jurisdictions were covered, as those jurisdictions had been targeted for federal oversight due to a lamentable history that no longer described their present.<sup>95</sup>

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<sup>89</sup> Voting Rights Act of 1965 § 4(b), Pub. L. 89-110, 79 Stat. 437, 438 (1965) (codified as amended at 42 U.S.C. § 1973(b) (2006)), *invalidated by Shelby Cty.*, 133 S. Ct. 2612.

<sup>90</sup> *See Shelby*, 133 S. Ct. at 2619 (explaining that “covered jurisdictions” were those “States or political subdivisions that had maintained a test or device as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential election”).

<sup>91</sup> *Id.* at 2618.

<sup>92</sup> *Id.* at 2624-25 (citation omitted).

<sup>93</sup> *See id.* at 2618-19 (“By 2009, ‘the racial gap in voter registration and turnout [was] lower in the States originally covered by § 5 than it [was] nationwide.’ Since that time, Census Bureau data indicate that African-American voter turnout has come to exceed white voter turnout in five of the six States originally covered by § 5 . . . .” (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203-04 (2009))).

<sup>94</sup> *Id.* at 2616 (quoting *Nw. Austin*, 557 U.S. at 202). Furthermore, the Court thought it significant that, pursuant to the preclearance requirements, the Attorney General objected to current proposed changes significantly less often than he or she did when the Act was initially enacted. *See id.* at 2626 (“In the first decade after enactment of § 5, the Attorney General objected to 14.2 percent of proposed voting changes. In the last decade before reenactment, the Attorney General objected to a mere 0.16 percent.” (citation omitted)).

<sup>95</sup> *See id.* at 2631 (“Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance. . . . Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”).

The Court's reasoning is problematic inasmuch as the absence of racial discrimination in voting in covered jurisdictions may be *due to* the fact that they are subject to federal oversight.<sup>96</sup> Moreover, the removal of federal oversight that is the consequence of striking down section 4(b) may result in jurisdictions implementing discriminatory changes in voting laws and, consequently, developing statistics documenting racial inequality in voting that rival those extant at the dawn of the VRA.<sup>97</sup> However, this is not the immediate focus. Instead, the interest here is on *why* the Court believed that things had changed between the passage of the VRA and the present. The answer: the law did it. The Court is clear on this point:

There is no doubt that these improvements are in large part *because of* the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process. . . . Problems remain in these States and others, but there is no denying that, due to the Voting Rights Act, our Nation has made great strides.<sup>98</sup>

The Court's logic in *Shelby* is fascinating. The law has achieved great successes in eliminating racial discrimination. Moreover, because the law has achieved great success, the Court thinks it appropriate to recalculate the costs and benefits of the law. In the case of the VRA, one of the costs of the law was the fact that principles of federalism were necessarily offended by it.<sup>99</sup> Yet, in 1964, these costs were outweighed by the law's benefits: eradicating racism and racist practices from the franchise.<sup>100</sup> However, when *Shelby* was decided

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<sup>96</sup> Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 725 (2014) ("The Court rejected the argument that the improvements on the ground could be attributable to Section 5's deterrent effect, which justified continuation of the law . . .").

<sup>97</sup> *See id.* at 744 (arguing that the majority of the *Shelby* Court disregarded "a record which demonstrates continued racial discrimination in voting in covered jurisdictions" and that "race discrimination in voting remained a real problem, at least in some of the jurisdictions" (footnote omitted)).

<sup>98</sup> *Shelby*, 133 S. Ct. at 2626 (citations omitted); *see also id.* at 2628 (indicating that in the fifty years that had passed since the enactment of the VRA, "voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers" and arguing that these changes occurred "largely because of the Voting Rights Act").

<sup>99</sup> *See id.* at 2624 (stating that the VRA "authorizes federal intrusion into sensitive areas of state and local policymaking," that it "represents an 'extraordinary departure from the traditional course of relations between the States and the Federal Government,'" and that it "constitutes 'extraordinary legislation otherwise unfamiliar to our federal system'" (citations omitted)).

<sup>100</sup> *See id.* at 2618 ("The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. . . . This was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting . . .").

in 2013—when the flagrant practices that facilitated minority exclusion in the pre-Civil Rights era had been largely eradicated—the benefits of the continued use of the law were modest.<sup>101</sup> Most importantly, they were dwarfed by the undiminished federalism costs of the law.<sup>102</sup> That the costs of the law outweighed the benefits justified striking down the law in *Shelby*.

Notice the parallels between the Court’s logic in *Shelby* and the Court’s logic in *Croson*. In both, the elimination of de jure discrimination and the use of law to prohibit private and public acts of discrimination meant to the Court that most discrimination had been defeated. The fact of the defeat of discrimination *by law* justified the Court increasing its skepticism *of law*. In the case of *Croson* and the Equal Protection Clause, the increased skepticism of law took the form of the Court being as solicitous of laws that burdened whites as it is of laws that burdened racial minorities. In the case of *Shelby* and the VRA, the increased skepticism of law took the form of the Court striking down the engine behind one of the VRA’s most foundational sections.

The lesson of *Croson*, *Shelby*, and the Court’s race jurisprudence generally is that the Court is comfortable declaring the elimination of a particular, historically specific type of discrimination as the elimination of discrimination in its entirety. When there is no evidence of de jure discrimination and no evidence of private and public actors consciously excluding a racial group, then the Court believes that the war against racism has been won. Importantly, what goes unidentified as discrimination is discrimination in forms that deviate from historical antecedents. Structural exclusions, unconscious biases, institutional inertia, intentions to disadvantage cleverly camouflaged by seemingly legitimate motives—all of these more modern iterations of racial discrimination go uncognizable as racial discrimination. Instead, in the vanquishing of antiquated forms of racism, the Court sees society’s entrance into a post-racial future.

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This Part has explained how we have arrived at a constitutional present where class-based affirmative action is a more tenable legal avenue than race-based affirmative action in achieving the admission of racial minorities into educational institutions from which they have been excluded historically. However, many commentators have argued that, independent of the fact that class-based affirmative action raises fewer constitutional questions than race-based affirmative action, the former is superior to the latter. The next Part disputes this contention. It demonstrates that class-based affirmative action is as conceptually and pragmatically flawed as race-based affirmative action.

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<sup>101</sup> See *id.* at 2619 (stating that “[t]he question is whether the Act’s extraordinary measures . . . continue to satisfy constitutional requirements” and holding that they do not).

<sup>102</sup> See *id.* at 2626.

Moreover, it argues that the reason why class-based programs enjoy the level of support that they do is because class-based affirmative action does not make the claims that race-based affirmative action makes. The latter declares, stridently, that race matters, racial inequality endures, and society is obliged to do something about it. Class-based affirmative action makes no such declaration.

## II.

The beginning of the previous Part showed how interest in class-based affirmative action inevitably skyrockets upon the advent of laws that threaten the legality of race-based affirmative action. Thus, in the wake of *Bakke*, interest in class-conscious admissions programs waxed. Subsequent to the Fifth Circuit's *Hopwood* decision holding that the federal Constitution prohibited race-based affirmative action, interest in class-conscious admissions programs increased—and it surged even higher after the passage of Proposition 209 in California, which prohibited race-consciousness in university admissions in the state. After the Court's decision in *Fisher v. Texas*, in which the Court intimated that it may never encounter a race-based affirmative action program that it believes passes constitutional muster, interest in class-conscious programs swelled. And, yet again, after the Court upheld the constitutionality of an amendment to Michigan's constitution that prohibited the consideration of race in university admissions in *Schuetz*, interest in class-conscious programs has grown again.<sup>103</sup>

Because of the direct relationship between the demonstrated vulnerability of race-conscious programs and the interest in class-conscious ones, it is not at all unreasonable to conclude that, for some supporters of race-conscious admissions programs, class-based affirmative action is a surrogate for race-based affirmative action.<sup>104</sup> As the “next best thing,” class-conscious programs are a way to accomplish the goals pursued by race-conscious programs—the admission of racial minorities to institutions from which they have been historically excluded and to which they would not gain admission pursuant to traditional indicia of merit—without having to use the “dirty” word of race.

In this way, class-based affirmative action is a way for those who disagree about the propriety of race-based affirmative action to “get to yes.” Supporters of race-based programs may support class-based programs because they will achieve the admission of racial minorities to more selective colleges and universities, and opponents of race-based programs will be content inasmuch

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<sup>103</sup> See *supra* notes 29-37 and accompanying text.

<sup>104</sup> Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913, 1914 (1996) (stating that one group of supporters of class-based affirmative action views such programs “as a partial, second-best surrogate for race-based affirmative action in a legal and political climate in which race-based affirmative action may no longer be feasible”).

as they will have achieved the goal of preventing admissions offices from consciously considering the race of applicants.<sup>105</sup>

Some argue that we ought not to conceptualize class-based affirmative action as “the next best thing” or a “compromise” at all. They argue that, even if the legality of race-based programs is clearly established and is in no way threatened, institutions ought to implement class-based programs because they are actually superior to race-based programs. That is, they argue that class-based programs are second to none—they *are* the best thing.<sup>106</sup>

Richard Kahlenberg, who has been described as “the nation’s chief proponent of class-based affirmative action in higher education admissions,”<sup>107</sup> has championed such programs, frequently and vigorously, for nearly two decades.<sup>108</sup> His chief argument is that race-conscious admissions programs are deeply flawed because they have the effect of admitting racial minorities who are not disadvantaged in any real way.<sup>109</sup> He notes that racial minorities admitted pursuant to such programs do not tend to be poor, but instead frequently have some degree of class privilege.<sup>110</sup> Moreover, they tend not to

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<sup>105</sup> See Tung Yin, *A Carbohic Smoke Ball for the Nineties: Class-Based Affirmative Action*, 31 LOY. L.A. L. REV. 213, 215 (1997) (reviewing RICHARD D. KAHLBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996)) (“Supporters of race-based affirmative action may see class-based affirmative action as a second-best alternative . . . . Opponents of race-based affirmative action may view class-based affirmative action as an acceptable compromise.”).

<sup>106</sup> See Fallon, *supra* note 104, at 1915 (explaining that some view “economically based affirmative action as attractive for reasons independent of the arguments supporting race-based affirmative action” because such programs “respond[] directly to ‘burdens that have been unfairly placed in . . . individual’s [sic] paths’” (quoting Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, 5 YALE L. & POL’Y REV. 402, 410-11 (1987))).

<sup>107</sup> Ronald Roach, *Class-Based Affirmative Action: Battle Over Race-Conscious Approaches Pushes Idea to the Surface*, DIVERSE ISSUES HIGHER EDUC. (June 19, 2003), <http://diverseeducation.com/article/3029/> [<http://perma.cc/CPB5-RV6B>].

<sup>108</sup> See, e.g., Kahlenberg, *Class-Based Affirmative Action*, *supra* note 39.

<sup>109</sup> RICHARD D. KAHLBERG & HALLEY POTTER, *A BETTER AFFIRMATIVE ACTION: STATE UNIVERSITIES THAT CREATED ALTERNATIVES TO RACIAL PREFERENCES 2* (2012) (claiming that “racial preferences avoid the hard work of addressing deeply rooted inequalities” related to class).

