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# The Deserving Poor, the Undeserving Poor, and Class-Based Affirmative Action

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**THE DESERVING POOR, THE  
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CLASS-BASED AFFIRMATIVE ACTION**

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# THE DESERVING POOR, THE UNDESERVING POOR, AND CLASS-BASED AFFIRMATIVE ACTION

*Khiara M. Bridges\**

## ABSTRACT

*This Article is a critique of class-based affirmative action. It begins by observing that many professed politically conservative individuals have championed class-based affirmative action. However, it observes that political conservatism is not typically identified as an ideology that generally approves of improving the poor's well-being through the means that class-based affirmative action employs—that is, through redistributing wealth by taking wealth from a wealthy individual and giving it directly to a poor person. This is precisely what class-based affirmative action does: it takes a seat in an incoming class (a species of wealth) from a wealthy individual and gives it directly to a poor person. This Article attempts to reconcile this apparent contradiction. Interestingly, engaging in this project of reconciliation reveals very little about conservatism, but a lot about class-based affirmative action. This Article proposes that class-based affirmative action enjoys widespread support from people across the political spectrum because it is imagined to benefit the “deserving poor.” Unlike the “undeserving poor,” the “deserving poor” are those who cannot be blamed for their poverty; their impoverishment is not due to individual behavioral or character flaws, but rather to structural or macro forces well outside of an individual's control. Class-based affirmative action enjoys bipartisan political popularity because it is imagined to benefit these respectable poor people—folks who are deserving of a “leg up” in the admissions competition and deserving of programs designed to assist them, even if those programs involve a direct transfer of wealth from the wealthy to the poor. However, that political conservatives and liberals alike currently imagine class-based affirmative action to benefit the deserving poor is a reason for alarm. Alarm bells should ring because, throughout history, the categories of the deserving and undeserving poor have been racialized—and, frequently,*

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\* Professor of Law, Boston University. Thanks to Jack Beermann, Kris Collins, Alan Feld, Gary Lawson, Linda McClain, Kevin Outterson, and Kate Silbaugh for helpful comments on earlier drafts of this paper. Thanks as well to Mike Garry and Aaron Horth—and Gert Reynaert—for excellent research assistance. I am also indebted to Jenna Fegreus, Ellen Minot Frentzen, and Jennifer Robble in the BU Law Library for helping me with my numerous research requests and for making my scholarship better as a result. All errors remain my own.

*racist. To be precise, it has been difficult for people of color—black people, particularly—to access the ranks of the deserving poor. If history is a teacher, then we might expect that it will be difficult for society to continue to imagine that the beneficiaries of class-based affirmative action are the deserving poor if these class-conscious programs disproportionately benefit racial minorities. Indeed, if history is a teacher, then class-based affirmative action will lose its popularity if poor racial minorities—who have figured within the cultural imaginary as the embodiment of undeservingness—are (or are imagined to be) class-based affirmative action’s primary beneficiaries. The Article explores the case of Aid for Families with Dependent Children (AFDC) and Temporary Assistance for Needy Families (TANF) and unemployed single mothers as an example of the racist nature of deservingness. It argues that if class-based affirmative action functions to assist people of color in disproportionate numbers, it, like AFDC and TANF before it, will be reimagined to be a program that assists the undeserving poor, and its political tenability will suffer as a result.*

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## INTRODUCTION

In conservative political scientist Charles Murray's recent book, *Coming Apart: The State of White America 1960–2010*, he argues that there has been an increasing divide in “white America” between the haves and the have-nots.<sup>1</sup> This divide, he argues, threatens the country.<sup>2</sup> However, the situation is not hopeless, he contends. Murray—the W. H. Brady Scholar at the American Enterprise Institute, a libertarian think tank<sup>3</sup>—has identified class-based affirmative action as part of the solution to the nation's class divide crisis. He argues that we should “replace ethnic affirmative action with socioeconomic affirmative action. This is a no-brainer.”<sup>4</sup>

What is interesting is that Murray first began to garner national attention after he published *Losing Ground: American Social Policy 1950–1980*, a book that argued the nation would be better off if it dismantled the welfare state in its entirety.<sup>5</sup> Murray claimed that transfers—in which resources are taken from the haves and given to the have-nots—were plentiful in our society.<sup>6</sup> He lists “welfare programs,” “jobs programs,” “federal efforts to foster better health and housing among the disadvantaged,” and “Affirmative Action” as all involving some type of transfer.<sup>7</sup> However, he argues that there are many reasons for “regarding transfers with suspicion. Any compulsory transfer from one person to another person unavoidably puts a terrific burden on the rule-maker to be ‘right’ in decisions that call for very subjective, difficult judgments about who has a greater need of what, and about long-term versus short term outcomes.”<sup>8</sup> He ultimately concludes that, given the difficulty of making the “right” decision about transfers, and given that the transfers made by the welfare state often

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<sup>1</sup> CHARLES MURRAY, *COMING APART: THE STATE OF WHITE AMERICA 1960–2010*, at 11–12 (2012).

<sup>2</sup> *Id.*

<sup>3</sup> See *Charles Murray*, AM. ENTERPRISE INST., <https://www.aei.org/scholar/charles-murray/> (last visited Jan. 10, 2017).

<sup>4</sup> Charles A. Murray, *Narrowing the New Class Divide*, N.Y. TIMES (Mar. 7, 2012), <http://www.nytimes.com/2012/03/08/opinion/reforms-for-the-new-upper-class.html?ref=opinion>.

<sup>5</sup> CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY 1950–1980*, at 218 (1984). Murray continued to garner national attention after the publication of the book that he co-authored with Richard J. Herrnstein, *The Bell Curve: Intelligence and Class Structure in American Life*. In this book, he argued that it was “highly likely” that genetic inferiority explained black people's underperformance on IQ tests relative to white people. See RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 311 (1994) (“It seems highly likely to us that both genes and the environment have something to do with racial differences [in IQ].”).

<sup>6</sup> Murray, *supra* note 5, at 13.

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

<sup>8</sup> *Id.* at 205.

incentivize bad behavior, we ought not to make these transfers to reduce poverty or its effects.<sup>9</sup>

And, thus, we witness a contradiction: Murray has famously argued against transferring resources from the haves to the have-nots to help those mired in poverty. Nevertheless, he supports class-based affirmative action, a program that involves transferring resources—in this case, a seat in an incoming class—from the haves to the have-nots in an effort to help those mired in poverty.

The contradiction that Murray inhabits is worth reiterating: although many professed political conservatives like Murray have championed class-based affirmative action, political conservatism is not typically identified as an ideology that generally approves of improving the poor's well-being through the means class-based affirmative action employs—that is, through redistributing wealth by taking wealth from a wealthy individual and giving it directly to a poor person. This Article attempts to reconcile this apparent contradiction. Interestingly, engaging in this project of reconciliation reveals very little about conservatism, but a lot about class-based affirmative action.

This Article proposes that class-based affirmative action enjoys widespread support from people across the political spectrum because it is imagined to benefit the “deserving poor.” Unlike the “undeserving poor,” the “deserving poor” are those who cannot be blamed for their poverty; their impoverishment is not due to individual behavioral or character flaws, but rather to structural or macro forces well outside of an individual's control. Class-based affirmative action enjoys bipartisan political popularity because it is imagined to benefit these respectable poor people—folks who are deserving of a “leg up” in the admissions competition and deserving of programs designed to assist them, even if those programs involve a direct transfer of wealth from the wealthy to the poor.

However, that political conservatives and liberals alike currently imagine class-based affirmative action to benefit the deserving poor is a reason for pause. Indeed, it is a reason for alarm. Alarm bells should ring because, throughout history, the categories of the deserving and undeserving poor have been racialized—and, frequently, racist. To be precise, it has been difficult for people of color—black people, particularly—to access the ranks of the deserving poor. The historical tendency has been to attribute black people's poverty to their personal shortcomings. If history is a teacher, then we might expect it will be

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<sup>9</sup> *Id.* at 218.

difficult for people to continue to imagine that the beneficiaries of class-based affirmative action are the deserving poor if these class-conscious programs disproportionately benefit racial minorities. Indeed, if history is a teacher, then class-based affirmative action will lose its popularity among political conservatives *and liberals* if poor racial minorities—who have figured within the cultural imaginary as the embodiment of undeservingness—are (or are imagined to be) class-based affirmative action's primary beneficiaries, as these programs will then be understood as benefitting the undeserving poor.

This Article proceeds in three Parts. Part I begins by revealing the contradiction. It documents conservative support of class-based affirmative action, and it establishes that class-based affirmative action has been described as an antipoverty program that endeavors to provide indigent individuals the tools with which they can lift themselves out of poverty. However, class-based affirmative action endeavors to aid the indigent through means that conservatism generally regards with a hefty degree of skepticism: the direct transfer of wealth from those who have it to those who do not. Thus, conservative support for affirmative action appears to be a bit of a contradiction. Part II continues by reconciling the contradiction. It looks to the social safety net and observes that the programs that comprise this net enjoy varying levels of support. Importantly, conservatives do not oppose all programs involving direct transfers of wealth. Instead, they oppose only *some* programs that involve direct transfers. Moreover, these unpopular programs—of which AFDC, TANF, and general assistance are paradigmatic—are universally deplored, *by political conservatives and liberals alike*. This Part goes on to observe that the deserving/undeserving poor dichotomy explains this phenomenon. That is, programs that are imagined to benefit the deserving poor enjoy political support, and programs that are imagined to benefit the undeserving poor do not. This is true without regard to whether the program involves a direct transfer of wealth. This Part argues that, inasmuch as class-based affirmative action enjoys support from people across the political spectrum, this is due to it being understood as a program that benefits the deserving poor.

Part III engages in a critique of this aspect of class-based affirmative action. It shows that deservingness has always been racialized. That is, the deserving poor have always existed within the cultural imaginary as indigent white people, and the undeserving poor have always existed within the cultural imaginary as indigent people of color. This Part observes that the line that divides the deserving from the undeserving poor has shifted throughout history to keep people of color on the undeserving side of the binary, and it explores the case of

AFDC, TANF, and unemployed single mothers as an example of the shifting nature of deservingness. This Part argues that if class-based affirmative action functions to assist people of color in disproportionate numbers, it, like AFDC and TANF before it, will be reimagined to be a program that assists the undeserving poor, and its political tenability will suffer as a result. A brief conclusion follows.

Two caveats before beginning: First, the term “conservative” refers to a group with heterogeneous elements, and scholars have schematized this heterogeneity in many different ways.<sup>10</sup> Although the term may unfairly homogenize a heterogeneous group, this Article nevertheless uses the term to refer to persons who identify themselves as politically conservative or who are registered as Republicans or both.

Second, it may be important to be clear about the motivations for the ensuing critique: proponents of class-based affirmative action have suggested it is a common ground where those who are on opposing sides of the debate about race-based affirmative action can meet. For example, Richard Kahlenberg, who has been one of the loudest and most prolific champions of class-based affirmative action,<sup>11</sup> has argued it is superior to race-based affirmative action because class-conscious programs are more politically palatable than race-conscious programs. He suggests that, from the perspective of political expediency, there is something unproductive about focusing on racism and race inequality.<sup>12</sup> He argues that shifting the focus from racial injustice to class injustice will allow those interested in racial justice to right wrongs in a way that maintaining a focus on racial injustice will not.<sup>13</sup>

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<sup>10</sup> For example, Ernest Young identifies six distinct threads of conservatism: economic conservatives, libertarians, traditionalists, social/religious conservatives, neo-conservatives, and anti-communists. Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1192–95 (2002). Richard Fallon distinguishes three types of conservative ideologies, consisting of “substantive,” “methodological,” and “institutional” conservatism. Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 447–51 (2002). Robin West, on the other hand, recognizes “social conservatives,” “legal conservatives,” and “libertarian conservatives.” Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 654–58 (1990). And Brenda Cossman identifies “fiscal conservatives,” “social conservatives,” and “libertarian[s].” Brenda Cossman, *Contesting Conservatism: Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL’Y & L. 415, 431 (2005).

<sup>11</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/>.

<sup>12</sup> See Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CALIF. L. REV. 1037, 1063 (1996) (“[C]lass-based preferences provide benefits in a way that is politically productive for those concerned about inequality.”).

<sup>13</sup> See *id.*



However, this Article is prompted by the conviction that the impact of race does not decrease by simply trying to push it from our consciousness. That is, racial discourses affect our law, our politics, and our society even when we do not explicitly invoke them. Race is always there. Indeed, it seems overly optimistic to imagine that race—which, less than fifty years ago, formally determined who was and was not a member of the body politic—can become irrelevant today simply by an act of will. It seems misguided, even, to believe the mere desire to take no notice of race can rob the stories we tell about race of their historical potency. This Article critiques class-based affirmative action because of the certainty that, even though these programs of class-consciousness purport to ignore race, racial discourses will undoubtedly impact how they are received. They will inevitably shape how society understands class-based affirmative action.

Further, the ensuing critique is motivated by the sense that projects of racial obfuscation, of which class-based affirmative action is a species, are ultimately harmful. Race remains significant and determines individuals' life chances and life experiences even when we try to pay no attention to it. As such, if we are interested in producing something that we can call racial justice, the superior approach is to talk explicitly, honestly, and frequently about race. Class-based affirmative action placates us and wrongly assures us that we do not need to directly confront the horrors of our racial past and the tragedies of our racial present.

## I. REVEALING THE CONTRADICTION

### A. *Conservative Support for Class-Based Affirmative Action*

On November 5, 1996, the people of California voted into law Proposition 209, which amended the state constitution to prohibit public actors from “discriminat[ing] against, or grant[ing] 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>14</sup> The immediate and intended effect of Proposition 209 was to make race-based affirmative action illegal in the state.<sup>15</sup> Ward Connerly—a businessman, activist, and former University of California regent—is properly credited with giving

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<sup>14</sup> CAL. CONST. art. I, § 31, cl. a.

<sup>15</sup> Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 196 (1997) (“Proposition 209 amends the California Constitution so that it generally prohibits race- and gender-based affirmative action by California state agencies.”).

Proposition 209 life. In 1995, he took the reins of the campaign to end race consciousness in admissions and hiring in the state.<sup>16</sup> “Under his leadership, the campaign successfully obtained more than 1 million signatures and qualified for the November 1996 ballot. California voters passed Proposition 209 by a 55 percent to 45 percent margin.”<sup>17</sup>

As Connerly properly is credited with giving Proposition 209 life, he also properly is credited with giving Proposition 209 legs. He led efforts to pass similar initiatives banning the use of race in university admissions and hiring in Arizona, Michigan, Nebraska, and Washington.<sup>18</sup> Notably, his efforts in Michigan led to the passage of Proposal 2, which ultimately became Article I, section 26 of the Michigan Constitution.<sup>19</sup> Like Proposition 209 in California, Proposal 2 in Michigan made race-based affirmative action a violation of the state constitution.<sup>20</sup> The Supreme Court, in a 6–2 opinion in *Schuette v. BAMN*, recently held that Proposal 2 did not run afoul of the federal Constitution.<sup>21</sup>

Two additional points about Connerly deserve mention: first, it does not mischaracterize Connerly to describe him as a political conservative. Indeed, conservative groups have honored him for his political conservatism. For example, he was the recipient of the 2006 “Conservative of the Year Award” from the Conservative Forum of the Silicon Valley, the recipient of an Honorary Lifetime Membership from the College Republicans at Sacramento State University, the recipient of the “Lifetime Achievement Award” from the American Conservative Union Foundation presented at the Conservative Political Action Conference in 2007, and the recipient of the “Ronald Reagan Award for Leadership” from the California Republican Party in 1998.<sup>22</sup>

Second, although Connerly has built a career around his opposition to race-based affirmative action, he has articulated his support for class-based affirmative action. For example, he wrote a short piece after the publication of his book, *Creating Equal: My Fight Against Racial Preferences*, in which he

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<sup>16</sup> *About Mr. Ward Connerly*, AM. C.R. INST., <http://acri.org/about-ward-connerly/> (last visited Jan. 10, 2017).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *See Schuette v. BAMN*, 134 S. Ct. 1623, 1629 (2014).

<sup>20</sup> *See id.*

<sup>21</sup> *Id.* Justice Kagan recused herself from the case due to a conflict of interest arising from her work as Solicitor General. *See id.* at 1638; Adam Liptak, *Court Backs Michigan on Affirmative Action*, N.Y. TIMES (Apr. 22, 2014), <https://www.nytimes.com/2014/04/23/us/supreme-court-michigan-affirmative-action-ban.html>.

<sup>22</sup> *See About Mr. Ward Connerly*, *supra* note 16.

sought to clarify some of the positions that he has taken publicly.<sup>23</sup> He wrote then:

I do not want to “end all affirmative action”. . . . To the contrary, I have been a leading force in California, even according to some of my critics, in promoting the expansion of need-based outreach programs that are designed to benefit low-income students of all “races” in California’s underperforming elementary, middle, and high schools.<sup>24</sup>

Indeed, an article published in the *Chicago Tribune* described Connerly as proposing that “class-based affirmative action would be a much fairer method of ensuring equity.”<sup>25</sup> He said his group will attempt to “develop a workable model.”<sup>26</sup>

Connerly is not the only conservative who publicly has championed class-based affirmative action. Prior to ascending to the nation’s highest court, both Justice Scalia and Justice Thomas expressed their approval of admissions and hiring programs that evaluate candidates from socioeconomically disadvantaged backgrounds with criteria that do not privilege traditional indicia of merit<sup>27</sup> and, in so doing, give these candidates educational and job opportunities that they otherwise would not have. When Scalia was a law professor at the University of Chicago Law School, he penned an article in which he spoke favorably of class-based affirmative action. He wrote, “I do not . . . oppose—indeed, I strongly favor—what might be called . . . ‘affirmative action programs’ of many types of help for the poor and disadvantaged.”<sup>28</sup> And during Thomas’s Senate

<sup>23</sup> Ward Connerly, *Ward Connerly Writes Back*, MOTHER JONES (May 22, 2000), <http://www.motherjones.com/toc/2000/05/defending-ward-connerly>.

<sup>24</sup> *Id.*

<sup>25</sup> V. Dion Haynes, *Who Affirms King’s Dream?: 2 Civil Rights Groups Contest Means to Redress Bias*, CHI. TRIB. (Feb. 9, 1997), [http://articles.chicagotribune.com/1997-02-09/news/9702090328\\_1\\_affirmative-action-ward-connerly-american-civil-rights-institute](http://articles.chicagotribune.com/1997-02-09/news/9702090328_1_affirmative-action-ward-connerly-american-civil-rights-institute).

<sup>26</sup> *Id.*

<sup>27</sup> I describe affirmative action programs as “evaluating candidates with criteria that do not privilege traditional indicia of merit,” as opposed to describing them as simply giving “preferences,” be they racial or otherwise, because I believe that when such programs are done well, they do not simply “prefer” one racial group or one socioeconomic class over another. Instead, when done well, these programs consider overcoming disadvantage—whether that disadvantage is race-based or class-based—as the stuff of merit. These programs conceptualize a person who has surmounted racial or economic obstacles to be as meritorious as a person who has managed to do well on standardized tests and who has taken advantage of the opportunities that privilege tends to afford (i.e., extensive travel, the acquisition of more than one language, the ability to take several AP courses in high school and to participate in extracurricular activities, mastery of an instrument). Again, when done well, these programs do much more than simply “prefer” a black or Latino candidate to a white one, or a poor candidate to a middle-class or wealthy one.

<sup>28</sup> Antonin Scalia, *The Disease As Cure: “In Order to Get Beyond Racism, We Must First Take Account of Race”*, 1979 WASH. U. L.Q. 147, 156.

confirmation hearings, he repeatedly testified that he supported programs that gave employment opportunities to socioeconomically disadvantaged persons. When asked whether he thought favorably of the kinds of affirmative action programs from which he himself had benefited, he replied in the affirmative, arguing that affirmative action programs in previous eras had attempted to benefit persons of all races who were actually disadvantaged:

I think that during that era, those of us who were then the beneficiaries of what were called preferential treatment programs—I think that was the exact terminology—that it was an effort to determine whether kids had been disadvantaged, had socioeconomic disadvantages, had done very, very well in other endeavors against those odds, and I think that the law schools, that the colleges involved attempted to determine are these kids, with all those disadvantages, qualified to compete with these kids who have had all the advantages.

That is a difficult, subjective determination, but I thought that it was one that was appropriately made. One of the aspects of that is that the kids could come from any background of disadvantage. The kid could be a white kid from Appalachia, could be a Cajun from Louisiana, or could be a black kid or Hispanic kid from the inner cities or from the barrios, but I defended that sort of a program then and I would defend it today.<sup>29</sup>

Now, it is true that Connerly, Scalia, and Thomas's articulations of support for class-based affirmative action came on the heels of their disavowals of support for race-based affirmative action. Indeed, Scalia follows the sentence quoted above with the following statement:

It may well be that many, or even most, of those benefited by such [class-based affirmative action] programs would be members of minority races that the existing programs exclusively favor. I would not care if *all* of them were. The unacceptable vice is simply selecting or rejecting them *on the basis of their race*.<sup>30</sup>

And later in Thomas's testimony in the Senate, he noted that the class-conscious programs that he supported would benefit individuals in a way that was not "offensive or in a way that was strictly based on race."<sup>31</sup> He goes on to describe

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<sup>29</sup> *Nomination of J. Clarence Thomas to Be Associate Justice of the Supreme Court of the United States Hearings Before the S. Comm. on the Judiciary*, 102d Cong. 358 (1991) [hereinafter *Hearings*] (statement of J. Clarence Thomas).

<sup>30</sup> Scalia, *supra* note 28, at 156.

<sup>31</sup> *Hearings*, *supra* note 29, at 359 (statement of J. Clarence Thomas).

what he thought was wrong with a “purely” race-based affirmative action program:

I believe it . . . doesn’t say that this kid has to come from a disadvantaged background, it doesn’t say that the kid has to have had problems in life. It is race-specific, and I think we all know that all disadvantaged people aren’t black and all black people aren’t disadvantaged. The question is whether you are going to pinpoint your policy on people with disadvantages, or are you simply going to do it by race.<sup>32</sup>

Because Connerly’s, Thomas’s, and Scalia’s articulations of approval of class-based affirmative action were made when they were articulating their disfavor of race-based affirmative action, one might conclude that their support of class-based programs is disingenuous.<sup>33</sup> One might accuse them of backing

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<sup>32</sup> *Id.* at 360. It is worth noting that Justice Thomas’s *support* of policies that assist persons disadvantaged by class is inconsistent with his *opposition* to policies that assist persons disadvantaged by race. In 1987, Thomas gave an interview in which he voiced his frustration with programs that endeavored to help disadvantaged racial minorities. See Bill Kauffman, *Freedom Now II: Interview with Clarence Thomas*, REASON.COM (Nov. 1, 1987, 12:00 AM), <http://reason.com/archives/1987/11/01/clarence-thomas>. In this interview, he described his perception about the NAACP and organizations like it:

[These organizations] spend their time telling minority kids that it is hopeless out here. Why is it hopeless? Because Ronald Reagan is making it hopeless.

When Ronald Reagan is gone, why are you going to tell them that it’s hopeless? Because the government isn’t spending enough money. It will always be hopeless if that’s the reason. You don’t have any control over that. What you do have control over is yourself. They should be telling these kids that freedom carries not only benefits, it carries responsibilities. You want to be free, you want to leave your parents’ house? Then you’ve got to earn your own living, you’ve got to pay your own mortgage, pay your own rent, buy your own car, and pay for your own food. You’ve got to learn how to take care of yourself, learn how to raise your kids, how to go to school and prepare for a job and take risks like everybody else.

*Id.* There is an inconsistency here. Thomas has defended and, as head of the EEOC, implemented programs that help individuals who hail from backgrounds of socioeconomic disadvantage. However, he believes that individuals hailing from backgrounds of *racial* disadvantage ought to help themselves. It is unclear why he would not give indigent individuals the same advice that he would give racial minorities: because the poor can only control themselves, they should go earn a living, pay their own mortgage or rent, and “go to school and prepare for a job and take risks like everybody else.” *Id.*

Professor Kendall Thomas describes Justice Thomas as advocating “muscular self-help” as the means by which racial justice will be realized: racial minorities need to help themselves because no one (i.e., state actors) and nothing (i.e., law or government) has an obligation or duty to help them. See Kendall Thomas, *Reading Clarence Thomas*, 18 NAT’L BLACK L.J. 224, 236 (2004–2005) (describing Thomas as having a “vision of muscular self-help as the royal road to racial uplift in the post-civil rights era”). Yet, puzzlingly, Thomas does not champion “muscular self-help” as the means by which the poor should be lifted out of poverty.

<sup>33</sup> In fact, I have argued elsewhere that support for class-based affirmative action is oftentimes disingenuous. See Khiara M. Bridges, *Class-Based Affirmative Action, or the Lies that We Tell About the Insignificance of Race*, 96 B.U. L. REV. 55, 58 (2016). The article claims that many supporters of class-conscious

the latter programs for rhetorical reasons—because they endeavor to frame class-based programs as the more effective, less immoral, more constitutional siblings of race-based programs. Thus, the argument may be that Connerly, Scalia, and Thomas support class-based programs *not* because they really want to assist socioeconomically disadvantaged persons, but rather because class-based programs perform the work of disparaging race-based programs.