<sup>110</sup> *Id.* at 5 (“[R]esearch from strong supporters of affirmative action . . . found that 86 percent of African Americans at selective colleges were either middle or upper class.”); see also Antonin Scalia, Commentary, *The Disease as Cure: “In Order To Get Beyond Racism, We Must First Take Account of Race”*, 1979 WASH. U. L.Q. 147, 153-54 (articulating his opposition to race-conscious admissions programs because he is “not willing to prefer the son of a prosperous and well-educated black doctor or lawyer—solely because of his race—to the son of a recent refugee from Eastern Europe who is working as a manual laborer to get his family ahead”).

be black American, but rather black immigrants,<sup>111</sup> who are not thought to be disadvantaged in the way that black people born in the United States are disadvantaged.<sup>112</sup> Beyond his fundamental argument that the wrong people are benefitting from race-based programs, he also claims that class-based affirmative action does not raise the same moral questions as do race-based programs.<sup>113</sup> For Kahlenberg and likeminded observers, the consideration of race in admissions may very well be immoral; the consideration of class, on the other hand, does not present similar moral dilemmas.<sup>114</sup>

On closer examination, however, class-based affirmative action suffers from the same infirmities from which race-based affirmative action allegedly suffers. The next Section demonstrates this fact.

A. *The Shared Infirmities of Race-Based and Class-Based Affirmative Action*

1. Meritocracy Perversion

Race-based affirmative action is often accused of perverting systems of meritocracy.<sup>115</sup> Some argue that when, pursuant to race-conscious admissions programs, a racial minority gets admitted to an institution with a GPA and standardized test scores lower than others who were rejected, the institution

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<sup>111</sup> See KAHLBERG & POTTER, *supra* note 109, at 5 (“At Ivy League institutions, 41 percent of black freshmen in one study were immigrants, a group that is more socioeconomically advantaged than non-immigrant blacks. At Harvard College, the *New York Times* reported in 2004, the majority of black undergraduates ‘perhaps as many as two-thirds [] were West Indian and African immigrants or their children . . . .’” (footnote omitted) (quoting Sara Rimer & Karen W. Aronson, *Top Colleges Take More Blacks, But Which Ones?*, N.Y. TIMES, June 24, 2004, at A1)).

<sup>112</sup> Douglas S. Massey et al., *Black Immigrants and Black Natives Attending Selective Colleges and Universities in the United States*, 113 AM. J. EDUC. 243, 246 (2007) (“On socioeconomic indicators such as education, income, and residential segregation, black immigrants generally fare better than African Americans.”).

<sup>113</sup> KAHLBERG & POTTER, *supra* note 109, at 19 (discussing the “significant moral . . . costs” involved with “using race in deciding who gets ahead in society”).

<sup>114</sup> *Id.* (“It is entirely reasonable, given the moral costs associated with using race, to conclude that if universities can achieve racial diversity without racial preferences, then that is the preferred course to take.”); see also Fallon, *supra* note 104, at 1923 (“To date, virtually no one has argued that preferences based on economic disadvantage are inherently morally unjust.”); Gose, *supra* note 35 (stating that some critics of race-based affirmative action find such programs “morally objectionable”).

<sup>115</sup> Yin, *supra* note 105, at 248 (“One of the strongest arguments against race-based affirmative action is that it is subversive to the notion of a meritocracy.”); Jared M. Mellott, Note, *The Diversity Rationale for Affirmative Action in Employment After Grutter: The Case for Containment*, 48 WM. & MARY L. REV. 1091, 1140 (2006) (“In a country that prides itself on being a meritocracy without official ranks of nobility attached at birth, affirmative action seems especially perverse.”).

has compromised its merit-based system.<sup>116</sup> Indeed, it has admitted an unmeritorious, or not quite as meritorious, person.<sup>117</sup>

Bracketing the compelling arguments made by critical race theorists that traditional indicia of merit are not race-neutral (or class-neutral, or gender-neutral, or enjoy any form of neutrality at all) and thus only privilege one kind of race-specific merit over other kinds,<sup>118</sup> class-based affirmative action similarly perverts systems of meritocracy. That is, *any* admissions program that allows for the admission of those who would not have been admitted but for the changes in admissions criteria heralded by the program can be accused of perverting systems of meritocracy. To the extent that class-based affirmative action programs would admit students who would not have been admitted otherwise, it, too, should be understood as forcing institutions to “lower their standards”—that is, to compromise their merit-based system.<sup>119</sup> Yin has quite clearly made this argument:

Assuming that one believes in the ability of test scores and high school grades to predict college performance—and those who argue that [race-based] affirmative action results in the admission of the less qualified do . . . class-based affirmative action simply lowers standards for a different group of applicants: the poor rather than minorities.<sup>120</sup>

## 2. Inefficacy

Race-based affirmative action is sometimes accused of being incapable of remedying the problem that its authors intend it to address. At least part of

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<sup>116</sup> See Yin, *supra* note 105, at 248.

<sup>117</sup> See, e.g., Scalia, *supra* note 110, at 149 (“There is a whole range of ability—from unqualified, through minimally qualified, qualified, well-qualified, to outstanding. If I can’t get Leontyne Price to sing a concert I have scheduled, I may have to settle for Erma Glatt. La Glatt has a pretty good voice, but not as good as Price . . . . Any system that coerces me to hire her in preference to Price, because of her race, degrades the quality of my product . . .”).

<sup>118</sup> See, e.g., *Introduction to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* at xiii, xxix (Kimberlé Crenshaw et al. eds., 1995) (“[C]ertain conceptions of merit function not as a neutral basis for distributing resources and opportunity, but rather as a repository of hidden, race-specific preferences for those who have the power to determine the meaning and consequences of ‘merit.’”).

<sup>119</sup> See Yin, *supra* note 105, at 249 (observing the irony that results when opponents of race-based affirmative action support a class-based “program that is equally subversive to a meritocracy as racial preferences”).

<sup>120</sup> *Id.* at 250. Moreover, Yin notes the possibility that that which is odious to opponents of race-conscious admissions programs—the construction of different admissions “tracks” for students who possess the salient characteristic—may also be a feature of class-conscious admissions programs. *Id.* at 249 (“Like racial preferences . . . class-based affirmative action creates two tracks for admissions, one for ‘standard’ admissions and one for the ‘poor.’”).

Justice Thomas's objection to race-based affirmative action, as articulated in his dissent in *Grutter*, is his sense that the admission of a few racial minorities to elite institutions like the University of Michigan Law School every year is not going to solve the crisis that is racial stratification in the United States.<sup>121</sup> He writes that race-conscious programs "will never address the real problems facing 'underrepresented minorities,'"<sup>122</sup> and he charges that the architects of such programs only care about their "own image[s] among know-it-all elites, not solving real problems like the crisis of black male underperformance."<sup>123</sup> Essentially, Justice Thomas can be heard to argue that race-based affirmative action can not and will not accomplish the job that it is designed to do: make race matter less (or make race have different meanings) in future iterations of society by giving presently disempowered racial minorities access to elite institutions and the opportunities, power, and privilege that come with such access.<sup>124</sup>

However, class-based affirmative action suffers from the same infirmity. If these programs are designed to reduce the size of the gaping chasm in the United States between the wealthy and the poor by helping the poor through removing some of the barriers that they have in accessing elite institutions,<sup>125</sup> then there ought to be skepticism about the efficacy of class-based affirmative action as well.<sup>126</sup> Professor Malamud has argued that class-based affirmative

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<sup>121</sup> See Khiara M. Bridges, *Race Matters: Why Justice Scalia and Justice Thomas (and the Rest of the Bench) Believe that Affirmative Action is Constitutional*, 24 S. CAL. INTERDISC. L.J. 607, 645 (2015).

<sup>122</sup> *Grutter v. Bollinger*, 539 U.S. 306, 372 (2003) (Thomas, J., concurring in part and dissenting in part).

<sup>123</sup> *Id.* at 372-73 n.11.

<sup>124</sup> See, e.g., Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 TUL. L. REV. 1767, 1769 (2004) ("Affirmative action is needed to create a leadership class for a diverse American future . . .").

<sup>125</sup> See Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1849 (1996) (discussing "the redistributive task of class-based affirmative action").

<sup>126</sup> It should be noted that one does not need to define the goals of class-based affirmative action in structural terms—that is, in terms of reducing the gap between the "haves" and the "have-nots." Stated differently, one does not have to imagine that class-based affirmative action is concerned with reordering society. One can imagine, rather, that it is simply concerned with individuals. As such, one can articulate the goals of class-conscious programs as removing some of the barriers that individual poor people face in accessing elite institutions and the opportunities, power, and privilege that come with such access. If this is the goal of class-based affirmative action, then it is wildly successful every time that it allows a poor person to attend a school that he or she would not have been "qualified" to attend pursuant to traditional indicia of merit.

However, just as one can define the goals of class-based affirmative action with an eye

action is unlikely to result in the large-scale restructuring of society in terms of reducing income inequality, nor will it produce something that we could call “economic justice.”<sup>127</sup> Instead, she notes that “[c]lass-based affirmative action is likely to do its work by redistributing economic opportunities among individuals who stand relatively close together in the gradational hierarchy—it offers opportunities to the strongest of the ‘have-nots’ at the expense of the weakest of the ‘haves.’”<sup>128</sup> She writes that such programs will only produce “[s]light differences in relative economic position” and will likely “generate all the more resentment as a result.”<sup>129</sup>

### 3. Resentment

The third infirmity of race-based affirmative action relates to resentment. One charge that is frequently levied against race-based affirmative action is that it will stoke the fires of race hatred and racial tribalism. For example, in her dissent in *Metro Broadcasting*, Justice O’Connor voted to strike down a federal affirmative action program that gave preferences to racial minorities in the granting of broadcasting licenses in part because of her fear that racial classifications in law “endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict.”<sup>130</sup> Class-based affirmative action is supposed to be superior to race-based programs because it will not similarly generate racial tensions.<sup>131</sup>

However, that hope may be specious. In light of the well-documented, and fairly obvious, fact that class-based affirmative action is intended to act as a

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towards something that we can call individual justice, and away from something that we can call social justice, we can define the goals of race-based affirmative action in similar ways. Accordingly, if race-based programs are not intended to make race matter less in future iterations of society, but rather are intended to remove some of the barriers that individual racial minorities face in accessing elite institutions, then such programs are wildly successful every time that they allow a racial minority to attend a school that he or she would not have been “qualified” to attend pursuant to traditional indicia of merit.

<sup>127</sup> Malamud, *supra* note 125, at 1865 (“Legal decisionmakers designing programs of class-based affirmative action will most likely be drawn to the gradational approach.”).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603 (O’Connor, J., dissenting).

<sup>131</sup> *See, e.g., KAHLENBERG & POTTER, supra* note 109, at 19 (arguing that “economic affirmative action programs can address . . . discrimination indirectly, without conflicting with . . . public perceptions of fairness”); Richard H. Sander, *Class in American Legal Education*, 88 *DENV. U. L. REV.* 631, 666 (2011) (“Students receiving such preferences are much less likely to be stigmatized . . . . There is much less likely to be group self-segregation or the nourishment of group resentment, which sometimes happens with strictly race-based preferences.”).

surrogate for race-based affirmative action,<sup>132</sup> it will not take much for most to realize that class-based programs are doing the work of race-based programs. It will not take much for most to realize that class-based affirmative action may just be a (failed) euphemism for race-based affirmative action. The sense that class-based programs are just race-based programs dressed in sheep's clothing will likely be heightened by the fact that, since racial minorities are disproportionately represented among the poor, class-based programs will likely have the effect of disproportionately benefitting racial minorities.<sup>133</sup> The result is that we should expect that class-based programs would still generate many of the same racial tensions that race-based programs are accused of generating. As Kim Forde-Mazrui has described, class-based affirmative action's "overall disparate impact in favor of minorities may still stoke resentment among whites who perceive such programs as racial favoritism by proxy."<sup>134</sup>

#### 4. Denial of Individuality

Some opponents of race-conscious admissions programs argue that these programs deny the individuality of applicants seeking admission to institutions of higher learning.<sup>135</sup> They insist that when admissions offices know and consider the race of persons submitting applications, the consideration thereof renders invisible and irrelevant all of the applicant's other characteristics that make him or her an individual—like grades, scores on standardized tests,

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<sup>132</sup> See *supra* notes 104-05, and accompanying text.

<sup>133</sup> Sander, *supra* note 35, at 475-76 (discussing "the theory that socioeconomic preferences will disparately favor racial minorities (particularly blacks and Latinos)"). However, the presumption that class preferences will disproportionately benefit racial minorities may not be true. This is because, while poor white people are unprivileged by virtue of class, poor black and Latino people are unprivileged by virtue of class *and* race. See, e.g., Nikole Hannah-Jones, *Class Action: A Challenge to the Idea that Income Can Integrate America's Campuses*, PROPUBLICA (June 24, 2013, 12:46 PM), <http://www.propublica.org/article/class-action-a-challenge-to-the-idea-that-income-can-integrate-americas-cam> [<http://perma.cc/Q76M-29TE>]. Therefore, a poor white applicant will enjoy advantages that a poor black or Latino applicant will not. Those advantages, which may translate into higher standardized test scores, may make the poor white applicant more attractive to institutions implementing a class-based affirmative action program. See *id.* ("Some studies have shown that a college admissions system that favors the poor would indeed boost enrollment of working-class students—making them as much as 40 percent of the student body—but it would sink black and Latino enrollment. Representation of blacks and Latinos in college could fall from its current 16 percent into the single digits.").

<sup>134</sup> Forde-Mazrui, *supra* note 39, at 2377.

<sup>135</sup> See, e.g., *Hopwood v. Texas*, 78 F.3d 932, 945-46 (5th Cir. 1996) ("[Race-based admissions] treats minorities as a group, rather than as individuals. . . . The assumption is that a certain individual possesses characteristics by virtue of being a member of a certain racial group."), *abrogated by Grutter v. Bollinger*, 539 U.S. 306 (2003).

special talents, the ability to speak multiple languages, and adversities overcome.<sup>136</sup> In effect, many opponents of race-conscious admissions programs contend that the application process successfully allows applicants to present themselves as individuals, and it successfully allows those who read the applications to know the applicants as individuals. The consideration of race defeats this feat of individuation, transforming the applicants into deindividuated persons to be admitted, waitlisted, or rejected outright on the basis of one overriding trait: race.

Thus, when admissions offices claim that they need to be conscious of race in order to admit a class of students who have a multiplicity of perspectives and viewpoints, critics of race-based affirmative action counter that these offices are impermissibly equating race with viewpoint.<sup>137</sup> This is a racial stereotype, they say.<sup>138</sup> It is a generalization about race. So generalized, raced persons are denied their individuality.<sup>139</sup> Class-based affirmative action is not

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<sup>136</sup> See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 273-74 (2003) (“Thus, the result of the automatic distribution of 20 points [for race] is that the University would never consider student A’s individual background, experiences, and characteristics . . . .” (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978))); Joshua P. Thompson & Damien M. Schiff, *Divisive Diversity at the University of Texas: An Opportunity for the Supreme Court to Overturn its Flawed Decision in Grutter*, 15 TEX. REV. L. & POL. 437, 485 (2011) (“By labeling students as either ‘Hispanic’ or ‘African-American’ and according preferences in relation to these broad group identities, the law school in *Grutter* rejects the individuality of its students.”).

<sup>137</sup> See, e.g., Thompson & Schiff, *supra* note 136, at 470 (stating that *Grutter* “assumes that increasing racial diversity will increase viewpoint diversity” and arguing that this assumption treats “people according to race on account of outmoded or unsubstantiated stereotypes about what members of certain races think or believe”); Stamenia Tzouganatos, Case Comment, *Law School’s Race-Conscious Admissions Policy Survives Equal Protection Analysis*, 38 SUFFOLK U. L. REV. 733, 738 (2005) (“By allowing the Law School to target specific racial and ethnic groups in promoting a student body with diverse perspectives, the Court equated race with viewpoint and undermined the significance of other individual characteristics that contribute to diversity.”).

<sup>138</sup> See, e.g., *Hopwood*, 78 F.3d at 946 (“To believe that a person’s race controls his point of view is to stereotype him. . . . Instead, individuals, with their own conceptions of life, further diversity of viewpoint.”); Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 425 (1998) (“[U]se of race to achieve educational diversity ‘impermissibly equat[es] race with thoughts and behavior’ and thereby promotes improper racial stereotyping.” (alteration in original) (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 615 (1990) (O’Connor, J., dissenting))).

<sup>139</sup> Some opponents of race-based affirmative action have argued that race-based affirmative action is *unconstitutional* because it denies the individuality of applicants, observing that the Court has stated that “[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens ‘as individuals, not “as simply components of a racial, religious, sexual or national class.””

thought to deny applicants their individuality in this way. Class-based affirmative action, proponents say, treats applicants like individuals.<sup>140</sup>

An assertion that any admissions program “treats applicants like individuals” requires some unpacking. Essentially, opponents of race-based affirmative action argue against it by claiming that the consideration of race denies persons their individuality, while the consideration of other characteristics—like test scores and grades—does not. However, an individual’s test scores and grades, like an individual’s race, are simply traits that he possesses.<sup>141</sup> Accordingly, considering solely an applicant’s test scores and grades does not treat him as an individual any more than considering his race. Ken Simons explains this position quite clearly: “Consider a white employee who demonstrates that he would have received a promotion based on job ability if not for an affirmative action preference. He has been disadvantaged based on race, at least over the short-term. But considering his job ability and not his race would not be treating him purely as an individual. Job ability is a trait like any other—education, physical size, friendship with the boss, or race.”<sup>142</sup>

Moreover, just as an individual’s test scores, grades, and race are simply traits that an applicant possesses, so is an individual’s class. Accordingly, considering an individual’s class does not treat him any more—or less—like an individual than considering his race. Thus, *the consideration of race in admissions denies applicants their individuality to the same extent as the consideration of class denies applicants their individuality*. And the inverse is also true: the consideration of race in admissions respects the individuality of applicants to the same extent as does the consideration of class.

At bottom, the claim cannot be that consideration of some traits, like race, does not allow persons to be treated as individuals; at bottom, the claim must be that some traits are only *illegitimately* considered.<sup>143</sup> In this way, the claim

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Miller v. Johnson, 515 U.S. 900, 911 (1995) (quoting *Metro Broad. Inc.*, 497 U.S. at 602 (O’Connor, J., dissenting)); *see, e.g.*, Thompson & Schiff, *supra* note 136, at 483 (citing the language of *Miller* and arguing that “[t]he law school, therefore, falls prey to the criticism of the *Miller* and *Adarand* Courts”).

<sup>140</sup> *See, e.g.*, Sander, *supra* note 131, at 664-65 (“[Socioeconomic] preferences are based on individual circumstances, not group membership. . . . [L]aw schools generally pay little attention to the ‘diversity’ contribution of individual blacks in their quest to admit blacks with the highest possible credentials.”).

<sup>141</sup> *Cf.* Kenneth W. Simons, *Overinclusion and Underinclusion: A New Model*, 36 UCLA L. REV. 447, 501 (1989) (arguing that race is one trait among many possessed by employees—like “education” or “physical size”—and that we should be wary of arguments claiming that “using one trait amounts to ‘treatment as an individual’ and using another trait does not”).

<sup>142</sup> *Id.*

<sup>143</sup> *See id.* (observing that when persons assert that applicants should be treated as individuals in the employment context, they are actually arguing that the hiring process

that any admissions program “treats applicants as individuals” should be read as an assertion that the admissions program solely considers traits that those making the claim deem legitimately considered. The inverse is also true: the claim that any admissions policy does not “treat applicants as individuals” should be read as an assertion that the program considers traits that those making the claim deem illegitimately considered. Thus, arguments that class-based programs “treat applicants as individuals,” while race-based programs do not, are not arguments. Instead, they are conclusions about the desirability of the two programs.

##### 5. Unfair Burdens

Race-based affirmative action programs are often charged with unfairly burdening individuals and groups of individuals in an effort to benefit other individuals and groups of individuals.<sup>144</sup> Indeed, race-based programs “burden” individuals who are members of groups that have historically enjoyed racial privilege in the effort to benefit members of groups who have not historically enjoyed such privilege. However, the problem, opponents say, is that race-based programs burden individuals who, themselves, did not cause the disadvantage suffered by racial minorities.<sup>145</sup> While these opponents of race-based programs may be willing to concede that racial minorities in this country have experienced disadvantages on the basis of their race, they conceptualize those disadvantages as having been perpetrated by individuals who are no longer around.<sup>146</sup> As such, the persons who are burdened by programs designed to relieve racial minorities of some of their racial burdens are not the same persons who perpetuated the racial injury.<sup>147</sup> The applicants being burdened by such programs have no direct relationship to those who were the architects and agents of the historical and present disadvantages visited upon racial minorities.<sup>148</sup>

Simply put, the argument is that race-based affirmative action burdens people who, themselves, have not burdened anyone. However, this is also a feature of class-based affirmative action programs. When a wealthier student does not gain admission to an institution to which he would have been

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should only consider certain characteristics (e.g. job ability) to the exclusion of others (e.g. race)).

<sup>144</sup> See *supra* notes 48-54 and accompanying text (describing how the Supreme Court in *Croson* feared that race-based affirmative action unfairly burdened white people).

<sup>145</sup> *Id.*

<sup>146</sup> See Yin, *supra* note 105, at 224 (“[D]iversity [rather than remedying past societal discrimination] does not involve charges of past injustice and does not require children to pay for the sins of their parents.”).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* (“[The diversity rationale] avoids the difficulty of showing a causal relationship between past discrimination and today’s minorities.”).

admitted absent the class-conscious admissions program—that is, when the seat that would have been given to him is given to a poorer student—he is burdened even though he is not the perpetrator of the poorer student’s disadvantage.

Yin makes this point by posing the hypothetical of a white student, Jason, who is not admitted to a school after a race-conscious admissions program admits a black student, Benjy, in his stead.<sup>149</sup> Opponents of race-based affirmative action would argue that Jason has been wronged because, to the extent that Benjy has been disadvantaged on the basis of race, Jason had nothing to do with his disadvantage.<sup>150</sup> Yin then changes the hypothetical into one in which Jason is a wealthier student and Benjy is poor.<sup>151</sup> Should Jason be rejected, and Benjy admitted, pursuant to a class-based affirmative action program, Jason’s sense of having been wronged—inasmuch as he is being burdened in order to correct a disadvantage that he did not perpetrate—remains unchanged. Writes Yin:

[I]f Jason loses out to Benjy, Jason would probably feel that Benjy did not ‘deserve’ to get in with lower scores. In this regard, Jason’s feelings would probably be the same whether Benjy got in because he came from a poor family or because he was black. . . . Jason had nothing to do with that race injury, but then, we might ask, what did Jason have to do with Benjy’s class injury?<sup>152</sup>

#### 6. Undeserving Beneficiaries

Many proponents of class-conscious programs argue that race-based programs benefit people who are not truly disadvantaged.<sup>153</sup> These proponents claim that class-based programs will more successfully target those who are disadvantaged, ensuring that those who are benefitted are actually deserving in that regard.<sup>154</sup> There are two responses to this argument.