Professor Randall Kennedy has made a form of this argument. He has written that “[s]heer opportunism” explains why some members of the “right-wing” declaim their support of class-based affirmative action.<sup>34</sup> He writes:

Figures who typically evince little or no constructive sympathy whatsoever for the black poor all of a sudden become their putative champions for the limited purpose of discrediting affirmative action. My suspicion is that when that mission is accomplished, they will renege on their promise to support nonracial, class-based reform and instead adopt their more usual posture: defending the current maldistribution of wealth, opportunity, and power in America.<sup>35</sup>

While, undoubtedly, Kennedy correctly identifies the reason why *some* conservative individuals support class-based affirmative action, there is surely a contingent of supporters who do not fit that description. That is, some persons on the ideological right might genuinely support the goals and aims of class-based affirmative action—and not simply because support of such programs is a technique by which they attack the legitimacy of race-based programs.

Consider the Texas Ten Percent Plan.<sup>36</sup> The program, which guarantees that all students in Texas who graduate in the top 10% of their high school classes

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admissions programs champion these programs because they comfortingly declare, albeit implicitly, that we have entered a post-racial society where race is irrelevant. *Id.* at 59–60.

<sup>34</sup> RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW 88 (2013).

<sup>35</sup> *Id.* at 88–89.

<sup>36</sup> See H.B. 588, 75th Leg., Reg. Sess. (Tex. 1997). The Texas legislature dreamed up the Ten Percent Plan after the Fifth Circuit’s decision in *Hopwood v. Texas* made it illegal for public colleges in Louisiana, Mississippi, and Texas to consider race in admissions. See 78 F.3d. 932, 962 (5th Cir. 1996). One of the goals of the Ten Percent Plan was to ensure that, even in the absence of race-based affirmative action, racial minorities would be well represented in Texas’s more elite colleges. Michelle Adams, *Isn’t It Ironic? The Central Paradox at the Heart of ‘Percentage Plans’*, 62 OHIO ST. L.J. 1729, 1737 (2001) (noting that “[t]he effect of the *Hopwood* ruling was to prohibit the use of race-conscious, preferential affirmative action in university admissions in the state of Texas,” observing that “[t]he immediate result of the *Hopwood* decision was to decrease Black and Mexican American enrollment at the state’s most prestigious campuses,” and stating that “[i]n response to the *Hopwood* decision, Governor George W. Bush signed House Bill No. 588 into law in 1997, creating the Texas ‘Ten Percent Plan.’”). Thus, Texas’s class-conscious admissions scheme was the consequence of a successful attack on the legitimacy—and legality—of race-conscious admissions schemes.

will be admitted to the state-funded college of their choice, is widely considered a species of class-based affirmative action because it alters traditional admissions criteria so as to dramatically increase the likelihood that a poor student will be admitted to one of the state's more competitive colleges<sup>37</sup>—including the elite University of Texas-Austin and the flagship Texas A&M University. Poorer students get a “leg up” in admissions through the program's leveraging of the massive racial and socioeconomic segregation in the state. The law places the top 10% of students graduating from schools located in impoverished areas of cities as well as in poorer rural areas on equal competitive standing in admissions with the top 10% of students attending schools in moneyed suburbs.

Importantly, the Texas Ten Percent Plan only became law because Republicans in the Texas legislature in 1997 were willing to back it. The legislation prevailed by a vote of seventy-seven to sixty-eight in the Texas House, with five Republican Representatives casting votes in favor of it.<sup>38</sup> It bears highlighting that had those five legislators refused to support this species of class-based affirmative action, the law would have been defeated by a vote of seventy-two to seventy-three. Further, the legislation prevailed by a vote of twenty-seven to four in the Texas Senate, with thirteen Republican Senators casting votes in its favor. Again, had those thirteen congressmen declined to support the program, the bill never would have become law. And as a *pièce de résistance* of conservative support for Texas's experiment with class-based affirmative action, George W. Bush, the Republican then-governor of the state, signed the bill into law.<sup>39</sup>

History repeated itself in 2007 when a bill was introduced in the Texas legislature that would have significantly scaled back the Ten Percent Plan, capping the number of students admitted to public universities in the state under

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<sup>37</sup> See Nona Willis Aronowitz, *Affirmative Action's Next Phase May Target Class, Not Race*, NBC NEWS (Apr. 29, 2014, 7:40 AM), <http://www.nbcnews.com/news/education/affirmative-actions-next-phase-may-target-class-not-race-n89856> (referring to the Texas Ten Percent Plan—and similar programs adopted in California and Florida—as examples of class-based affirmative action).

<sup>38</sup> Votes in opposition to the law were cast by the rest of the House Republicans and four House Democrats. H. JOURNAL, 75th Leg., Reg. Sess. 1115 (Tex. 1997); *Legislators and Leaders*, LEGIS. REFERENCE LIBR. TEX., <http://www.lrl.state.tx.us/legeLeaders/members/membersearch.cfm> (last visited Jan. 23, 2017) (showing the Republican representatives for the 75th Legislature in Texas).

<sup>39</sup> See NICHOLAS WEBSTER, ANALYSIS OF THE TEXAS TEN PERCENT PLAN 5 (2007), [http://kirwaninstitute.osu.edu/wp-content/uploads/2012/05/Texas-Ten-Percent\\_style.pdf](http://kirwaninstitute.osu.edu/wp-content/uploads/2012/05/Texas-Ten-Percent_style.pdf) (noting that then-governor Bush signed the bill into law on May 20, 1997).

the program to half of a college's incoming freshman class.<sup>40</sup> The bill was defeated in the Texas House by a vote of seventy-five to sixty-four.<sup>41</sup> Significantly, eighteen Republicans cast votes in opposition.<sup>42</sup> Several Republican legislators who were willing to break ranks with their party went on record to explain why they opposed any diminution of the existing class-based affirmative action program. Representative Warren Chisum, a Republican representing the town of Pampa, argued that "Top 10 percent is really important to the people in rural Texas. A lot of times it's the only way we can get into the big universities."<sup>43</sup> And Republican Representative John Otto from Dayton noted that "[n]inety-three percent of the kids from my district that got into UT in Austin got in from the top 10 percent rule. Any change would have lessened their access."<sup>44</sup>

Thus, Texas was able to implement a program of class-based affirmative action because Republicans in the state legislature were willing to cast decisive votes in its support.<sup>45</sup> The case of the Ten Percent Plan demonstrates that conservative support of class-based affirmative action is not invariably an insincere mechanism used to impeach the credibility of race-based affirmative action. Instead, conservative support of class-conscious programs may be a product of a concern about the obstacles that poor individuals face that, all too often, make getting out of poverty an impossibility.

Now, one might argue that the support of class-based affirmative action that Chisum and Otto, along with the other Republican legislators who cast votes to protect the robustness of the Ten Percent program, gave in 2007 is nothing more than legislators protecting the interests of their constituency. That is, one might

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<sup>40</sup> See Polly Ross Hughes & Matthew Tresaugue, *Small-Town GOP Behind Survival of Top 10% Rule: Rural Republicans Say Law for Automatic College Admissions Is Essential for Their Students*, CHRON (May 30, 2007, 5:30 AM), <http://www.chron.com/news/article/Small-town-GOP-behind-survival-of-top-10-rule-1535211.php>.

<sup>41</sup> Scott Jaschik, *10 Percent Plan Survives in Texas*, INSIDE HIGHER ED. (May 29, 2007), <https://www.insidehighered.com/news/2007/05/29/percent>.

<sup>42</sup> H. JOURNAL, 80th Leg., Reg. Sess. 6942-43 (Tex. 2007); *Legislators and Leaders*, *supra* note 38.

<sup>43</sup> Hughes & Tresaugue, *supra* note 40.

<sup>44</sup> *Id.*

<sup>45</sup> Interestingly, Justice Thomas described the Texas Ten Percent Plan in favorable terms in his dissent in *Grutter v. Bollinger*. There, he criticized the University of Michigan Law School for its "selective" admissions program, noted that "alternative methods have historically been used for the admission of students," and described the "certificate system," under which a student automatically was admitted to a university if he graduated from a school that the university had certified. *Grutter v. Bollinger*, 539 U.S. 306, 368 (2003) (Thomas, J., dissenting). He then noted, apparently approvingly, that "[t]he facially race-neutral 'percent plans' now used in Texas, California, and Florida are in many ways the descendants of the certificate system." *Id.* at 369 (citation omitted).



claim that Chisum and Otto’s support evidences no concern about the frequently insuperable barriers that indigent folks face when trying to escape poverty; rather, it evidences their interest in pleasing their electorate. One might claim that they voted to protect the program because they sought to please those empowered to vote them in and out of office. However, consider the fact that Republican Todd Smith, who also voted against shrinking the scope of the Ten Percent Plan,<sup>46</sup> represented a district whose county seat is the city of Euless—a far from impoverished, hardly rural city where only 7% of the population lived below the poverty line in 2000.<sup>47</sup> Republican Rob Orr, who also cast a vote to protect the scope of the Ten Percent Plan, represented a district whose county seat is Burleson—a predominately white city where only 6% of the population lived in poverty.<sup>48</sup> Republican Dan Gattis, who was shown casting a vote to diminish the size of the Ten Percent Plan, later stated in the public record that he intended to vote against the diminution.<sup>49</sup> Notably, Gattis hailed from Georgetown, a city where only 7.2% of the population lived below the poverty line.<sup>50</sup> The support that class-based affirmative action received from these Republican legislators in the Texas legislature shows that conservative support was not invariably an effort to satisfy a constituency, but rather may have been a product of a concern about the difficulty that many individuals face when attempting to ascend the economic ladder.

Indeed, scholars who have theorized class-based affirmative action often describe these programs as tools with which to combat poverty, reduce income

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<sup>46</sup> H. JOURNAL, 75th Leg., Reg. Sess., at 1115–16 (Tex. 1997).

<sup>47</sup> See *Poverty Status in 1999 of Individuals*, U.S. CENSUS BUREAU: AM. FACT FINDER (2000), [https://factfinder.census.gov/faces/nav/jsf/pages/community\\_facts.xhtml](https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml).

<sup>48</sup> See *Poverty Status in the Past 12 Months for Burleson City, Tex.*, U.S. CENSUS BUREAU: AM. FACT FINDER (2007), [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_07\\_3YR\\_S1701&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_07_3YR_S1701&prodType=table).

<sup>49</sup> H. JOURNAL, 80th Leg., Reg. Sess. 6942–43 (Tex. 2007). <http://www.journals.house.state.tx.us/hjml/80r/pdf/80RDAY80FINAL.PDF>.

<sup>50</sup> See *2007 Poverty Status in the Past 12 Months for Georgetown, Tex.*, U.S. CENSUS BUREAU, AM. FACT FINDER (2007), [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_07\\_3YR\\_S1701&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_07_3YR_S1701&prodType=table). Of note, Kirk England of Grand Prairie, Patrick Haggerty of El Paso, Anna Mowery of Fort Worth, John Smithee of Amarillo, David Swinford of Dumas, and G.E. “Buddy” West of Odessa are all Republicans in the Texas House who voted against shrinking the Ten Percent Plan. See H. JOURNAL, *supra* note 49, at 6942–43. None of the areas that they represent can fairly be described as rural. Indeed, Fort Worth and El Paso are the sixteenth and twentieth most populous cities in the United States, respectively. See *Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More*, U.S. CENSUS BUREAU: AM. FACT FINDER (2015), <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

inequality, and redistribute wealth.<sup>51</sup> They describe class consciousness in admissions as a means to move opportunities to attain elite education—oftentimes a prerequisite for earning a high income and acquiring wealth—from those with class privilege to those without it. It may be helpful to note here that *race-based* affirmative action was originally imagined to be an antipoverty tool as well—functioning to move opportunities to acquire higher income and wealth from those who had enjoyed those opportunities historically to those who had been denied them by law and social practice. In a recent article, Tomiko Brown-Nagin recalls that the Equal Opportunity Act, which featured race-based affirmative action as part of a toolbox that included job training programs, legal services, and social welfare programs, was a “central . . . component of President [Lyndon B.] Johnson’s ‘War on Poverty.’”<sup>52</sup> As such, race-based affirmative action in education and employment was proffered as a tool for combating *poverty*. It was understood as an effort to move poor and working-class black people out of indigence and into the middle-class and higher socioeconomic ranks.<sup>53</sup> As race-based affirmative action was imagined to be an antipoverty tool, class-based affirmative action has been conceptualized in similar terms.<sup>54</sup>

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<sup>51</sup> See, e.g., 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 increases social mobility and thus helps, however modestly, to reduce poverty and increase equality.”).

<sup>52</sup> Tomiko Brown-Nagin, *Rethinking Proxies for Disadvantage in Higher Education: A First Generation Students’ Project*, 2014 U. CHI. LEGAL F. 433, 437–38.