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<sup>149</sup> *Id.* at 257-58.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 257; *see also* Fallon, *supra* note 104, at 1939 (quoting a critic of class-based affirmative action who asked: “‘Will the man in that famous Jesse Helms commercial—crumbling his rejection letter [that he received because a racial minority was offered employment pursuant to a race-based affirmative action program] in disgust—be comforted because he lost his job to someone else adjudged to be socio-economically preferable rather than racially preferable?’”).

<sup>153</sup> *See* KAHLBERG & POTTER, *supra* note 109, at 5 (arguing that the racial minorities who actually benefit from race-conscious admissions programs enjoy a large degree of class privilege and/or come from privileged subpopulations (such as immigrant groups)).

<sup>154</sup> *See* Yin, *supra* note 105, at 257 (citing RICHARD D. KAHLBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* 178 (1996)) (delineating Kahlenberg’s position that class preferences benefit the actual victims of class injury in a way that race

First, the argument presumes that there is a homogeneity with respect to the disadvantage experienced by poor people such that, any time a poor person is benefitted by a class-conscious admissions program, the program has benefitted someone who has suffered the disadvantage. But this assumption of homogeneity is misguided. As Fallon observes, “the principal disadvantages associated with poverty are variable in degree. Not all poor people have suffered them acutely . . . .”<sup>155</sup> Fallon suggests that given the heterogeneity among the poor and the variations among their experiences with poverty’s disadvantages, an effective class-based affirmative action program that addresses the injustice that is poverty would have to determine which poor individuals deserve to be benefitted in light of their actual experiences.<sup>156</sup> However, is that not the exact same inquiry that those implementing race-based affirmative action ought to make? I, for one, have argued that there is much heterogeneity in the experiences that members of a racial group have *with race*; further, because race does not privilege and un-privilege members of races *equally*, then those charged with the duty of administering race-conscious admissions programs ought to interrogate how an individual’s race has interacted with all the other characteristics that he or she possesses (i.e., sex, sexuality, skin color, class, immigration status) in order to get a sense of whether the individual is someone who ought to benefit from the program.<sup>157</sup> Which is to say: in order to be fair or effective, both class-conscious and race-conscious admissions programs must be informed by a nuanced view of class and race, respectively.<sup>158</sup> As the necessity of nuance ought not to impeach the

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“preferences” do not).

<sup>155</sup> Fallon, *supra* note 104, at 1939. Fallon also observes that there is heterogeneity among people who may not be classified as “poor,” and, consequently, many non-poor people may have suffered the disadvantages from which the poor are assumed to suffer. *See id.* at 1926.

<sup>156</sup> *See id.* at 1926-27 (“[N]ot all of the disadvantages associated with poverty are caused or constituted by poverty. Someone can be poor, even very poor, yet grow up in a stimulating and nurturing environment with strong support for the development of good character traits . . . . It is therefore an important question whether affirmative action based on economic disadvantage . . . should be based on economic criteria alone or whether there should be a further inquiry into the presence or absence of the disadvantaging conditions that are associated with, but not necessarily caused or constituted by, poverty.”).

<sup>157</sup> *See* Bridges, *supra* note 121, at 632 (“[T]he extent to which [race] has mattered for an individual (how much, in what ways, positively or negatively, etc.) will vary depending on the other characteristics that the [raced] individual possesses, such as socioeconomic status, immigration status, citizenship status, sexual orientation, age, gender, gender identity, and the region of [the] country in which the individual resides . . . . [A]dmissions officers . . . must consider the nuanced ways that race intersects with the totality of an individual’s characteristics.”).

<sup>158</sup> *Id.*

legitimacy of class-based affirmative action, it ought not to impeach the legitimacy of race-based affirmative action.

Second, consider Yin's hypothetical involving a white student, Jason, who, due to a race-conscious admissions program, loses a seat in an institution's incoming class to a minority student, Benjy.<sup>159</sup> There is good reason to believe that, even if there was clear, compelling evidence that Benjy has been disadvantaged on account of his race, Jason and other opponents of race-based affirmative action would still feel as if Jason has suffered some wrong if, because of a race-based affirmative action program, he is rejected from the school to which Benjy is admitted.<sup>160</sup> Imagine that a team of experts can prove that Benjy has suffered race-based disadvantages: he attended primary and secondary schools in a racially segregated school district;<sup>161</sup> his schools were invariably majority-minority and were grossly underfunded (especially when compared to the schools where a majority of the students were white); he has been stopped and questioned by the police when driving, walking, and doing banal activities that normal law-abiding citizens should expect to do without police interrogation;<sup>162</sup> he has been the victim of implicit bias when seeking employment and consequently has not been hired to do jobs that he has been qualified to do;<sup>163</sup> his physical condition reflects the diminished state of health that racial minorities suffer in the United States in ways that are independent of class,<sup>164</sup> and he is more likely to develop hypertension in adulthood.<sup>165</sup> Even in

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<sup>159</sup> See *supra* notes 149-52 and accompanying text.

<sup>160</sup> See *id.*

<sup>161</sup> By "racially segregated school district," I mean a school district where, although there is no evidence of de jure segregation, the racial composition of individual schools does not reflect the racial composition of the school district as a whole. Thus, I do not draw the distinction between "racially segregated" schools and "racially imbalanced" schools that Justice Thomas draws in his concurrence in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 749 (2007) (Thomas, J., concurring) ("Racial imbalance is not segregation, and the mere incantation of terms like resegregation and remediation cannot make up the difference.").

<sup>162</sup> *Stop and Frisk Data*, N.Y. C.L. UNION, <http://www.nyclu.org/content/stop-and-frisk-data> [<http://perma.cc/PR3N-VWLZ>] (providing demographic statistics of stop-and-frisk incidents in New York City since 2002).

<sup>163</sup> Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1033-34 (2006) ("The science of implicit bias demonstrates that disparate treatment can result not only from the deliberate application of consciously endorsed prejudiced beliefs, but also from the unwitting and uncorrected influence of implicit attitudes and associations in the social-perception process.").

<sup>164</sup> INST. OF MED., ADDRESSING RACIAL AND ETHNIC HEALTH CARE DISPARITIES: WHERE DO WE GO FROM HERE? 3 (2005) ("[R]acial and ethnic minorities receive lower-quality health care than white people—even when insurance status, income, age, and severity of conditions are comparable . . .").

the face of these facts about Benjy, many opponents of race-based affirmative action nevertheless will imagine that an injustice has been done if, pursuant to a race-conscious admissions program, Jason loses “his” seat in an incoming class to Benjy.<sup>166</sup> Which is to say: there is good reason to believe that the opposition to race-based affirmative action may *not* be due to opponents’ beliefs that such programs are imprecise insofar as they do not benefit those who ought to be benefitted because they have suffered race-based disadvantages. Instead, opposition to such programs may be due to opponents believing that society should *not* endeavor to remedy race-based disadvantages: such disadvantages are in the nature of “just the way things are.”<sup>167</sup> Alternately, opposition to such programs may be due to *opponents’ failure to believe that there is such a thing as race-based disadvantage*. Accordingly, any time that racial minorities are benefitted in an effort to remedy this “disadvantage,” that benefit is given unjustly or undeservedly because the disadvantage is chimerical.

A gloss on the argument that race-based affirmative action programs benefit undeserving people is the charge that, in practice, they benefit racial minorities with some degree of class privilege. The argument is that the programs benefit people who have not been disadvantaged at all.<sup>168</sup> There are two possible theoretical underpinnings of this argument, both of which are problematic. The first theory is that racial disadvantages and class disadvantages are simultaneous. The second theory is that racial disadvantages are derivative of class disadvantages. According to both theories, if an individual has class privilege, then, as a matter of course, she either does not experience the effects of lacking race privilege or she no longer lacks race privilege.<sup>169</sup> However, this

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<sup>165</sup> David Satcher, *Our Commitment to Eliminate Racial and Ethnic Health Disparities*, 1 YALE J. HEALTH POL’Y L. & ETHICS 1, 7 (2001) (“Racial and ethnic minorities tend to have higher rates of hypertension, develop hypertension at an earlier age, and are less likely to undergo treatment to control their high blood pressure. For example, from 1988 to 1994, 35% of black males, aged twenty to seventy-four, had hypertension, while the rate in the general population was 25%.”).

<sup>166</sup> See *supra* note 150 and accompanying text.

<sup>167</sup> See Crenshaw, *supra* note 36, at 12 (hypothesizing that some people believe that the “current distribution of access, power, privilege, and disadvantage is just the way things are”). If society is not obligated in any way to remedy disadvantages on the basis of race, then the onus is on the individual to “pull herself up by her bootstraps.” Hence, the theory of “muscular self-help” embraced by Justices Thomas and Scalia. See Kendall Thomas, *Reading Clarence Thomas*, 18 NAT’L BLACK L.J. 224, 236 (2005); see also, Stephen E. Gottlieb, *Three Justices in Search of a Character: The Moral Agendas of Justices O’Connor, Scalia and Kennedy*, 49 RUTGERS L. REV. 219, 245-46 (1996).

<sup>168</sup> See *supra* notes 153-54 and accompanying text.

<sup>169</sup> Kahlenberg, *Class-Based Affirmative Action*, *supra* note 39, at 1061. The converse is also true: if an individual does not have class privilege, then it may be accurate to describe the individual as lacking race privilege or open to experiencing the effects of lacking race

does not competently describe how race operates in the United States. Simply stated, race is not an epiphenomenon of class.<sup>170</sup> Race is not derivative of class.<sup>171</sup> Quite the contrary, race is independent of class. The scores of empirical studies documenting the fact that, *even when controlling for class*, racial minorities are sicker and die earlier than their counterparts with racial privilege function to demonstrate that race is independent of class.<sup>172</sup>

Moreover, one ought not to deny the fact that, even when one has class privilege, having a phenotype that correlates with racial minority status means that one will have experiences that can only be described as alienating, injurious, disempowering, and destructive. Justice Sotomayor quite powerfully describes this fact in her dissent in *Schuetz*:

Race matters to a young man's view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman's sense of self when she states her hometown, and then is pressed, "No, where are you *really* from?", regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: "I do not belong here."<sup>173</sup>

Race matters when a black woman is not assumed to be the owner of the home in front of which she stands. Race matters when a Latina's doctor offers her a long-acting contraceptive injection while this same doctor offers her counterpart with race privilege a simple birth control pill.<sup>174</sup> Race matters even in hackneyed ways—when a black man finds it impossible to hail a cab in any

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privilege.

<sup>170</sup> If race were an epiphenomenon of class, then if we eliminated class we would eliminate race. This is an argument that some classical Marxists have made. See Alan D. Freeman, *Race and Class: The Dilemma of Liberal Reform*, 90 YALE L.J. 1880, 1891 (1981) (reviewing DERRICK A. BELL, JR., *RACE, RACISM, AND AMERICAN LAW* (2d ed. 1980)). And it is an argument that many antiracist scholars and activists have rejected. See, e.g., Tanya K. Hernandez, *An Exploration of the Efficacy of Class-Based Approaches to Racial Justice: The Cuban Context*, 33 U.C. DAVIS L. REV. 1135, 1161 (2000).

<sup>171</sup> See Hernandez, *supra* note 170, at 1159.

<sup>172</sup> See INST. OF MED., *supra* note 164 (discussing racial and ethnic disparities in healthcare).

<sup>173</sup> *Schuetz v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting).

<sup>174</sup> See KHIARA M. BRIDGES, *REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION* 107 (2011) (discussing the effects of race in the context of contraceptives).

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major metropolitan city.<sup>175</sup> It matters when police stop a black or Latino man while letting white men pass undisturbed.<sup>176</sup> It is undeniable that class privilege ameliorates some of the effects that the lack of race privilege would otherwise produce.<sup>177</sup> But, it should also be undeniable that even those racial minorities with class privilege have had the hurtful experiences described here. Race matters irrespective of class.<sup>178</sup>

Racial minorities have to endure injurious, burdensome, disadvantaging experiences without regard to their class. Thus, when a race-based affirmative action program admits a racial minority with class privilege, it admits an individual who, invariably, has endured and will continue to endure racial burdens. To say that this individual is undeserving of a benefit because he has not been burdened on account of race is to grossly misunderstand race and to dangerously ignore the fact that inhabiting a raced body matters.

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I will return to the charge that race-based affirmative action programs are immoral—the seventh infirmity.<sup>179</sup> In the meantime, we should acknowledge what the above section has endeavored to prove: class-based affirmative action suffers from the same infirmities from which race-based programs suffer. Accordingly, we should expect that class-based affirmative action would arouse the same antipathy that race-based affirmative action does. We should expect that result unless there is something specifically about benefitting

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<sup>175</sup> See Dan Harris & Gitika Ahuja, *Race for a Cab: When Hailing a Ride Isn't So Black and White*, ABC NEWS (Apr. 1, 2009), <http://abcnews.go.com/GMA/race-cab-hailing-ride-black-white/story?id=7223511> [<http://perma.cc/HQ6E-2MLQ>] (discussing the problem of racial profiling by New York City taxi drivers).

<sup>176</sup> *Stop and Frisk Data*, *supra* note 162.

<sup>177</sup> See Bridges, *supra* note 121, at 631 (“[I]t may be that a black person’s class privilege has reduced substantially the effect that her lack of racial privilege would otherwise have had.”).

<sup>178</sup> President Obama’s remarks about George Zimmerman’s killing of Trayvon Martin indicate his awareness of the fact that race matters irrespective of class. President Obama said: “You know, when Trayvon Martin was first shot I said that this could have been my son. Another way of saying that is Trayvon Martin could have been me 35 years ago.” President Barack Obama, Remarks on Race and Trayvon Martin 1 (July 19, 2013) (transcript available at <https://www.whitehouse.gov/the-press-office/2013/07/19/remarks-president-trayvon-martin> [<https://perma.cc/K8YL-MAVU>]). Although Obama has enjoyed class privilege all of his life, he is correct in noting that if a younger version of himself had been walking in a predominately white neighborhood—perhaps wearing a hooded sweatshirt, but perhaps not—someone might have perceived his race, gender, and age as marks of criminality and treated him accordingly. Which is to say: the construction of black males as criminals is not one that depends on class.

<sup>179</sup> See *infra* notes 230-31 and accompanying text.

persons *on the basis of race* that raises people's hackles. The next section attempts to divine what that "something" is.

B. *The Story that Class-Based Affirmative Action Tells about Race*

One of the staunchest opponents of race-conscious programs on the Bench, Justice Scalia, has clearly articulated his support of class-conscious programs. Back when he was a professor at the University of Chicago Law School, he wrote an article that criticized the wisdom, practicality, and constitutionality of race-based affirmative action.<sup>180</sup> At the very end, however, he stated, "I strongly favor . . . 'affirmative action programs' of many types of help for the poor and disadvantaged."<sup>181</sup>

We have to ask the question: Given the infirmities that it shares with race-based affirmative action, why is class-based affirmative action so defensible—indeed, attractive—to those who oppose race-based affirmative action? One answer may be found in the statements that follow Justice Scalia's articulation of support for class-based programs: "It may well be that many, or even most, of those benefited by such programs would be members of minority races that the existing [race-based] programs exclusively favor."<sup>182</sup> While the construction of the sentence draws the reader's attention to the members of the minority races that are explicitly mentioned, my focus here is on those who are only implicitly mentioned—those "others" who stand to benefit alongside members of minority races, i.e., white people. That is, when persons are "preferred" in admissions because of their lower socioeconomic status, it is easy to imagine that while many, or most, of the beneficiaries will be racial minorities, *at least some of those beneficiaries will be white*. While the winners under race-based affirmative action programs are exclusively racial minorities, under class-based programs, white people can be winners, too.<sup>183</sup> This might be what makes class-conscious programs appealing to some.

If this is true, then what should we make of Justice Scalia's declaration that he would support class-conscious programs even if no white people benefitted from them? Scalia states unequivocally that he would nevertheless support such programs even if "all" of the beneficiaries were people of color.<sup>184</sup> This avowal suggests another possibility: the opposition to race-based affirmative action is due to the work that such programs do to construct society as indebted

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<sup>180</sup> Scalia, *supra* note 110.

<sup>181</sup> *Id.* at 156.

<sup>182</sup> *Id.*

<sup>183</sup> Richard Cohen, a liberal columnist for the *Washington Post*, has expressed this very idea. See Steven A. Holmes, *Mulling the Idea of Affirmative Action for Poor Whites*, N.Y. TIMES, Aug. 18, 1991, at E3 (quoting Cohen as saying: "If economic need, not race, became the basis for what we now call affirmative action . . . [w]hites, too, could be helped as, indeed, they should be.").

<sup>184</sup> See Scalia, *supra* note 110, at 156.

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to the racial minorities who have been objects of centuries of racially discriminatory treatment.

Critical Race Theory pioneer Kimberlé Crenshaw, for one, has made the case that society is indebted to historically subordinated racial groups on account of the country's history of subordination. In a recent article, titled *The Court's Denial of Racial Societal Debt*, she argues that the Court's recent jurisprudence—its striking down of school desegregation plans in *Parents Involved*, its gutting of the Voting Rights Act in *Shelby*, its continuing effort to construct programs that function to eliminate racial barriers as constitutionally suspicious in *Fisher*—has the overall effect of framing efforts to correct “historically produced social deficit” as “‘preferences’ or reverse discrimination,” as opposed to mechanisms for achieving restorative justice.<sup>185</sup>

Now, it is entirely possible, and reasonable, to conceptualize this country's history of racial discrimination as constructing a debt to those racial groups whose contributions to the country—economic, political, social, discursive—have been devalued, have gone unrecognized, or have simply been denied. Indeed, it is possible to conceptualize this country's history of racism as compelling state actors to acknowledge that the current marginalized status of racial minorities is a direct result of the debt that is owed to them. If this country's history of racism has created a debt to racial minorities, then affirmative action programs, as a form of restorative justice, would pay this debt. It would do this by allowing racial minorities to gain admission to institutions from which they have been excluded historically—acknowledging, albeit belatedly, the contributions that racial minorities have made to this country and putting them in a position that they would have been had the debt never been accrued or had been repaid earlier.

Again, race-based affirmative action programs may be understood as forms of restorative justice—functioning to pay the social debt that has been accrued to racial minorities. That being said, at least some opposition to race-based affirmative action is likely due to the sense that, in the twenty-first century, no one is indebted to anyone else on account of race. Indeed, then-Professor Scalia made that precise argument: “I owe no man anything, nor he me, because of the blood that flows in our veins. To go down that road . . . , even behind a banner as gleaming as restorative justice, is to make a frightening mistake.”<sup>186</sup> In that way, opposition to race-conscious programs may be understood as arguments that there exists no racial debt. This opposition functions to deny the present-day relevance of this country's appalling history; it functions to deny either that such history could possibly have continuing effects in and on the present or that society could (or should) pay this debt through race-conscious admissions programs.

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<sup>185</sup> Crenshaw, *supra* note 36, at 12.

<sup>186</sup> Scalia, *supra* note 110, at 153.

The movement to deny the relevance of this country's racial history—and to deny that a racial social debt has been accrued—was first seen in the Court's refusal to find that states had a compelling interest in "remedying past societal discrimination."<sup>187</sup> Accordingly, if race-based affirmative action programs were to survive strict scrutiny, then they could not be justified as attempts to "remedy past societal discrimination." Post-*Grutter*, and in the context of university admissions, race-conscious programs could only be justified if they were framed as pursuits of the educational benefits that are produced from a diverse student body.<sup>188</sup> As such, the Court refused to allow race-based affirmative action programs to be understood as forms of racial restorative justice. They could only be understood as pedagogical tools that were uninterested in social justice at all.

The replacement of race-based affirmative action with class-based programs completes the work performed by the rejection of the "remedying past societal discrimination" rationale and the acceptance of the "diversity" rationale. Class-based programs elide the nation's history of (and present) disenfranchisement on the basis of race. In seeking to address the injustices wrought by income inequality, it obscures and denies that there are continuing injustices wrought by race.

Many proponents of class-based affirmative action agree with me. They recognize the value that race-based affirmative action has in avowing the enduring fact of racial inequality, and they recognize its potential to remedy racial injustices.<sup>189</sup> However, they argue that race-conscious admissions programs are improper tools with which to address racial inequality. Kahlenberg writes: "Only a fool would say racial discrimination has been eradicated, but the appropriate remedy to racial discrimination, under our laws, is punishment under civil rights statutes."<sup>190</sup> However, Kahlenberg's argument is ultimately specious. The only reason why "the appropriate remedy to racial discrimination, under our laws, is punishment under our civil rights statutes" is because Kahlenberg and other opponents of race-based affirmative action say so.<sup>191</sup> One can certainly imagine a legal system that, in full recognition that

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<sup>187</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 548 (1989) (Marshall, J., dissenting).

<sup>188</sup> *Grutter v. Bollinger*, 539 U.S. 306, 337-38 (2003) (approving a race-conscious program involving a "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment").

<sup>189</sup> KAHLBERG & POTTER, *supra* note 109, at 19 (asserting that race-based affirmative action may be a "way of publicly affirming that racism continues to afflict American society").

<sup>190</sup> *Id.*

<sup>191</sup> *See Croson*, 488 U.S. at 505-06 (declaring that the state's interest in remedying past societal discrimination is not a "compelling governmental interest").