<sup>53</sup> *Id.* at 439. The Court’s refusal to conceptualize race-based affirmative action as a mechanism to remedy historical societal discrimination has made it unwise to justify race-conscious programs by referencing the work they do to enable social mobility of those at the bottom of socioeconomic hierarchies. See *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 472 (1989) (rejecting the proposition that remedying the effects of past societal discrimination is a compelling governmental end that, when pursued with narrowly tailored means, allows a race-based affirmative action program to survive strict scrutiny review). Instead, race-based affirmative action must be framed as a pursuit of the educational benefits that flow from racial diversity in elite institutions of higher learning. See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). Thus, if race-based affirmative action can actually remedy the effects of this country’s history of racial disenfranchisement, it can only do so by not making any reference to this country’s history of racial disenfranchisement. 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, 655–56 (2015); see also Brown-Nagin, *supra* note 52, at 463 (“Affirmative action programs, as currently conceived and implemented, are loosely tethered to the social mobility mission for the truly disadvantaged that once motivated them. The policies touch on structural, embedded, and intergenerational inequality in only indirect, and . . . even perverse ways.”).

<sup>54</sup> Race-based affirmative action may also share another characteristic with class-based affirmative action: they both may be understood as responses to social unrest. It may be no coincidence that calls for “socioeconomic diversity” in elite institutions of higher education became more strident after income inequality and economic immobility was conceptualized within some political and popular discourses to be an issue that threatens the social order. See, e.g., *Remarks by the President on Economic Mobility*, THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY (Dec. 4, 2013), <https://www.whitehouse.gov/the-press-office/2013/12/04/remarks-president-economic-mobility> (describing income inequality as “the defining challenge of our time”). Moreover, the Occupy Wall Street movement, though ineffective in bringing about the social change that it sought, made it

Several scholars have argued that the increased interest in class-based affirmative action is a consequence of increasing recognition that income inequality has reached extreme levels and has been framed as a social problem.<sup>55</sup>

However, this reveals a bit of a contradiction: political conservatism is not typically identified as an ideology that approves of improving the lot of the poor through the means that class-based affirmative action employs—that is, through redistributing wealth by taking wealth from a wealthy individual and giving it directly to a poor person. The next section explores this issue.

### *B. Addressing Poverty: Conservative Distaste for Direct Transfers of Wealth*

It would be wrong to argue that conservatism is uninterested in the plight of the poor or in income inequality.<sup>56</sup> As one pundit notes, there are large numbers of persons on the ideological right who believe that:

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obvious that people were willing to protest, engage in civil disobedience, and disrupt society due to their dissatisfaction with the economic status quo. See Micah White, *A Unified Theory of Revolution*, OCCUPY WALL STREET (Nov. 16, 2015, 2:49 PM), <http://occupywallst.org/article/unified-theory-revolution/> (describing Occupy Wall Street as “a constructive failure”). Just as class-based affirmative action may be understood as a safety valve for the social pressure created by widespread dissatisfaction with the current economic landscape, race-based affirmative action might be similarly understood as a safety valve for the social pressure created by widespread dissatisfaction with the racial landscape in the 1960s. See Richard Delgado & Jean Stefancic, *California’s Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521, 1582–83 (2000) (observing that sociologist Jerome Karabel argued that the increase in black persons admitted to public universities in California in the late 1960s “was a direct product of the adoption—under the pressure of the riots that shook America’s cities in 1967 and 1968—of strong affirmative action policies”). While noticing that these changes occurred after the Montgomery bus boycott, but shortly after the 1967 riots in Newark and Detroit and the 1968 riots after Martin Luther King, Jr.’s assassination, Karabel conjectured “that it was not so much the civil rights movement’s moral claims as the palpable threat to existing order that produced the softening of official attitudes at the University of California.” *Id.*; see also Deborah C. Malamud, *Values, Symbols, and Facts in the Affirmative Action Debate*, 95 MICH. L. REV. 1668, 1673 (1997) (“The initial impetus for affirmative action was the urban racial unrest of the late 1960s and early 1970s, which generated a ‘discourse of crisis management with which affirmative action or other normally risky, race-targeted measures could be advocated by political and business elites.’”). Malamud went on to say that “affirmative action was a white elite response to the urban riots, especially among leaders within the Johnson administration who, like Johnson himself, refused to see the use of overwhelming force as the solution.” *Id.*

<sup>55</sup> See, e.g., Catherine Hill, *Increasing Socioeconomic Diversity in American Higher Education*, in THE FUTURE OF AFFIRMATIVE ACTION: NEW PATHS TO HIGHER EDUCATION DIVERSITY AFTER FISHER V. UNIVERSITY OF TEXAS 226, 226 (Richard D. Kahlenberg ed., 2014) (“Greater access to higher education for low-income students would help moderate the increase in income inequality because of the economic returns to education beyond high school.”); Richard Sander & Aaron Danielson, *Thinking Hard About “Race-Neutral” Admissions*, 47 U. MICH. J.L. REFORM 967, 1016 (2014) (“Rising economic inequality . . . has increased pressure for elite colleges to increase [socioeconomic] diversity from both the public and intellectuals.”).

<sup>56</sup> It is true, however, that the most articulate defenses of income inequality have come from those on the political right. See, e.g., Finis Welch, *In Defense of Inequality*, 89 AM. ECON. REV., May 1999, at 1, 1 (“[G]rowing inequality has created opportunities that have been exploited by many and that the gains are not

American society should be more egalitarian. They differ with the liberals only in the kind of measures they would have government take to address inequality. Where the liberals would increase taxes to fund universal health care and pensions and welfare, the conservatives would increase only some taxes, means-test entitlements, spend more money on education, and try to arrest through government action the erosion of the two-parent family.<sup>57</sup>

Additionally, one could believe that poverty is a problem that ought to be addressed, but embrace conservatism because one believes that private individuals and institutions—not the government—should determine whether, when, and how to care for the poor.<sup>58</sup>

Conservatism tends to argue that when the government attempts to reduce poverty or inequality by directly transferring wealth from the wealthy to the poor, these efforts actually reduce economic outputs—a result that is bad for everyone, rich and poor alike.<sup>59</sup> Conservatism embraces the possibility that as

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restricted to the traditional elite.”); *see also* JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY* 106 (2012) (describing a view characteristic of the “political right” that conceptualizes “incentives [as] essential for making an economy work, and inequality [as] the inevitable consequence of any incentive system, since some will produce more than others”); Richard B. Freeman, (*Some Inequality Is Good for You*, in *THE NEW GILDED AGE: THE CRITICAL INEQUALITY DEBATES OF OUR TIME* 63, 63–64 (David B. Grusky & Tamar Kricheli-Katz eds., 2012) (observing that “[e]conomists look favorably on inequality because economic analysis stresses that inequality creates incentives that induce people to work hard, invest in skills, and choose work activities where the economy most needs labor” and noting that “[e]conomists defend inequality/incentives as virtuous because it motivates people to undertake the activities that society wants”); *Does U.S. Economic Inequality Have a Good Side*, PBS NEWSHOUR (Oct. 26, 2011, 12:00 AM), [http://www.pbs.org/newshour/bb/business-july-dec11-makingense\\_10-26/](http://www.pbs.org/newshour/bb/business-july-dec11-makingense_10-26/) (interviewing Professor Richard Epstein, who describes inequality as “an incentive for people to produce and to create wealth” and as a “wonderful force for innovation”); Thomas A. Garrett, *U.S. Income Inequality: It's Not So Bad*, FED. RESERVE BANK OF ST. LOUIS (2010), <https://www.stlouisfed.org/Publications/Inside-The-Vault/Spring-2010/US-Income-Inequality-Its-Not-So-Bad> (“Different incomes reflect different productivity levels. The unconstrained opportunity for individuals to create value for society—and the fact that their income reflects the value they create—encourages innovation and entrepreneurship.”).

<sup>57</sup> *See* Matthew Continetti, *About Inequality*, WKLY. STANDARD (Nov. 14, 2011), [http://www.weeklystandard.com/articles/about-inequality\\_607779.html](http://www.weeklystandard.com/articles/about-inequality_607779.html).

<sup>58</sup> *See id.* (denying that the “government’s purpose is to redress inequalities of income,” declaring that “[i]nequalities of condition are a fact of life” and that “[s]ome people will always be poorer than others,” but concluding that “human altruism will always seek to alleviate the suffering of the destitute”).

<sup>59</sup> Professor Richard Epstein recently explained why he believes that the means for addressing poverty that liberals typically champion—directly transferring wealth from the rich to the poor through tax-supported safety net programs—are actually bad for the poor. *See Does U.S. Economic Inequality Have a Good Side?*, *supra* note 56. He believes that direct transfers through taxation dramatically reduce production, while very little of the money collected through taxation gets distributed to the poor:

the wealthy get wealthier, the poor will also be made better off. As economist Richard Freeman explains:

[E]fforts to reduce inequality below what the market produces [costs] society in terms of output. The efficiency-equity trade-off creates a choice between lower output and a more desirable distribution of income and higher output and a less desirable distribution. *If the gain in output from higher inequality is sizeable, the rate of poverty could be lower in a high-inequality society than in a low-inequality society.*<sup>60</sup>

Similarly, economist Joseph Stiglitz explains:

While different people may differ in how much efficiency one would be willing to give up to get more equality, in the view of the Right the price we have to pay for any more equality in America is just too great. Indeed, it's so high that even the middle and the bottom, especially those who depend on government programs, would likely suffer; with a weaker economy, incomes for all would be down, tax revenues would be lower, and government programs would have to be cut.<sup>61</sup>

Thus, those on the political right tend to argue that poverty is best addressed by strengthening the economy so that even those who are poor are made better off. However, when they concede the necessity of direct efforts to address poverty—efforts that consist of assisting the poor directly and not indirectly (i.e., through strengthening the economy)—they posit that the most defensible efforts are those that do not make wealthier individuals substantially worse off. As Garrett proposes, “[s]ound economic policy to reduce poverty would lift people out of poverty (increase their productivity) while not reducing the well-being of wealthier individuals. . . . [P]ublic policy should encourage people to move up the income distribution and not penalize them for having already done so.”<sup>62</sup> Hence, we might conclude that conservatism is most supportive of antipoverty

You can tell the difference between a liberal and conservative by the following test. A liberal believes that changes in taxes have very little effect on production, but huge effects favorable on distribution.

Folks like myself believe it's exactly the opposite. Very high tax rates or even small changes in taxes have very adverse effects on production, and they do very little to produce redistribution, because the money gets dissipated and taken away through the political process in the ways that even the most ardent supporters of redistribution will not like.

*Id.*; see also Garrett, *supra* note 56 (arguing that “a wary eye should be cast” on efforts to redistribute wealth, like taxes, because “[r]edistribution of wealth increases the costs of entrepreneurship and innovation, with the result being lower economic growth for everyone”).

<sup>60</sup> Freeman, *supra* note 56, at 67 (emphasis added).

<sup>61</sup> See STIGLITZ, *supra* note 56, at 106.

<sup>62</sup> Garrett, *supra* note 59.

programs that improve the comfort and security of the poor while avoiding diminishing the welfare of the wealthy.

### C. Class-Based Affirmative Action as a Direct Transfer of Wealth

Yet, class-based affirmative action cannot be understood as programs that make poorer individuals better off without reducing the wellbeing of wealthier individuals. Quite the contrary, these programs alter schools' admissions standards such that a spot in an entering class that would have gone to a wealthier candidate can go to a poorer candidate. This has certainly been the case in Texas under the state's Ten Percent Plan. Observers have noted that academically weaker students who graduate in the top 10% of academically weaker high schools (read: high schools in poorer neighborhoods) get admitted to the state's flagship universities while academically stronger students who do not graduate in the top ten percent of academically stronger high schools (read: high schools in wealthier neighborhoods) are denied admission.<sup>63</sup> Essentially, poor students graduating in the top deciles of their high school classes are "taking the seats" of wealthier students graduating in the second and third deciles of their classes.<sup>64</sup> These wealthier students graduating in the second and third deciles of their high school classes likely would have been admitted to Texas's most elite institutions in the absence of the statewide, class-based affirmative action program.<sup>65</sup>

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<sup>63</sup> See Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 TUL. L. REV. 1767, 1820 (2004) ("There are many students in the second ten percent and below with strong test scores and strong high school curricula who would reasonably be predicted to outperform students in the top ten percent with low test scores and weaker high school curricula.")

<sup>64</sup> Tung Yin has made a similar point to dispute the claim that class-based affirmative action is unlike race-based affirmative action programs because the latter generates the sense that those who have been excluded have been unjustly harmed while the former do not generate that same sense. See Tung Yin, *A Carbolic Smoke Ball for the Nineties: Class-Based Affirmative Action*, 31 LOY. L.A. L. REV. 213, 257–58 (1997). He offers a hypothetical in which a white student, Jason, loses a spot in an incoming class to a black student, Benjy, pursuant to a race-based affirmative action program. *Id.* at 257. He then changes the hypothetical into one in which Jason is a wealthier student and Benjy is poor. *Id.* Should Jason be rejected, and Benjy admitted, pursuant to 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. "[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." *Id.*; see also Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913, 1939 (1996) (quoting a critic of class-based affirmative action who asked, "[w]ill 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 socioeconomically preferable rather than racially preferable?").

<sup>65</sup> See SHERYLL CASHIN, PLACE, *NOT RACE: A NEW VISION OF OPPORTUNITY IN AMERICA* 68 (2014) (noting that Amherst College, which considers the socioeconomic status of applicants for admission, "puts a substantial number of academic 1's on its wait list"—academic 1s that virtually would have been guaranteed

Now, we ought to be skeptical of claims that affirmative action programs, whether class-based or race-based, allow poor students or racial minority students to “take the seats” of wealthier students or nonminority students. Language suggesting that poor or minority persons “take” wealthier or nonminority persons’ seats implies wealthier or nonminority persons owned those seats—that those seats were their property or their entitlement. The reality, of course, is that no one is entitled to any seat in an incoming class. The contingent criteria that admissions offices establish are responsible for the allocation of seats in an incoming class. It deserves underscoring that those criteria are *contingent*; wealthier students or nonminority students do not have a property interest in the traditional criteria that schools have used historically to determine merit. Thus, if an admissions office (or state) decides that seats in an incoming class ought to be allocated based on socioeconomic disadvantage, then the seat that a poor student gets is *her* spot. She has not taken anything from anyone.

Nevertheless, opponents of race-based affirmative action can be accused of conceptualizing race-blind admissions criteria as their property right and the seat in an incoming class that *might* have gone to them if an admissions office had used such criteria as “their” seat.<sup>66</sup> Although this thinking is seriously flawed, it certainly has been embraced in the context of race-conscious admissions programs.<sup>67</sup> In the interest of consistency, this Article similarly conceptualizes seats in an entering class as a species of private property in the class-based affirmative action context, proffering that a wealthier student has a property interest in class-blind admissions criteria and the seat that might have gone to her pursuant to that criteria as “hers” in some non-negligible sense. It is worth repeating that this Article embraces this conceptualization in the context of class-based affirmative action only in the interest of being consistent with the discourse surrounding race-based affirmative action.

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admission if the institution did not implement a program of class-based affirmative action—and noting that one of the college’s leaders says that “any institution serious about racial and socioeconomic diversity has ‘to be willing to make that sacrifice’”).

<sup>66</sup> See, e.g., Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 429–30 (2014) (arguing that Abigail Fisher, who challenged the constitutionality of University of Texas-Austin’s race conscious admissions criteria after she was not admitted to the school, had a “sense of entitlement to admission at a flagship state university that receives thousands of applications every year” and describing Fisher as thinking, “[i]f an unqualified nonwhite person had not been unjustly awarded my spot, I surely would have successfully claimed what was rightfully mine”).

<sup>67</sup> See *id.*

Thus, inasmuch as class-based affirmative action might be conceptualized as an antipoverty program that seeks to improve the prospects of the poor by directly transferring wealth (in the form of a seat in the incoming class of an elite institution) from the wealthy to the poor, conservative support of these programs seems a bit contradictory. However, while it may be somewhat valuable to identify the contradictory nature of conservative support of class-based affirmative action, most of the value is in reconciling the contradiction. The next Part begins the task of reconciliation.

## II. RECONCILING THE CONTRADICTION

### A. *The Varying Levels of Support for Safety Net Programs*

We might begin by noting that one overstates the case if one claims that conservatism is categorically opposed to antipoverty mechanisms that function to transfer wealth directly from the haves to the have-nots. Now, it is true that support of the welfare state—the aim and intention of which is to redistribute wealth to improve the comfort and safety of the poor—is strongest among those who have lower incomes, are young, and are nonwhite,<sup>68</sup> and people with these characteristics tend to identify with liberal political parties;<sup>69</sup> the corollary to this

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<sup>68</sup> See Yehekel Hasenfeld & Jane A. Rafferty, *The Determinants of Public Attitudes Toward the Welfare State*, 67 SOC. FORCES 1027, 1035 (1989) (observing that support of the welfare state “is stronger among those who are economically vulnerable, that is, persons with low income, nonwhite, women, and of younger age”). Scholars have proposed that self-interest explains why those who are economically vulnerable are more supportive of the welfare state: the vulnerable understand that, due to their vulnerability, they could come to need to rely on the safety net. *Id.* at 1041 (noting that those who are “more likely to benefit from the welfare state tend to be more supportive of it”). *But see* Martin Gilens, “Race Coding” and White Opposition to Welfare, 90 AM. POL. SCI. REV. 593, 594 (1996) (“[T]he association of economic status and welfare attitudes is quite modest; many poor Americans oppose welfare, and many who are well off support it, despite their apparent self-interest in cutting welfare spending.”). However, theories of self-interest do not explain racial minorities’ support of the welfare state, as those who are nonwhite tend to be supportive of the safety net and its programs without respect to their socioeconomic status. See Hasenfeld & Rafferty, *supra*, at 1043 (stating that “support of the welfare state by blacks clearly transcends social status as measured by income and education, because even upper income blacks are more supportive of the welfare state than their white counterparts” and concluding that this support is “related to the perceived disadvantaged position of blacks and the shared recognition of the importance of government in protecting their rights”).

<sup>69</sup> See A DEEP DIVE INTO PARTY AFFILIATION, PEW RES. CTR. (2015), <http://www.people-press.org/2015/04/07/a-deep-dive-into-party-affiliation/> (showing that “Democrats hold advantages in party identification among blacks, Asians, Hispanics, well-educated adults and Millennials”); 2014 PARTY IDENTIFICATION DETAILED TABLES, PEW RES. CTR. (2015) [hereinafter DETAILED TABLES], <http://www.people-press.org/2015/04/07/2014-party-identification-detailed-tables/> (showing that while 35% of those polled with incomes below \$30,000/year identified as Democrat, only 17% of those polled with similar incomes identified as Republican, and showing that the percentage of persons identifying as Republican generally increases as income increases). Of course, those with lower incomes, racial minorities, and the young do not comprise the entirety of



proposition, of course, is that support of the welfare state is not as strong among persons ascribing to conservative political ideologies. It is also true that persons are more likely to oppose the welfare state when they believe that poverty is caused by individual moral, personality, or behavioral deficiencies—as opposed to macro, institutional, or structural processes;<sup>70</sup> moreover, persons who attribute poverty to individual failures, as opposed to structural failures, are more likely to embrace conservatism.<sup>71</sup> The conclusion that one logically can draw

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the Democratic Party's voting base. See DETAILED TABLES (showing that 25% of white persons polled, 34% of persons polled between the ages of fifty and sixty-eight, 33% of people between the ages of sixty-nine and eighty-six, and 29% of persons polled with incomes above \$150,000/year identified as Democrat). And, of course, many persons with lower incomes, who are young, and who are nonwhite do embrace conservatism. See *id.* (showing that 5% of black persons polled, 13% of "Hispanics" polled, 18% of persons polled between the ages of eighteen and thirty-three, and 17% of persons polled with incomes below \$30,000 identified as Republican).

<sup>70</sup> See Gilens, *supra* note 68, at 594 (citing a study demonstrating that "respondents with a greater commitment to individualist beliefs express greater opposition to welfare").

<sup>71</sup> See Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311, 383 (2008) (citing studies that demonstrate that, with respect to the causes of poverty, "[c]onservatives 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" (quoting Gail Sahar Zucker & Bernard Weiner, *Conservatism and Perceptions of Poverty: An Attributional Analysis*, 23 J. APPLIED SOC. PSYCHOL. 925, 940 (1993)); Andrea Bobbio, Luigina Canova & Anna Maria Manganelli, *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"); Catherine Cozzarelli, Anna V. Wilkinson & Michael J. Tagler, *Attitudes Toward the Poor and Attributions for Poverty*, 57 J. SOC. ISSUES 207, 210 (2001) (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 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"); Daniel J. Hopkins, *Partisan Reinforcement and the Poor: The Impact of Context on Explanations for Poverty*, 90 SOC. SCI. Q. 744, 749 (2009) ("Republicans and Democrats have sent consistent and distinctive messages about the causes of poverty for decades, with the Democrats more likely to cite structural explanations." (citation omitted)).

Interestingly, one study shows that the best predictor of whether an individual will embrace individualist or structuralist explanations of poverty is whether he or she lives in a community that is predominately Republican or Democratic. See *id.* at 745–46 ("Local partisanship's influence is . . . the single most potent contextual predictor of attributions about poverty, and is a stronger predictor than education or income."); *id.* at 760 (observing that the political context in which an individual lives "can outweigh explanations [of why individuals attribute poverty to individualist or structuralist causes] that are commonly cited in past work,

from these two premises is that those who are more likely to oppose the welfare state are those who embrace conservatism.<sup>72</sup> But, as a general matter, Americans tend to be supportive of the wealth-redistributing welfare state. Indeed, one study calculates the percentage of Americans who have indicated support of the welfare state at 70%.<sup>73</sup> If this number is accurate, it follows that many politically conservative individuals are supportive of this country's social safety net and the wealth redistribution that the safety net effects.

Yet, it is also accurate to observe that the programs that comprise the safety net are not equally favored. Some safety net programs enjoy widespread support from persons across the political spectrum. Study after study has shown that Americans, as a general matter, support public assistance programs that help children, the disabled, and the elderly.<sup>74</sup> Indeed, the Social Security program, which provides an income to those at retirement age, is one of the most politically popular safety net programs.<sup>75</sup> Further, the public is largely in favor of government spending on education and healthcare.<sup>76</sup>

In sharp contrast, however, programs that cannot be understood as direct spending on education or healthcare and that are not imagined as benefiting children, the disabled, or the elderly—programs like Temporary Assistance for Needy Families (TANF), its predecessor, Aid for Families with Dependent

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including respondents' incomes, education, and religious affiliations"). The individual will likely attribute poverty to individual inadequacies if she lives in a predominately Republican community, and she will likely attribute poverty to structural forces if she lives in a predominately Democratic community. *See id.* at 745–746, 760.

<sup>72</sup> *See* Gilens, *supra* note 68, at 595 (noting that “conservatives are more likely to oppose welfare than are liberals”).

<sup>73</sup> *See* Hasenfeld & Rafferty, *supra* note 68, at 1028 (“[I]t is clear that from 1935 to 1975 and beyond, a majority of the American public (approximately 70%) have endorsed the principle of government responsibility to support the needy and the unemployed.”).

<sup>74</sup> Jennifer L. Christian, *When Does Public Opinion Matter?*, 35 J. SOC. & SOC. WELFARE, Mar. 2008, at 133, 134 (“Numerous public opinion polls have illustrated that Americans support programs that provide basic services to needy children and the elderly”); Hasenfeld & Rafferty, *supra* note 68, at 1028 (“There is strong endorsement of government assistance to the disabled, elderly, and children . . .”).

<sup>75</sup> *See* Christian, *supra* note 74, at 139, 144 (noting that “[a]n overwhelming majority of Americans in the 1990s supported the Social Security system and believe it is one of the most important government programs,” stating that “when Social Security was presented as a policy in need of change, the public appeared to react with outrage,” and noting that in 2002, the percentage of Americans who expressed support of Social Security was 60%); *id.* at 148 (“[T]here is no significant difference in attitudes between Republican and Democratic identifiers regarding spending preferences toward Social Security.”); Greg M. Shaw, *Changes in Public Opinion and the American Welfare State*, 124 POL. SCI. Q. 627, 634 (2009–2010) (noting that a 2008 public opinion survey showed that 58% of respondents believed that the government was spending too little on Social Security).

<sup>76</sup> *See* Hasenfeld & Rafferty, *supra* note 68, at 1028 (noting the broad “support for such programs as social security and health care”).

Children (AFDC), and general assistance programs<sup>77</sup>—are widely abhorred.<sup>78</sup> Moreover, they are widely abhorred across party lines.<sup>79</sup> As professor of social work William Epstein has stated quite powerfully,

Not only are Americans antagonistic to welfare narrowly defined but the antagonism is consistent through almost every political division of the nation. Most notably, the poor and the wealthy, blacks and whites, men and women, union and nonunion households, and the variety of ethnic groups share in the same hostile attitudes.<sup>80</sup>

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<sup>77</sup> General assistance, or general relief, refers to locally-funded and locally-administered programs that provide financial assistance to indigent individuals who are ineligible for benefits from other federal and state safety net programs. *See, e.g., General Assistance or General Relief*, CAL. DEP'T OF SOC. SERVS., <http://www.dss.cahwnet.gov/cdssweb/PG132.htm> (last visited Apr. 5, 2017) (“The General Assistance or General Relief (GA/GR) Program is designed to provide relief and support to indigent adults who are not supported by their own means, other public funds, or assistance programs.”).