“only a fool would say that racial discrimination has been eradicated,” deems that governmental efforts to remedy this enduring racial discrimination are constitutionally pursued when pursued through affirmative action programs.<sup>192</sup>

Moreover, to say that the appropriate remedy to racial discrimination is punishment under civil rights statutes is fairly glib in light of the fact that racial inequality persists despite fifty years of civil rights statutes.<sup>193</sup> Further, one can just as easily say that just as civil rights statutes are supposed to remedy racial discrimination, anti-poverty programs—like Medicaid and Medicare, Temporary Assistance for Needy Families, the Supplemental Nutrition Assistance Program, Supplemental Security Income, the Earned Income Tax Credit, the minimum wage, and a graduated income tax—are supposed to remedy income inequality and poverty.<sup>194</sup> To the extent that class-based affirmative action is designed to address injustices wrought by class, then one can similarly accuse it of being an improper tool. Proponents of class-based affirmative action would have to reply that class-conscious admissions programs remain proper tools for addressing injustices wrought by class in light of the fact that the anti-poverty programs that we do have in this country have revealed themselves to be inadequate. While these programs may have succeeded in providing the most basic of necessities to individuals, they are unsuccessful inasmuch as income inequality remains recognized as a dire issue of national importance<sup>195</sup> and there is good evidence that they have done nothing to alleviate structural barriers to economic independence.<sup>196</sup> Yet, one

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<sup>192</sup> See *id.* at 558 (Marshall, J., dissenting) (“[I]t is too late in the day to assert seriously that the Equal Protection Clause prohibits States . . . from enacting race-conscious remedies. Our cases in the areas of school desegregation, voting rights, and affirmative action have demonstrated time and again that race is constitutionally germane, precisely because race remains dismayingly relevant in American life.”).

<sup>193</sup> See Stephen Plass, *Reinforcing Title VII with Zero Tolerance Rules*, 39 SUFFOLK U. L. REV. 127, 137 (2005) (“The unrelenting challenges to impact theory highlight some of the indifference to discrimination and a key weakness of Title VII.”); Reginald Leamon Robinson, *The Impact of Hobbes’s Empirical Natural Law on Title VII’s Effectiveness: A Hegelian Critique*, 25 CONN. L. REV. 607, 609-12 (1993) (arguing that the Hobbesian theory underlying Title VII and the “business necessity” defense to employment practices that have a disparate impact on racial minorities render the statute ineffective).

<sup>194</sup> See Hayes Holderness, *Taxing Privacy*, 21 GEO. J. ON POVERTY L. & POL’Y 1, 11-14 (2013) (discussing the goals of TANF, EITC, SNAP, and other public benefit programs within the income redistribution system).

<sup>195</sup> Lewis A. Friedland et al., *Consuming Ourselves to Dearth: Escalating Inequality and Public Opinion*, 644 ANNALS AM. ACAD. POL. & SOC. SCI. 280, 281 (2012) (“By almost any measure—income, wealth, opportunities, or comparison with other nations—the United States is a more stratified and unequal nation than at any time since just before the Great Depression in 1929.”).

<sup>196</sup> See Wendy A. Bach, *Governance, Accountability, and the New Poverty Agenda*, 2010 WIS. L. REV. 239, 245 (discussing the long-term effects of social welfare programs and

can make a similar argument about race-based affirmative action. Race-conscious admissions programs are appropriate tools for remedying racial discrimination because, while civil rights statutes have succeeded in punishing the most egregious forms of racism, they are unsuccessful inasmuch as racial inequality endures (as evidenced by any measure of health, income, and social well-being).<sup>197</sup> Further, such statutes have done little to dismantle structural and institutional racism—the form that racial disenfranchisement tends to take in modern society given the limited, but nevertheless important, successes of civil rights statutes.<sup>198</sup>

C. *Just Saying: How Conservatism Tends to Explain Poverty and Conceptualize Income Inequality*

It bears noting that in order to justify class-based affirmative action as a mechanism for addressing injustices wrought by class, one must have a thick theory of class inequality. That is, one must believe that poverty has structural, not individual, causes.<sup>199</sup> If poverty is caused by individual shortcomings, then it would be hard to defend class-based affirmative action programs because they would reward poor individuals, who are to blame for being poor, with admission to competitive universities. So, in order for class-based affirmative action to avoid being a program that benefits subordinated people who do not deserve to be benefitted because they are responsible for their own subordination, one needs to subscribe to a theory of poverty that explains it in terms of macro forces and *not* in terms of individual shortcomings. It is not uncontroversial to say that this is a theory of poverty that is not as widely accepted as progressives would hope it to be.<sup>200</sup>

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recognizing that “families did not appear to be moving up the economic ladder”).

<sup>197</sup> See, e.g., BRIDGES, *supra* note 174, at 107 (discussing the considerably higher rates of maternal and infant mortality for black mothers and children than for their white counterparts); *Report Sees “Sobering Statistics” on Racial Inequality*, CNN (Mar. 25, 2009, 12:25 PM), <http://www.cnn.com/2009/US/03/25/black.america.report/> [<http://perma.cc/A4D9-9ZS6>] (citing statistics showing that blacks are “twice as likely to be unemployed, three times more likely to live in poverty and more than six times as likely to be imprisoned compared with whites”).

<sup>198</sup> Cheryl I. Harris, *Whitewashing Race: Scapegoating Culture*, 94 CAL. L. REV. 907, 912 (2006) (reviewing MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2003)).

<sup>199</sup> See William Julius Wilson, *Why Both Social Structure and Culture Matter in a Holistic Analysis of Inner-City Poverty*, 629 ANNALS AM. ACAD. POL. & SOC. SCI. 200, 204 (2010) (discussing how Americans favor “individualistic explanations for poverty (e.g., lack of effort or ability, poor moral character, slack work skills) . . . over structural explanations (e.g., lack of adequate schooling, low wages, lack of jobs, etc.)”).

<sup>200</sup> See *id.* (“The Americans who answered the survey considered structural factors, such as ‘low wages,’ ‘failure of industry to provide enough jobs,’ and ‘racial discrimination,’ least important of all.”).

There is a substantial literature documenting that the most favored explanation of poverty in the United States is one that accepts individual, not structural, causes as the root of indigence.<sup>201</sup> For example, Cozzarelli et al., in summarizing the relevant literature, write that “most of these studies find that Americans believe there are multiple determinants of poverty but that individualistic or ‘internal’ causes (e.g., lack of effort, being lazy, low intelligence, being on drugs) tend to be more important than societal or ‘external’ ones (e.g., being a victim of discrimination, low wages, being forced to attend bad schools).”<sup>202</sup>

Moreover, there is a wealth of studies documenting that political conservatives, more so than political liberals, tend to favor explanations of poverty that locate its causes in individuals rather than the structures in which individuals exist.<sup>203</sup> For example, Benforado and Hanson condense the literature into this summary:

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<sup>201</sup> See Malamud, *supra* note 125, at 1896.

<sup>202</sup> Catherine Cozzarelli et al., *Attitudes Toward the Poor and Attributions for Poverty*, 57 J. SOC. ISSUES 207, 209 (2001) (citations omitted); see also Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior are Shaping Legal Policy*, 57 EMORY L.J. 311, 404-05 (2008) (reporting individuals making the following statements: “Bottom line, most people are poor because they choose to be poor;” and “Many poor, of all colors, are where they are because they are foolish with their money, integrity and philosophy.”).

Cozzarelli et al. go on to say that many people believe in individualistic and structural explanations of poverty simultaneously. Cozzarelli et al., *supra*, at 209 (citing JAMES R. KLUEGEL & ELIOT R. SMITH, *BELIEFS ABOUT INEQUALITY: AMERICANS’ VIEWS OF WHAT IS AND WHAT OUGHT TO BE* (1986)). They conclude that “[t]his allows those who recognize that structural barriers may make overcoming poverty difficult to also believe that these barriers can be surmounted by sustained personal effort.” *Id.*

<sup>203</sup> See, e.g., Benforado & Hanson, *supra* note 202, at 383 (citing studies that demonstrate that “conservatives generally rate individualistic . . . causes as being more important than do liberals who, in turn, rate societal and fatalistic . . . causes as being more important than do conservatives”); Andrea Bobbio et al., *Conservative Ideology, Economic Conservatism and Causal Attributions for Poverty and Wealth*, 29 CURRENT PSYCHOL. 222, 224 (2010) (citing studies that document that “[c]onservative voters . . . were generally more likely to explain wealth and poverty in individualistic terms, while left-wing individuals supported explanations in wide societal terms (for example, tax system, economic opportunities)” and that “[c]onservatives, who tend to hold people personally responsible for positive/negative behaviors and/or life outcomes within a free market system, make internal attributions or refer to dispositional characteristics of poor people”); Cozzarelli et al., *supra* note 202, at 210 (looking to studies documenting that “political conservatives were more likely than political liberals to make internal attributions for poverty”); William E. Griffin & Yaw Oheneba-Sakyi, *Sociodemographic and Political Correlates of University Students’ Causal Attributions for Poverty*, 73 PSYCHOL. REP. 795, 796 (1993) (stating that “[t]here is evidence which also shows that people affiliated with conservative political parties are more likely to choose an attribution of individual causality than those affiliated with liberal

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[C]onservatives tend to believe that “people are poor because they are lazy, do not improve themselves, cannot manage money, and abuse drugs or alcohol. Less conservative beliefs correlate with situational attributions: perceiving societal causes . . . . In this view, people are poor because of prejudice and discrimination, inadequate education, exploitation by the rich, and low wages. The conservative dispositional attributions imply that poor people have a controllable predisposition to stay poor.” Relatedly, conservatives tend to be less sympathetic to and less willing to help individuals harmed by everything from natural disasters to low income, in part, because they tend to attribute the suffering to the victims’ faulty dispositions.<sup>204</sup>

That a politically conservative ideology explains poverty (and wealth) in terms of individual, and not structural, causes may also explain why those who adopt this ideology do not tend to conceptualize income inequality as a problem—as an issue of social justice. Many conservative commentators have gone on the record to make the claim that the massive gap that exists between the wealthy and the poor in this country is unproblematic.<sup>205</sup> As Samuel Gregg,

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political parties,” citing a study that “showed that political conservatives regard individual traits such as effort and hard work as more important than situational factors in causal attributions of responsibility for socioeconomic success,” and looking to more studies that showed that “[c]onservative voters find [individual] attributions for poverty more important, blame the poor for their position, and have more negative attitudes towards the poor than do liberal voters”).

Of course, the conclusion that conservatives embrace individual attributions of poverty is both overinclusive and underinclusive. Many self-identified conservatives favor structural explanations of poverty, and many self-identified liberals favor individual explanations of poverty. Moreover, it is possible that self-identified conservatives may embrace individual explanations of poverty in some instances and structural explanations in others. For example, in response to the images of the ravages that Hurricane Katrina visited upon the Gulf Coast and the fact that those who were most hauntingly affected were poor, then-President Bush spoke about the “‘deep, persistent poverty’ that ‘all of us saw on television.’ According to President Bush, ‘[t]hat poverty has roots in a history of racial discrimination, which cut off generations from the opportunity of America.’ Viewed from a situationist vantage point, the impoverished seem to be victims, as opposed to causes, of their plight, which is perhaps why President Bush stated that ‘[w]e have a duty to confront this poverty with bold action.’” Benforado & Hanson, *supra* note 202, at 405 (footnotes omitted) (quoting Press Release, Office of the White House Press Sec’y, President Discusses Hurricane Relief in Address to the Nation (Sept. 15, 2005)).

<sup>204</sup> Benforado & Hanson, *supra* note 202, at 383-84 (quoting SUSAN T. FISKE, SOCIAL BEINGS: A CORE MOTIVES APPROACH TO SOCIAL PSYCHOLOGY 98 (2004)).