<sup>78</sup> *See* MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY 17, 28 (1999) (noting that AFDC, TANF, and general assistance programs are conceptualized as the “quintessential” welfare programs and showing that 63% of people polled expressed their belief that the government should cut spending on “welfare,” and 71% of those polled favored cutting spending on “people on welfare”).

<sup>79</sup> *See, e.g.,* Christian, *supra* note 74, at 151 (“[T]he American public, across partisan identifiers, was less supportive of welfare spending in comparison to other aspects of the U.S. welfare state.”); William M. Epstein, *Cleavage in American Attitudes Toward Social Welfare* 31 J. SOC. & SOC. WELFARE, Dec. 2004, at 177, 180 (“The attitude differences toward welfare [narrowly defined as AFDC and TANF], that is, cleavage, between rich and poor men, women, blacks and whites, between poor and wealthy union and nonunion households, and among ethnicities are typically small, theoretically insubstantial, or both. . . . Except occasionally, all groups consistently preferred . . . limiting welfare payments, the stringent reform measures of 1996, and attitudes hostile toward welfare recipients.” (emphasis added)); Gilens, *supra* note 68, at 593–94 (“Education, health care, and benefits for the elderly receive nearly unanimous support among the U.S. public . . . . Programs such as [AFDC], General Assistance, and Food Stamps, all of which offer assistance directly to poor families and individuals, are the least popular components of the U.S. welfare state.”); *id.* at 597 (observing that “[o]pposition to welfare [narrowly defined] . . . cuts across partisan and ideological lines . . .”). But the Supplemental Nutrition Assistance Program (“SNAP,” formerly known as “food stamps”) is a bit of a puzzle because the program enjoys wide support even though able-bodied adults are eligible for it. *See* Michael W. Long et al., *Public Support of Policies to Improve the Nutritional Impact of the Supplemental Nutrition Assistance Program (SNAP)*, 17 PUB. HEALTH NUTRITION 219, 220 (2014) (“Seventy-seven per cent of [those polled] believed that federal spending on SNAP should be increased (48%) or maintained (29%) . . .”). The poll also showed that although fewer Republicans than Democrats supported SNAP, the level of support among Republicans was still quite significant. *See id.* (showing that “88% of Democrats believed that federal spending [on SNAP] should be increased or maintained compared with 81% of Independents and 61% of Republicans”). *But see* Gilens, *supra* note 68, at 594 (describing food stamps as one of the “least popular components of the U.S. welfare state”).

<sup>80</sup> Epstein, *supra* note 79, at 195–96. While TANF, AFDC, and general assistance welfare programs are universally reviled, conservatives tend to revile these programs more than their liberal counterparts. *See* Christian, *supra* note 74, at 148 (“Democrats have consistently more liberal attitudes toward government spending on welfare policy . . . . Democrats are nearly twice as likely to believe the government is spending too little on welfare.”); Gilens, *supra* note 68, at 595 (observing that “research has shown that Republicans express greater opposition to welfare [narrowly defined] than do Democrats” and noting that “[s]imilarly, conservatives are more likely to oppose welfare than are liberals”). Interestingly, conservatives tend to show strong support

*B. Theorizing the Uneven Support for the Social Safety Net: The Deserving and Undeserving Poor*

Scholars have offered a variety of explanations for why the programs that constitute the social safety net enjoy widely varying levels of support. Some have theorized that the form in which a safety net program gives assistance impacts its political popularity, with programs that give assistance in kind, or in the form of goods or services, being more acceptable than programs that give assistance in cash.<sup>81</sup> The idea is that it is impossible, or more difficult, for beneficiaries to abuse or waste in kind assistance.<sup>82</sup> Thus, these programs, of which the Supplemental Nutrition Assistance Program, or SNAP (formerly known as food stamps), and Medicare/Medicaid are examples, are popular because the public believes they are less susceptible to fraud and more likely to benefit those who are truly in need of help.<sup>83</sup>

Other scholars have theorized that the contributory or noncontributory nature of a safety net program influences its political popularity, with programs to which beneficiaries have contributed directly enjoying more support than those to which beneficiaries have only indirectly contributed or not contributed at all.<sup>84</sup> Thus, for example, the elderly beneficiaries of the Social Security program have contributed more directly to the program, through payroll contributions, than the indigent beneficiaries of TANF—who may have only contributed to TANF through sales taxes or other state and federal taxes. The theory is that, because the contributory nature of programs like Social Security makes it easy to conceptualize them as similar to the widely-accepted social convention of insurance, and because these programs are consistent with economic

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for government spending in aid of the poor through the tax code. *See Shaw, supra* note 75, at 651 (“Perhaps ironically, conservatives have bought into a different expression of a welfare state, one implemented through the tax code. Whether in the form of child tax credits . . . or the EITC, a parallel welfare state has grown up that cuts an impressive path across the landscape of federal spending.” (footnote omitted)).

<sup>81</sup> *See, e.g., Shaw, supra* note 75, at 634–35 (discussing the fact that, in 2007, the food stamps program—which is administered in such a way that beneficiaries can only use the benefits on food items—enjoyed more popularity than TANF, despite that the fact that the government spends twice as much on the former than it does on the latter, and noting that Medicaid—which is administered by reimbursing providers for the services that they provide to beneficiaries—also enjoys substantial public support).

<sup>82</sup> *See id.* at 634 (“Transfer programs that do not appear to lend themselves to widespread misuse by the poor tend to enjoy substantially stronger support than those offering cash grants.”).

<sup>83</sup> *See id.* at 635 (“Beyond health care being a privileged dimension of social provision, part of Medicaid’s political strength probably derives from the facts that recipients cannot spend Medicaid dollars simply as they see fit and that funds go directly to medical providers . . .”).

<sup>84</sup> *See Hasenfeld & Rafferty, supra* note 68, at 1032 (“Contributory programs such as social security and unemployment compensation are structurally distinct in that entitlement to their benefits is based solely on one’s active participation in the labor market and an automatic payroll contribution to the program.”).

individualism (which asserts that one ought to receive only those economic rewards that one has earned), they are more politically palatable than other safety net programs that do not have these features.<sup>85</sup>

Still other scholars have theorized that the consequences that a safety net program is imagined to produce influence its political popularity, with programs that are thought to produce negative social effects being most out of favor. Thus, the public does not support welfare programs that are thought to create disincentives to working in the labor market, that make marriage an economically disadvantageous choice, or that incentivize childbearing outside of marriage. In the cultural imaginary, AFDC and TANF are paradigmatic examples of such programs.<sup>86</sup> On the contrary, those programs that are believed to avoid producing these negative effects, like Social Security or Medicare/Medicaid, are popular among the public.<sup>87</sup>

However, the literature's most ubiquitous theory that explains the differing levels of support enjoyed by safety net programs is the theory of the deserving and undeserving poor.<sup>88</sup> According to this theory, programs to which the public

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<sup>85</sup> See *id.* (stating that the legitimacy of Social Security and unemployment compensation “is very broad, is well-anchored in the insurance metaphor . . . and is consonant with the principle of economic individualism” (citation omitted)).

<sup>86</sup> See Christian, *supra* note 74, at 139 (citing studies that show that AFDC was thought to do “more harm than good,” encourage “the break up of the family,” and “discourage[] the work ethic” (quoting R. Kent Weaver, Robert Y. Shapiro & Lawrence R. Jacobs, *The Polls—Trends*, PUB. OPINION Q. 606, 611 (1995))).

<sup>87</sup> See *id.* (noting that large swaths of the population throughout history have conceptualized the Social Security program as an important component of the welfare state).

<sup>88</sup> See MICHAEL B. KATZ, *THE UNDESERVING POOR: AMERICA'S ENDURING CONFRONTATION WITH POVERTY* 86–87 (2d ed. 2013) (stating that AFDC became unpopular when it was thought to benefit the undeserving poor, but that other programs—like Social Security for widows, Supplemental Social Security, Medicare and Medicaid, federal housing programs, nutritional grants to women and children with infants, food stamps, the EITC, and child care tax credits—have been popular because they are imagined to benefit the deserving poor); Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 819–25 (2007) (arguing that, when first proposed, the EITC was framed as a program that would benefit the undeserving poor and was politically unpopular for that reason, and asserting that the only way that the EITC could become politically palatable was to “sell” it as a program that would assist the deserving poor); 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, 23 (1996) (describing AFDC as a program that the public conceptualized as serving the undeserving poor and, thus, became “the target of conservative reformers,” while other programs that the public conceptualized as benefiting the deserving poor, like Social Security, SSI, and food stamps, “have fared much better”); Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1526–28 (1991) (analyzing Chief Justice Rehnquist's opinion in *Jefferson v. Hackney*, in which the Court upheld Texas's AFDC program over an equal protection challenge, and theorizing that Rehnquist conceptualized AFDC as benefiting the undeserving poor while conceptualizing other programs that assisted the “sick and elderly” as benefiting the deserving poor); Rachel M. Schulman, *Welfare Reform: Fact or Fiction?*, 20 SETON HALL LEGIS. J. 169, 174 n.34 (1996) (“The recipients of SSI were classified as

shows widespread opposition are those that are imagined to assist the undeserving poor; the programs that the public defends and champions are those that are imagined to assist the deserving poor.

The concept of the deserving poor posits that there are some who are poor through no fault of their own.<sup>89</sup> They are indigent because of unfortunate or inevitable circumstances—because they were born disabled or became disabled (through an accident that was in no way attributable to recklessness or negligence on their part), because they have become too old to work,<sup>90</sup> because they were stricken with an illness that robbed them of their savings or their ability to earn a living, etc. The deserving poor are mired in poverty because of forces that are much larger and more powerful than they are.

The macro forces that impoverish the deserving poor might also be identified as *structures* that force individuals into poverty. As Thomas Ross has observed, there exists (and has always existed) a sense that “[p]overty is built into the basic structure of our society, it is a product of our . . . political structures[] and economic structures.”<sup>91</sup> For example, economist David Autor’s oeuvre documents the structural forces that have combined to produce poverty in the United States. In one well-cited paper, he and his co-authors note that there has been a decrease in the number of middle-skill occupations that pay decent wages, while there has been a simultaneous increase in the number of low-skill occupations that pay low wages and high-skill occupations that pay high

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‘deserving poor’ because they were in situations beyond their control whereas recipients of AFDC payments were classified as ‘undeserving poor’ because they received payments based only on financial need. Society’s willingness to help the ‘deserving’ poor was greater than the ‘undeserving’ poor, therefore there was less criticism of SSI than there was of AFDC.”)

<sup>89</sup> See KATZ, *supra* note 88, at 27–34 (describing the “deserving poor” as those who are poor due to “external circumstances”).

<sup>90</sup> While society generally understands the indigent elderly to be firmly situated on the “deserving” side of the deserving/undeserving binary, this was not always true. Prior to the New Deal, the elderly poor were considered somewhat to blame for their indigence. See JOEL F. HANDLER & YEHESKEL HASENFELD, *THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA 75–76* (1991). The indigent elderly were thought to be those who had failed to work hard during their youths. *Id.* at 75. They were thought to be those who, despite having worked hard, had engaged in profligate spending and had failed to save the money that would keep them from destitution in their advanced years. *Id.* at 76. Even if they had engaged in no blameworthy activity and could not be deemed responsible for their poverty in some fundamental way, then the indigent elderly were to blame for their poverty nevertheless because they had raised irresponsible children who failed to support their needy parents in their dotage. *Id.* at 75–76. Thus, the figure of the poor aged body carried suggestions of immorality—whether it was his own immorality or his progeny’s immorality. *Id.* As such, the elderly poor largely were categorized as members of the undeserving poor—that is, until cultural discourses shifted and they were reimagined as blameless for their destitution. *Id.*

<sup>91</sup> See Ross, *supra* note 88, at 1510.

wages.<sup>92</sup> This shift in the labor market has made it difficult for middle-skill workers to earn livable wages. He writes:

[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 without a four-year college education, and differentially so for males, who are increasingly concentrated in low-paying service occupations.<sup>93</sup>

The thrust of Autor's scholarship in this area is that the jobs that pay wages that can support middle-skill workers are simply not there; consequently, they are forced into low-paying jobs that do not pay a living wage.<sup>94</sup> If these workers are poor, it is not because they are somehow to blame for their circumstances.<sup>95</sup> It is because the market does not contain opportunities for them to be anything but poor.