<sup>205</sup> See, e.g., N. Gregory Mankiw, *Yes, the Wealthy Can Be Deserving*, N.Y. TIMES, Feb. 16, 2014, at BU6 (arguing that the very wealthy deserve their astronomical incomes, and suggesting that we ought not to be disturbed that some individuals accumulate massive amounts of wealth in a society in which extremely poor individuals also exist); Karlyn

conservative pundit and founder of the Acton Institute, succinctly described, “That certain forms of inequality exist in commercial society is a given. Though it is indisputable that the standard of living for everyone, including the poorest, continues to rise in commercial society, some people will always possess more wealth than others.”<sup>206</sup> Indeed, some have claimed that not only is income inequality not a problem, but it is in fact desirable.<sup>207</sup> For example, in response to President Obama’s recent statement that income inequality is

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Bowman & Everett Carl Ladd, *The Nation Says NO to Class Warfare*, AM. ENTER. INST. (May 1, 1999), <http://www.aei.org/article/society-and-culture/the-nation-says-no-to-class-warfare/> [<http://perma.cc/Q4ZR-G6FH>] (citing a study showing that seventy-two percent of persons polled “agreed that differences in social standing between people are acceptable because they basically reflect what people have made out of their opportunities”); Patrick J. Buchanan, *Is Inequality a Problem—or a Power Play?*, AM. CONSERVATIVE (December 31, 2013, 12:01 AM), <http://www.theamericanconservative.com/is-inequality-a-problem-or-a-power-play/> [<http://perma.cc/CL9J-S3U8>] (“[T]here is far greater inequality in China today than in 1972,” but asking “[y]et is not the unequal China of today a far better place for the Chinese people than the Communist ant colony of Mao?” and contending that “it is freedom that produces inequality”); Kevin A. Hassett & Aparna Mathur, *Consumption and the Myths of Inequality: The Standard of Living Has Increased Among All Income Groups over the Past Decade*, WALL ST. J. (Oct. 24, 2012, 7:00 PM), <http://online.wsj.com/news/articles/SB10000872396390444100404577643691927468370?mg=reno64-wsj> [<http://perma.cc/RYP3-WN6U>] (responding to the charge that it is problematic that the rich are getting richer while the poor are getting poorer by arguing that “Americans have constructed a vast safety net that has adequately served the poor and helped them—as well as the middle class—to maintain significant consumption growth despite the apparent stagnation of cash incomes” and concluding that the “notion that a society that has accomplished such a feat is rigged or fundamentally unjust is ludicrous”); James Pethokoukis, *Income Inequality Revisionism: Obama Rewrites the History of the Reagan Revolution as the Beginning of the Bad Times*, AM. ENTER. INST. (Dec. 9, 2013), <http://www.aei.org/article/economics/income-inequality-revisionism/> [<http://perma.cc/2AC3-9F4C>] (“Now both France and Japan are wealthy nations with some big, successful multinational corporations. . . . But would anyone say they are flourishing? From these examples, we can reasonably conclude that if America had rejected the Reagan revolution, we might well have less inequality today, but we would probably also have less wealth, entrepreneurship, innovation, and, when you think of it, less fun.”); see also Bobbio, *supra* note 203, at 229-31 (“[P]eople endorsing a hierarchical social system, consistent with their beliefs about the basic and legitimate inequality existing between social groups, were less likely to attribute the causes of poverty to society itself.”).

<sup>206</sup> Samuel Gregg, *The Problem of Equality*, ACTON INST. (July 17, 2007), <http://www.acton.org/pub/commentary/2007/07/18/problem-equality> [<http://perma.cc/3MFC-VL2Z>] (suggesting that the only type of equality “genuinely conducive to a prosperous and humane society” is “[e]quality before the law”).

<sup>207</sup> See Tyler Cowen, *It’s Not the Inequality; It’s the Immobility*, N.Y. TIMES, Apr. 5, 2015, at BU6 (arguing against “using ‘inequality’ as an automatically negative term” and stating that “[a] lot of inequality is natural and indeed desirable, because individuals have different talents and tastes and opportunities can never be fully equalized”).

one of the biggest social justice issues of our time,<sup>208</sup> one pundit responded that “a 2009 study by researchers Dan Andrews, Christopher Jencks, and Andrew Leigh . . . found that more inequality is actually associated with higher GDP growth. Obama mentioned lots of stats and studies in his income-inequality speech, but he somehow failed to cite this one.”<sup>209</sup>

This is not to deny that structural explanations of poverty have some degree of salience in the United States. For example, in the early days of the campaign for the 2016 presidential election, potential Republican nominee Jeb Bush claimed that Americans needed to “work longer hours and, through their productivity, gain more income for their families.”<sup>210</sup> This claim—which sounds like an argument that if workers are not able to support themselves and their families, they are not working hard enough—is consistent with individualist explanations of poverty. Indeed, economist and New York Times columnist Paul Krugman interprets Bush’s remarks as motivated by individualist explanations of poverty consistent with Bush’s professed intellectual inclinations.<sup>211</sup> Krugman writes that Bush has expressed an affinity for conservative social analyst Charles Murray’s scholarship.<sup>212</sup> Discussing Murray’s recent book, *Coming Apart*, Krugman writes that:

[W]orking-class white families have been changing in much the same way that African-American families changed in the 1950s and 1960s, with declining rates of marriage and labor force participation. Some of us look at these changes and see them as consequences of an economy that no longer offers good jobs to ordinary workers. This happened to African-Americans first, as blue-collar jobs disappeared from inner cities, but has now become a much wider phenomenon thanks to soaring income inequality. Mr. Murray, however, sees the changes as the consequence of

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<sup>208</sup> Jim Kuhnenn, *Obama: Income Inequality is ‘Defining Challenge of Our Time,’* HUFFINGTON POST (Dec. 5, 2013), [http://www.huffingtonpost.com/2013/12/04/obama-income-inequality\\_n\\_4384843.html](http://www.huffingtonpost.com/2013/12/04/obama-income-inequality_n_4384843.html) [<http://perma.cc/FS74-HK57>] (citing President Obama’s statement that income disparity “should compel us to action” because “[w]e’re a better country than this”).

<sup>209</sup> Pethokoukis, *supra* note 205.

<sup>210</sup> Ed O’Keefe, *Jeb Bush: ‘People Need to Work Longer Hours’ Means They Need Full-Time, Not Part-Time Work*, WASH. POST (July 9, 2015), <http://www.washingtonpost.com/news/post-politics/wp/2015/07/08/jeb-bush-people-need-to-work-longer-hours-means-they-need-full-time-not-part-time-work> [<http://perma.cc/4A5T-MQZK>].

<sup>211</sup> Paul Krugman, Opinion, *The Laziness Dogma*, N.Y. TIMES (July 13, 2015), [http://www.nytimes.com/2015/07/13/opinion/paul-krugman-the-laziness-dogma.html?\\_r=0](http://www.nytimes.com/2015/07/13/opinion/paul-krugman-the-laziness-dogma.html?_r=0) [<http://perma.cc/8LJQ-QUNY>] (“Mr. Bush’s clumsy call for longer work hours wasn’t a mere verbal stumble. It was, instead, an indication that he stands firmly on the right side of the great divide over what working American families need.”).

<sup>212</sup> *Id.*

a mysterious decline in traditional values, enabled by government programs which mean that men no longer “need to work to survive.” And Mr. Bush presumably shares that view.<sup>213</sup>

Bush disputed this interpretation of his “work longer hours” remark. He argued that the remark was not an argument that workers who are having trouble supporting their families are lazy. Instead, it was an indictment of the lack of full-time jobs available in the labor market.<sup>214</sup> He argued that his comment was a measure of his concern for the “6.5 million part-time workers [who] want to work full-time.”<sup>215</sup> Thus, it seems that Bush recognized the political inadvisability of blatantly individualist explanations of poverty (and low-income), and he instead embraced structural explanations of the phenomena—arguing that “high, sustained economic growth” needed to happen in order to solve the problem of the evaporation of the livable wage.<sup>216</sup>

Moreover, in recent years, studies that endeavor to show the precise structural mechanisms that produce poverty have been met with receptive ears. For example, economist David Autor’s scholarship documents the macro forces that have combined to produce poverty in the United States.<sup>217</sup> In one well-cited paper, he says:

[T]he structure of job opportunities in the United States has sharply polarized over the past two decades, with expanding job opportunities in both high-skill, high-wage occupations and low-skill, low-wage occupations, coupled with contracting opportunities in middle-wage, middle-skill white-collar and blue-collar jobs. . . . [J]ob opportunities are declining in both middle-skill, white-collar clerical, administrative, and sales occupations and in middle-skill, blue-collar production, craft, and operative occupations. The decline in middle-skill jobs has been detrimental to the earnings and labor force participation rates of workers

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<sup>213</sup> Krugman, *supra* note 211 (discussing CHARLES A. MURRAY, *COMING APART: THE STATE OF WHITE AMERICA, 1960-2010* (2012)).

<sup>214</sup> See O’Keefe, *supra* note 210 (quoting Jeb Bush as saying: “You can take it out of context all you want, but high-sustained growth means that people work 40 hours rather than 30 hours and that by our success, they have money, disposable income for their families to decide how they want to spend it rather than getting in line and being dependent on government.”).

<sup>215</sup> Laura Meckler, *Hillary Takes Aim at Republicans in Policy Speech*, WALL ST. J. (July 13, 2015), <http://www.wsj.com/articles/hillary-clinton-economic-plan-emphasizes-growth-and-increasing-wages-1436811034> [<http://perma.cc/QW86-379U>].

<sup>216</sup> *Id.*

<sup>217</sup> See, e.g., DAVID AUTOR & MELANIE WASSERMAN, *THIRD WAY, WAYWARD SONS: THE EMERGING GENDER GAP IN LABOR MARKETS AND EDUCATION* 49 (2013) (“[T]he emerging gender gap in educational and labor market outcomes is explained in part by changes in U.S. household structures, which are themselves fomented by the declining labor market opportunities faced by non-college males.”).

without a four-year college education, and differentially so for males, who are increasingly concentrated in low-paying service occupations.<sup>218</sup>

Autor notes that middle-skill jobs have likely disappeared in the United States because they have been offshored, or because technology has made it unnecessary to hire workers to perform the job's required tasks.<sup>219</sup> He writes that middle-skill jobs are the type that "can be carried out successfully by either a computer executing a program or, alternatively, by a comparatively less-educated worker in a developing country who carries out the task with minimal discretion."<sup>220</sup> As such, these jobs have rapidly vanished from the labor market in the United States.

The thrust of Autor's oeuvre is that the jobs that pay wages that can support low- to middle-skill workers are simply not there. If these workers are poor, it is not because they are lazy, entitled, sexually promiscuous, or criminally inclined. It is because the market does not contain opportunities for them to be anything but poor. And, notably, Autor's work has been well-cited by people and organizations on all points of the political spectrum.<sup>221</sup>

Nevertheless, structural explanations of poverty have not deeply saturated the culture. In fact, a poll conducted in January 2014 by the Pew Research Center confirms that the majority of Americans believe that the poor are responsible for their poverty: sixty percent of respondents agreed with the proposition that "most people who want to get ahead can make it if they are willing to work hard."<sup>222</sup> Further, as documented in the studies cited above, those with a conservative political ideology tend to embrace individualist explanations of poverty and to defend income inequality.<sup>223</sup>

So, why is it interesting that politically conservative individuals tend to favor individualist explanations of poverty while also rejecting conceptualizing income inequality as a problem? The answer: politically conservative

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<sup>218</sup> DAVID AUTOR, CTR. FOR AM. PROGRESS/HAMILTON PROJECT, THE POLARIZATION OF JOB OPPORTUNITIES IN THE U.S. LABOR MARKET 1 (2010), <http://economics.mit.edu/files/5554> [<http://perma.cc/53SV-8VYK>].