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<sup>92</sup> DAVID AUTOR, THE POLARIZATION OF JOB OPPORTUNITIES IN THE U.S. LABOR MARKET: IMPLICATIONS FOR EMPLOYMENT AND EARNINGS, CTR. FOR AM. PROGRESS & THE HAMILTON PROJECT 1 (2010), <http://economics.mit.edu/files/5554>.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> As one might expect, some have responded to this claim (i.e., middle-skill laborers are not to blame for their poverty because the labor market does not contain jobs that require that level of skill) with the assertion that middle-skill laborers should simply acquire more skills. Bill O'Reilly has frequently made this claim on his tremendously popular television show, *The O'Reilly Factor*. On January 9, 2014, O'Reilly waxed philosophically about President Lyndon B. Johnson's War on Poverty and why millions of Americans are currently living in poverty decades after the war was first launched. Bill O'Reilly, *'True Poverty Is Being Driven by Personal Behavior': O'Reilly Talks War on Poverty*, FOX NEWS INSIDER (Jan. 9, 2014, 8:30 PM), <http://insider.foxnews.com/2014/01/09/'true-poverty-being-driven-personal-behavior'-oreilly-takes-war-poverty> ("Poverty will not change until personal behavior does. Addictive behavior, laziness, [and] apathy all override social justice goals."). When a guest on the show disputed O'Reilly's claim, redirected attention to the dearth of available jobs that pay living wages, and contended that "[w]e don't have a problem of workers who are too lazy to work for the jobs with good pay," O'Reilly interjected, "Yes, we do. We have an enormous underclass . . . We have a problem of people who can't do the jobs that pay high wages. But, we also have an underclass that's in chaos." *Id.* When his guest attempted to articulate her sense that poor people cannot attain the jobs that pay a living wage because they have not been given the skills that they need, O'Reilly replied that poor people necessarily had been presented with the opportunity to acquire the requisite skills. The problem was that they had not *accepted* the skills. *Id.* He concluded that "the parents have to drive the kid in [to the schools]. And the irresponsible parents don't. . . . You have to accept the education, you have to be able to work hard to be educated, and a number of Americans will not do that." *Id.*

On the other side of the binary is the undeserving poor, understood as those who are poor because of individual behavioral or moral deficiencies.<sup>96</sup> These persons are not poor because the fates dealt them an unfortunate hand. An illness has not incapacitated them. Age has not made their bodies incapable of productive labor. Quite the contrary, the undeserving poor are persons of sound mind and body. They are simply lazy or otherwise averse to work, promiscuous, incapable of delaying gratification, criminally inclined, predisposed to addiction and vice.<sup>97</sup> In essence, they are poor because of flaws in their characters or ethical codes.

When we put the schematization of the deserving and undeserving poor into conversation with the fact that some programs that constitute the social safety net enjoy widespread support while others are quite detested, it leads to the theory that popular safety net programs are those that are imagined to benefit the deserving poor while unpopular safety net programs are those that are imagined to benefit the undeserving poor. Thus, popular programs like Medicare, EITC,<sup>98</sup> and Supplementary Security Income (SSI) are thought to benefit those who are poor and need public assistance due to no fault of their own: they are old (i.e., Medicare), disabled (i.e., SSI), or have low incomes because of the structural forces that Autor describes in his scholarship and, consequently, need a tax break to keep enough of the wages that they have earned to support their families (i.e., EITC). Conversely, unpopular programs like AFDC, TANF, and general assistance are thought to benefit those who can be blamed for their poverty: they are lazy or unwilling to work (i.e., general assistance), or they have become pregnant while poor or while unattached to a male wage earner on whom they

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<sup>96</sup> See MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* 5, 7 (1989) (describing the “undeserving poor” as those whose “poverty is to some degree a matter of personal responsibility, and its alleviation requires personal transformation, such as the acquisition of skills, commitment to the work ethic, or the practice of chastity”).

<sup>97</sup> See *id.* at 13 (“In speaking of poverty, let us never forget that there is a distinction between this and pauperism. The former is an unavoidable evil . . . It is the result, not of our faults, but of our misfortunes. . . . Pauperism is the consequence of wilful error, of shameful indolence, of vicious habits. It is a misery of human creation, the pernicious work of man, the lamentable consequence of bad principles and morals.” (quoting CHARLES BURROUGHS, *A DISCOURSE DELIVERED IN THE CHAPEL OF THE NEW ALMS-HOUSE IN PORTSMOUTH, N.H.* 9 (1835))).

<sup>98</sup> Few polls have surveyed the public’s opinion about the EITC, specifically. Thus, whether the EITC is popular among the general electorate is debatable. What is clear, however, is that the EITC has enjoyed bipartisan support among lawmakers. See Chuck Marr, *A Bipartisan Call to Boost the EITC and Cut Poverty*, *CTR. ON BUDGET & POL’Y PRIORITIES* (Jan. 24, 2014, 3:35 PM), <http://www.cbpp.org/blog/a-bipartisan-call-to-boost-the-etc-and-cut-poverty> (noting that the EITC “has enjoyed broad bipartisan support over the years—President Ford signed it into law, and President Reagan lauded the credit and proposed, and signed, a major expansion of it—because the EITC helps low-income people struggling to make ends meet while encouraging work and personal responsibility”).



can depend, and they have given birth to children that they cannot independently financially support (i.e., AFDC and TANF).

### C. *Class-Based Affirmative Action and the Deserving Poor*

Class-based affirmative action is an antipoverty program that enjoys widespread support, like Medicare and Social Security. And like Medicare and Social Security, it is a program that is imagined to benefit the deserving poor. It is thought to help those who are poor through no fault of their own. It is an antipoverty program that even conservatism can get behind, *despite the fact that it directly transfers wealth and opportunity from the wealthy to the poor.*

Prominent sociologist William Julius Wilson has expressed skepticism about recent pushes to replace race-based affirmative action with class-based affirmative action.<sup>99</sup> He has articulated his concern about the ability of class-conscious programs to enjoy political support in a society that largely believes that most of those who are poor have done something to cause their own poverty.<sup>100</sup> Indeed, he is skeptical that class-based affirmative action will continue to enjoy popular support because “it is not readily apparent that a shift to class-based affirmative action would overcome the bias for individualistic explanations of social outcomes . . . .”<sup>101</sup> Thus, Wilson conjectures that class-based affirmative action programs will become politically unpopular because they will be conceptualized as offering a boon in admissions to those who are poor because of their own character flaws.

What Wilson misses is the distinction between the deserving and undeserving poor. That is, while large swaths of society believe that most are poor because of individual shortcomings, large swaths of society also believe

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<sup>99</sup> The primary reason for Wilson’s skepticism is his sense that class-based affirmative action will not function to benefit poor black people; instead, he expects that opportunities for elite education will be directed toward poor white people.

[I]f affirmative action were based solely on economic need, it would . . . result in the systematic exclusion of many Blacks from desirable positions, since they would be judged by conventional measures of aptitude, and, regardless of class, their scores on those tests are still likely to show the cumulative effects of race. By this I mean the effects of having one’s life choices limited by race; the effects of living in segregated neighborhoods and being exposed to the particular skills and styles of behavior that emerge from patterns of racial exclusion; the effects of attending lower-quality, de facto segregated schools, and of being nurtured by parents whose own experiences and resources have also been shaped and limited by race.

William Julius Wilson, *Race and Affirming Opportunity in the Barack Obama Era*, 9 DU BOIS REV. 5, 8 (2012).

<sup>100</sup> See *id.* at 7.

<sup>101</sup> *Id.*

that some are poor due to factors and forces well outside of their individual control. This latter group, the deserving poor, consists of those whom class-based affirmative action is imagined to assist in admissions processes. As long as class-based affirmative action is conceptualized as benefiting the deserving poor—the true “victims” of structural forces—then it will continue to enjoy popular support.

With this in mind, one can better understand the “disadvantage” to which proponents of class-based affirmative action constantly refer—the “disadvantage” that the beneficiaries of these programs are purported to have experienced universally. To explain: many advocates of class-conscious admissions programs have argued that they are superior to race-conscious programs because class-conscious programs more competently identify candidates who ought to be the beneficiaries of departures from traditional indicia of merit when making admissions decisions. The argument is that race-conscious programs indiscriminately benefit racial minorities—including those who enjoy privilege (of class, namely) and have been advantaged throughout their lives. Class-conscious programs, on the other hand, are argued to more precisely identify those who have been bereft of privileges and advantages and, consequently, deserve help in the admissions process.<sup>102</sup> Thus, the criticism is that race-based affirmative action does not necessarily benefit those who have been disadvantaged, while class-based affirmative action necessarily does.<sup>103</sup>

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<sup>102</sup> Elsewhere, I have disputed the contention that class-based affirmative action, by its very nature, more accurately identifies those who have been disadvantaged, while race-based affirmative action, by its very nature, is incapable of achieving similar results. See Bridges, *supra* note 33, at 80, 82–84, 87–88, 91–93, 96, 108. Essentially, there is a lot of heterogeneity within the category of the poor, and all those who may be categorized as poor have not been equally disadvantaged. See *id.* at 79–80, 89, 91–92, 98, 106 (making this argument). Thus, for a class-conscious admissions program to effectively identify whom among the poor ought to be the beneficiaries of departures from traditional admissions criteria, it needs to be guided by a thick theory of class and socioeconomic status. See *id.* at 98. Analogously, administrators of race-conscious admissions programs ought to understand that a racial identification or ascription has different meanings when it intersects with other characteristics, like class, sex, sexuality, immigration status, etc. As such, a race-conscious admissions program, *when done well*, must be guided by a thick theory of race. See *id.*; see also Bridges, *supra* note 53, 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 individual possesses, such as socioeconomic status, immigration status, citizenship status, sexual orientation, age, gender, gender identity, and the region of 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.”). Thus, class-based affirmative action and race-based affirmative action are quite similar: both types of programs must be incredibly nuanced to accurately identify those among the pool of candidates who ought to be benefited. If either class-conscious or race-conscious programs suffer from a failure of nuance, they will be ineffective and unjust—failing to benefit those who most need and *deserve* a boost in the admissions process.

<sup>103</sup> A major problem with the argument that race-based affirmative action programs do not benefit those who have experienced disadvantage when they benefit racial minorities who enjoy some degree of class privilege

Testaments that class-based affirmative action more precisely benefits those who have been disadvantaged (while race-based programs do not) are ubiquitous. Justice Scalia has made such a declaration. Writing as a law professor, Scalia declared that he was:

[E]ntirely in favor of according the poor inner-city child, who happens to be black, advantages and preferences not given to my own children because they don't need them. But I am 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. The affirmative action system now in place will produce the latter result . . . .<sup>104</sup>

Professor Sheryll Cashin, whose recent critique of race-based affirmative action<sup>105</sup> was widely acclaimed,<sup>106</sup> has also made the case for class-based admissions programs because of the belief that race-conscious programs do not benefit those who have been truly disadvantaged. She argues in favor of admissions programs that substitute “‘low opportunity neighborhood’ for race

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is that the argument presumes a simultaneity between race disadvantage and class disadvantage. That is, the argument presupposes that racial disadvantage is an epiphenomenon of class disadvantage such that when class disadvantage disappears, racial disadvantage disappears. But, this is simply not true. Racial minorities suffer the effects of their race even when they are not poor. *See, e.g.*, Benjamin Mueller, Al Baker & Liz Robbins, *James Blake's Arrest Brings Swift Apologies from New York Officials*, N.Y. TIMES (Sept. 10, 2015), [http://www.nytimes.com/2015/09/11/nyregion/james-blake-new-york-police-officer.html?\\_r=0](http://www.nytimes.com/2015/09/11/nyregion/james-blake-new-york-police-officer.html?_r=0) (describing the violent arrest of James Blake, a Harvard-educated, retired professional tennis player, who had been mistaken for a man who had been accused of a nonviolent, white collar crime); Ray Sanchez, *Who Was Sandra Bland?*, CNN (July 23, 2015, 9:17 PM), <http://www.cnn.com/2015/07/22/us/sandra-bland> (describing Sandra Bland—a black woman who was arrested by a Texas police officer after she was pulled over for failing to use a turn signal and who was later found dead in her jail cell—as a college-educated, gainfully employed black woman who was a valuable member of her community); *see also* 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 . . .”).

<sup>104</sup> Scalia, *supra* note 28, at 153–54. Justice Thomas made a similar declaration, also before ascending to the Bench. *See* Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, 5 YALE L. & POL'Y REV. 402, 410–11 (1987) (“[T]o whatever extent we do want to give preferences to compensate those who have been unfairly deprived of certain advantages, we should do so in a manner that is just. *Any preferences given should be directly related to the obstacles that have been unfairly placed in those individuals' paths*, rather than on the basis of race or gender, or on other characteristics that are often poor proxies for true disadvantage.” (emphasis added)).

<sup>105</sup> Sheryll Cashin, *Place, Not Race: Affirmative Action and the Geography of Educational Opportunity*, 47 U. MICH. J.L. REFORM 935 (2014).