<sup>219</sup> *Id.* at 4.

<sup>220</sup> *Id.*

<sup>221</sup> See, e.g., Kirk J. Stark & Eric M. Zolt, *Tax Reform and the American Middle Class*, 40 PEPP. L. REV. 1209, 1213-17 (2013); Christopher Uggen & Robert Stewart, *Piling On: Collateral Consequences and Community Supervision*, 99 MINN. L. REV. 1871, 1883 (2015); JAMES SHERK, THE HERITAGE FOUND., CREATING OPPORTUNITY IN THE WORKPLACE (Dec. 16, 2014), <http://www.heritage.org/research/reports/2014/12/creating-opportunity-in-the-workplace> [<http://perma.cc/M4DW-MA5K>].

<sup>222</sup> PEW RESEARCH CTR., MOST SEE INEQUALITY GROWING, BUT PARTISANS DIFFER OVER SOLUTIONS, (Jan. 23, 2014), <http://www.people-press.org/2014/01/23/most-see-inequality-growing-but-partisans-differ-over-solutions> [<http://perma.cc/FXG7-4E68>].

<sup>223</sup> See *supra* notes 201-04 and accompanying text (comparing the explanations for poverty commonly embraced among those who self-identify as liberal and conservative).

individuals have been some of the loudest champions of class-based affirmative action. Indeed, as quoted above, Justice Scalia has stated on the record that he favors class-based affirmative action.<sup>224</sup> The same is true of Justice Thomas.<sup>225</sup> It is interesting, to say the least, that persons who embrace a political ideology that has been identified as blaming the poor for their own poverty support admissions programs that give preferences to those “blameworthy” individuals.<sup>226</sup> It is interesting, to say the least, that persons

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<sup>224</sup> See *supra* notes 180-81 and accompanying text.

<sup>225</sup> Richard D. Kahlenberg, *Where Sotomayor and Thomas Agree on Affirmative Action*, CHRON. OF HIGHER EDUC.: THE CONVERSATION (Jan. 17, 2013), <http://chronicle.com/blogs/conversation/2013/01/17/where-sotomayor-and-thomas-agree-on-affirmative-action/> [http://perma.cc/2Q3K-P85R] (“[B]oth justices [Thomas and Sotomayor] favor affirmative action for low-income and working-class students of all races.”).

<sup>226</sup> Yin notes that some supporters of class-based affirmative action argue that, while racial “preferences” only indirectly target those who have been injured by racism and racial inequality (i.e., racial classifications are overinclusive because some members of the benefitted class have escaped being disadvantaged on account of race), class preferences directly target those who have been injured by class inequality. See Yin, *supra* note 105, at 257 (analyzing Kahlenberg’s argument that there is a difference between race-based affirmative action and class-based affirmative action inasmuch as “class preferences go to the actual victims of class injury”). The premise of this argument is that the poor are victims of class injury. However, the political ideology that many champions of class-conscious admissions programs embrace would argue that the poor have not been injured at all. Indeed, some iterations of the ideology would argue that if the poor have been injured, it is because they have injured themselves. See, e.g., PEW RESEARCH CTR., *supra* note 222 (stating that seventy-six percent of Republicans were of the opinion that “most people can get ahead if they are willing to work hard” (i.e., the poor injured themselves by not working hard)).

In order to resolve this apparent contradiction, one can observe that, historically, society has drawn a (usually racialized) distinction between the deserving poor and the undeserving poor. See BRIDGES, *supra* note 174, at 213-17 (explaining the shift in demographics of those receiving aid from governmental assistance programs from mostly white to mostly black). The deserving poor are those who have been conceptualized as worthy of economic assistance (from the government or private charities) because they are poor due to factors beyond their control. *Id.* The undeserving poor are those who have been conceptualized as unworthy of economic assistance because they are poor due to their own individual shortcomings. *Id.* If class-based affirmative action is thought to benefit the deserving poor—that is, those who are not blameworthy with respect to their poverty—then perhaps these programs might be understood as identifying those who actually have been injured by structural forces. The beneficiaries of class-based affirmative action are thought to be the deserving poor, who are the “actual victims of class injury.” See *supra* notes 153-54 and accompanying text. They exist in contradistinction to the undeserving poor, who are not victims of class injury and who are not imagined to benefit from class-based affirmative action.

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who embrace a political ideology that does not recognize as problematic the vast, and frequently insuperable, chasm that separates the “haves” from the “have-nots” in this country would also support admissions programs that identify income inequality as an injustice and are designed to help those victimized by it. There appears to be a tension. This Article suggests that the tension may be resolved by understanding that conservative champions of class-based affirmative action programs do not defend these programs because of the work that such programs do to help the poor and to realize economic justice. Instead, they support them because of the work that they do to deny both the legitimacy of race-based affirmative action as well as the claims that race-based affirmative action makes: a racial societal debt exists in this country, race remains a significant fact of life, race is not simply an epiphenomenon of class, and individuals can be racially unprivileged while being class privileged.

D. *The Dangers of Political Expediency, or Why Class-Based Affirmative Action is Immoral*

This Article has suggested that the reason why class-based affirmative action is so appealing to some is because it works to deny the enduring fact of racism and racial inequality. Now, some argue that the work that class-based affirmative action does to obscure and deny that there are continuing injustices wrought by race is actually an attractive aspect of such programs. Kahlenberg, for one, suggests that from the perspective of political expediency, there is

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The distinction between the deserving and undeserving poor might also explain why some conservatives support class-based affirmative action. It is not unreasonable to understand class-conscious admissions programs as antipoverty programs. Danielle Holley-Walker, *Race and Socioeconomic Diversity in American Legal Education: A Response to Richard Sander*, 88 DENV. U. L. REV. 845, 846 (2011) (“Helping low-SES people to enter higher education increase[s] social mobility and thus helps, however modestly, to reduce poverty and increase equality.”). But conservatives, historically speaking, have been highly critical of government-funded antipoverty programs. Kathleen A. Kost & Frank W. Munger, *Fooling All of the People Some of the Time: 1990’s Welfare Reform and the Exploitation of American Values*, 4 VA. J. SOC. POL’Y & L. 3, 89 (1996). Thus, one needs to resolve the contradiction of why conservatives tend to oppose antipoverty programs, but support them when they take the form of class-based affirmative action.

The answer may stem from the difference between the deserving and underserving poor. That is, conservatives may not tend to oppose all antipoverty programs—they may just oppose those that are imagined to benefit the undeserving poor, i.e., single mothers and able-bodied adults. *Id.* at 6 (“Reformers have succeeded in manipulating the categorization of deserving and undeserving poor, claiming that the proposed reforms only target welfare recipients who are undeserving: idle, shiftless, and irresponsible.”). If class-based affirmative action is an antipoverty program imagined to benefit the deserving poor, then conservative support of it may not be a contradiction at all.

something unproductive about focusing on racism and race inequality.<sup>227</sup> He argues that shifting the focus from racial injustice to class injustice will allow those interested in social justice to “get the job done”—that is, to right social wrongs—in a way that maintaining a focus on racial injustice will not. He contends that “replacing race preferences with class preferences will decrease public consciousness of race and increase public consciousness of class. For progressives, this shift has always been a political imperative.”<sup>228</sup>

Kahlenberg is not correct when he argues that progressives have always wanted to shift the focus from race to class.<sup>229</sup> But, more importantly, Kahlenberg is certainly not correct when he argues, essentially, that the ends justify the means. That is, political expediency ought not to excuse the elision of the injustices that have been visited upon racial minorities *because of their race*. And this is how one ought to respond to the accused seventh infirmity of race-based affirmative action, which argues that it is immoral, making it different from class-based affirmative action programs that arguably raise no moral issues.<sup>230</sup> The reverse is true. Class-based affirmative action is immoral insofar as it obscures racial injustices. Indeed, race-based affirmative action may be the most moral effort that society could make insofar as it reminds society about the racial injury that racial minorities have suffered. That is, there is a *moral* value to acknowledging the exact form and content of the constellation of indignities, deprivations, and injuries that has functioned to reiterate racial minorities’ subordinate political, socioeconomic, cultural, and discursive status.<sup>231</sup> Which is to say that the public *ought* to be conscious of race, racism, and racial inequality. Perhaps being unconscious of race, racism,

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<sup>227</sup> See Kahlenberg, *Class-Based Affirmative Action*, *supra* note 39, at 1063.

<sup>228</sup> *Id.*

<sup>229</sup> Derrick Bell, *Racial Equality: Progressives’ Passion for the Unattainable*, 94 VA. L. REV. 495, 517 (2008) (reviewing RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007)) (discussing the reasons why progressives “hold fiercely to their fervent hope that an approach through law will move the country toward racial justice in every important field”). *But see* SHERYLL CASHIN, *PLACE, NOT RACE: A NEW VISION OF OPPORTUNITY IN AMERICA* 15-18 (2014) (arguing that because conversations about race are divisive, we ought to seek race-neutral means of solving problems like the underrepresentation of racial minorities in elite institutions of higher learning).

<sup>230</sup> See *supra* notes 113-14 and accompanying text.

<sup>231</sup> See TRUTH AND RECONCILIATION COMM’N, 1 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORTS (1998) (detailing the gross violations of human rights that individuals sustained under the system of apartheid in South Africa and contending that by acknowledging the past, the country could move into the future with a clear conscience); *id.* at 22 (“Having looked the beast of the past in the eye, having asked and received forgiveness and having made amends, let us shut the door on the past—not in order to forget it but in order not to allow it to imprison us.”).

and racial inequality is precisely the mechanism by which they all are reproduced.<sup>232</sup> Perhaps racial unconsciousness is the height of immorality.

Moreover, if, as I have argued, race is not an epiphenomenon of class, but rather is an independent system through which advantages and disadvantages, both material and ideological, are distributed,<sup>233</sup> then one should not assume that the realization of economic justice will be simultaneous to the realization of racial justice. This is to argue that racial minorities would remain unprivileged, relatively speaking, even if income inequality is addressed satisfactorily. This is hardly an eventuality with which those interested in racial justice can live.

#### CONCLUSION

Class-based affirmative action is understood, fairly, as an effort to repair the damage caused by this country's history of racism and exclusion. However, it is quite disturbing that efforts to repair the damage caused by this country's history of racism and exclusion can only be justified by not making reference to this country's history of racism and exclusion. There is something deeply unsettling about that. More satisfying would be a jurisprudence that allows us to speak frankly about our dreadful history and how that history continues to have repercussions. Much more satisfying would be a jurisprudence that allows us to say, emphatically and often, that our *present* is dreadful in many ways, as well. We exist in a nation in which nonwhite people—black people, specifically—are poorer, sicker, more frequently incarcerated, die earlier, more likely to die violent deaths, etc., than their white counterparts. Given the intuitive injustice of those facts, we ought to develop a jurisprudence that not only unties the hands of any state actor who wants to remedy them, but actively encourages them to use their hands to build a different, more just society.

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<sup>232</sup> See *Introduction* to CRITICAL RACE THEORY, *supra* note 118, at xv-xvi (arguing that one of the consequences of rejecting race-consciousness is that “virtually the entire range of everyday social practices in America—social practices developed and maintained throughout the period of formal American apartheid—[gets put] beyond the scope of critical examination or legal remediation”).

<sup>233</sup> See *supra* notes 169-72 and accompanying text.