<sup>106</sup> *See* Sheryll Cashin, *Reviews and Praise*, SHERYLLCASHIN.COM (2017), <http://sheryllcashin.com/reviews> (documenting that many prominent scholars of race—including Professors Michelle Alexander, Randall Kennedy, and Douglas Massey—have all described her work on affirmative action as an important contribution to the debate).

as a plus factor in the type of formulas that universities use in admissions decisions because race is too blunt an instrument . . . .”<sup>107</sup> She argues that “whites who *do* live in impoverished environs or attend high-poverty schools are no less deserving of special consideration—as is anyone who is actually disadvantaged by economic isolation.”<sup>108</sup>

What is notable is how both Cashin and Scalia imagine the beneficiaries of class-based affirmative action. In Cashin’s framing, they are children who are stuck in “impoverished environs”; they are students who are struggling to acquire a decent education in “high-poverty schools.”<sup>109</sup> They are talented people who are attempting to emerge from inopportune *places*. In other words, they are victims of *structural*—not individual—disadvantages. In Scalia’s framing, the worthy beneficiaries of class-based affirmative action are the children of parents who are poor *despite* their commendable work ethics.<sup>110</sup> Indeed, the figure in Scalia’s narrative—the man who is “working as a manual laborer to get his family ahead”—reminds of the laborer in Autor’s scholarship for whom work has disappeared: the “middle-skill, blue-collar” worker who has been employed in “blue-collar production, craft, and operative occupations.”<sup>111</sup> If these workers are poor, it is not because they are inadequate in any way, but rather because macro forces have conspired to force poverty upon them. Put simply, both Cashin and Scalia imagine the beneficiaries of class-based affirmative action to be poor, but poor through no fault of their own.

With this in mind, consider that advocates of class-conscious admissions programs have noted that to admit significant numbers of socioeconomically disadvantaged students, elite institutions, in many cases, *actually do not have to alter their admissions criteria*. They contend that there is a substantial number of poor students who are competitive with wealthier students in terms of GPAs and standardized test scores, but who do not apply to elite institutions because of various reasons.<sup>112</sup> These scholars contend that the underrepresentation of

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<sup>107</sup> Cashin, *supra* note 105, at 958, 965.

<sup>108</sup> *Id.* at 955.

<sup>109</sup> *Id.*

<sup>110</sup> Scalia, *supra* note 28, at 153–54.

<sup>111</sup> *Id.*; AUTOR, *supra* note 92, at 1.

<sup>112</sup> See, e.g., Alexandria Walton Radford & Jessica Howell, *Addressing Undermatch: Creating Opportunity and Social Mobility*, in *THE FUTURE OF AFFIRMATIVE ACTION* 133, 139 (Richard D. Kahlenberg ed., 2014) (discussing research with poor students who graduated as valedictorians of their classes that finds that some highly competitive, financially disadvantaged students do not apply to elite universities because they feel that they will not be able to afford them). The research found that many academically achieving poor students lacked “understanding about need-based financial aid and net college costs. Families are not sufficiently informed about

poor students in elite colleges and universities would be ameliorated to some extent if schools simply reached out to these potential students and encouraged them to throw their hats into the admissions ring and, once they receive a favorable response, to enroll.<sup>113</sup> The high GPAs and standardized test scores that these particular low-income, high-achieving students have earned demonstrate that they are “like” their wealthier peers in very important ways—in terms of work ethic, norms, values, behaviors, etc. If the poor were unlike the wealthy in these fundamental attributes, how could they have earned comparable GPAs and standardized test scores?

Consider as well the poor students who win seats in the incoming classes of elite institutions and who *do well*. These students usually have learned social rules relating to interacting with professors and other students that wealthier students know by virtue of living and learning in privileged environments. Sociologist Anthony Abraham Jack writes that half of poor black students at elite institutions have attended elite boarding high schools or other programs, like Prep for Prep and A Better Chance.<sup>114</sup> These schools and programs, he

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the existence of need-based financial aid and the range of incomes that can qualify, causing some that could have received aid to not even apply.” *Id.*

Another reason why the valedictorians who were the subjects of the study did not apply to elite institutions was because they could not access good information about these schools. They stated that guidance counselors at their high schools often disseminated information about college to large groups of students. These talks were geared to the average student—students for whom elite institutions were out of their reach. As such, counselors did not discuss elite institutions as an option in these fora. *Id.* Further, “[e]ven when valedictorians managed to arrange a one-on-one meeting, counselors rarely volunteered that the high achiever in front of them might consider more selective, private, or out-of-state institutions . . . . And when valedictorians took the initiative to ask about these types of colleges specifically, counselors were still uninformed about options and the admissions process.” *Id.*

<sup>113</sup> See Richard D. Kahlenberg, *Introduction* to *THE FUTURE OF AFFIRMATIVE ACTION* 16 (Richard D. Kahlenberg ed., 2014) (“[R]esearch suggests there is enormous potential to increase socioeconomic and racial diversity without in any way sacrificing academic quality by simply getting more underrepresented minority and low-income students to apply, and, when admitted, enroll.”).

<sup>114</sup> Anthony Abraham Jack, *What the Privileged Poor Can Teach Us*, N.Y. TIMES (Sept. 12, 2015), [https://www.nytimes.com/2015/09/13/opinion/sunday/what-the-privileged-poor-can-teach-us.html?\\_r=0](https://www.nytimes.com/2015/09/13/opinion/sunday/what-the-privileged-poor-can-teach-us.html?_r=0). Prep for Prep is a program whose mission is, first, to prepare disadvantaged minority students for elite private schools in New York City and elite boarding schools in the Northeast and second, to place them in these institutions. See *Mission*, PREP FOR PREP, <http://www.prepforprep.org/aboutprep> (last visited Jan. 23, 2017). The program makes disadvantaged students competitive for admission to these boarding schools by requiring them to “complete a rigorous fourteen-month course of study to prepare them for independent school success.” *Preparation*, PREP FOR PREP, <http://www.prepforprep.org/podium/default.aspx?t=126427> (last visited Mar. 9, 2017). Once the students are placed in coveted institutions, Prep for Prep provides them with continuing support services. *Mission*, *supra*.

Similarly, A Better Chance is a nonprofit whose mission is to place disadvantaged children in the “nation’s leading boarding, day and public schools.” *Welcome to A Better Chance*, A BETTER CHANCE, <http://www.abetterchance.org/index.aspx> (last visited Mar. 9, 2017). It achieves this mission by identifying

argues, have taught them the frequently unspoken and unacknowledged norms that make success in elite environments more possible.<sup>115</sup> He writes that while these students invariably receive excellent educations from their secondary schools and the other supplementary programs that they attend, the unrecognized value of these schools and programs is that they teach poor children “the informal social rules that govern elite college life [and that this] is what really gives them advantages relative to their lower-income peers who did not attend elite high schools . . . .”<sup>116</sup> Interestingly, he concludes that “[e]lite colleges effectively hedge their bets: They recruit those already familiar with the social and cultural norms that pervade their own campuses.”<sup>117</sup> This echoes in important ways what Brown-Nagin has surmised regarding elite colleges’ interest in poor students: “The commitment to recruiting poorer students itself is selective. *Universities are interested in poorer students who can gain entry without significant relaxation of admissions requirements or need for academic support.* In other words, colleges prefer, quite understandably, to admit the students perceived as the easiest to educate.”<sup>118</sup>

Which is to say: the low-income students who elite colleges and universities covet—the low-income students that this Article argues figure in the cultural imaginary as the beneficiaries of class-based affirmative action—are those who are “like” wealthier students in everything but socioeconomic background. These socioeconomically disadvantaged students have the same values, norms, work ethics, behaviors, expectations, aspirations, approaches to learning, etc., as their wealthier counterparts. Thus, if these poor students are poor, it *cannot* be because they are behaviorally or morally flawed. It cannot be because they, as individuals, are deficient in some way. Instead, it *must* be because they are the

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talented students, assisting them as they apply to elite middle and high schools, and supporting them throughout their course of study in these institutions. *Id.*

<sup>115</sup> See Jack, *supra* note 114. An example of these unspoken and unacknowledged norms is the conceptualization of professors as resources from whom students have the right to demand accessibility. Jack discusses a student from a socioeconomically disadvantaged background who had attended an elite boarding school for high school. This student reported that she felt “empowered to go talk to a professor and say, ‘I want to meet with you.’” *Id.* This student’s school instilled in her that she was “allowed to do that” and “that it’s actually [her] right.” *Id.* “In fact, when her instructor was away from campus, [this student] had no qualms calling his cellphone for virtual office hours despite her friends’ surprised looks and admonitions.” *Id.* Jack compares this student with another student from a similar background, but who had not attended an elite high school. This student reported that “[w]hen professors say that their door is open, she’s not sure that means she’s welcome. She admits to being ‘too intimidated or too afraid to go and talk to people’ and consequently she ‘rarely’ goes ‘to school-sponsored people for things.’” *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Brown-Nagin, *supra* note 52, at 478 (emphasis added).

victims of forces and structures well outside of their control. They must be the deserving poor.

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There are many problems with class-based affirmative action, some of which I have explored elsewhere.<sup>119</sup> In the following Part, I discuss the problems with class-based affirmative action specifically with regard to its conceptualization as an antipoverty program that benefits the deserving poor.

### III. CRITIQUING CLASS-BASED AFFIRMATIVE ACTION

#### A. *The Inefficacy of Class-Based Affirmative Action as an Antipoverty Program*

To begin, class-based affirmative action is a desperately weak tool with which to address poverty and, relatedly, the gaping chasm that separates the economic haves from the economic have-nots in this country. Professor Deborah Malamud has made a similar observation.<sup>120</sup> She has argued 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>121</sup> She writes that such programs will only produce “[s]light differences in relative economic position.”<sup>122</sup> The crux of Malamud’s critique is that class-based affirmative action is not an antipoverty program with real teeth.<sup>123</sup> It is unlikely to be a meaningful step toward bringing about something that we can call “economic justice.”<sup>124</sup>

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<sup>119</sup> Elsewhere, I have outlined my opposition to class-based affirmative action based on my sense that such programs allow society to avoid directly confronting the fact that race presently matters, that the effects of racial historical wrongs endure, and that extant racial discourses still powerfully disadvantage persons *on the basis of race*—not simply on the basis of class. See Bridges, *supra* note 33. There, I argued that class-based affirmative action celebrates the demise of racism before racism has actually met its demise and, thus, prematurely declares society’s entrance into a post-racial future. *Id.*

<sup>120</sup> See Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1849–50 (1996) (discussing “the redistributive task of class-based affirmative action”).

<sup>121</sup> *Id.* at 1865.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 1849–50.

<sup>124</sup> See *Defining Economic Justice and Social Justice*, CTR. ECON. & SOC. JUST., <http://www.cesj.org/learn/definitions/defining-economic-justice-and-social-justice/> (last visited Jan. 22, 2017) (“Economic justice . . . encompasses the moral principles which guide us in designing our economic institutions. These institutions determine how each person earns a living, enters into contracts, exchanges goods and services with others and otherwise produces an independent material foundation for his or her economic sustenance. The

Poverty will only be addressed satisfactorily by large-scale changes in our current system of distributing and protecting opportunities, privilege, and wealth. For example, Catherine Hill has noted that to reduce poverty, we need to make sweeping social policy changes.<sup>125</sup> She writes that poverty will be reduced when we transform our:

[T]ax, expenditure, and regulatory policies. Federal policies could make it easier for individuals to organize into labor unions to bargain for better wages and benefits. The minimum wage could be increased a reasonable amount, and the Earned Income Tax Credit for low-income families could be expanded. Likewise, greater expenditure could be devoted to improving pre-school and K–12 education, particularly in disadvantaged communities. And tax increases could contribute to greater income equality while also addressing our fiscal deficit concerns.<sup>126</sup>

Class-based affirmative action is not even a distant cousin of the programs that Hill appropriately identifies as competently addressing poverty.

Not only is class-based affirmative action unlikely to be effective at reducing poverty, but, more problematically, it leaves in place the overarching system that makes poor children underperform relative to their wealthier counterparts. That is, class-based affirmative action does not problematize the conditions that make poor students unable to compete against wealthier students when measured by traditional indicia of merit. In addition to GPAs and standardized tests (on which poorer students tend to do less well than their wealthier counterparts),<sup>127</sup> admissions offices consider as the stuff of merit taking and doing well in

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ultimate purpose of economic justice is to free each person to engage creatively in the unlimited work beyond economics, that of the mind and the spirit.”).

<sup>125</sup> Hill, *supra* note 55, at 227.

<sup>126</sup> *Id.* at 228. In a similar spirit, Richard Rothstein of the *American Prospect* has argued that class-based affirmative action is an incompetent technique for addressing poverty. He argues that poverty will not be reduced by affirmative action, but rather by “progressive economic policy,” the hallmarks of which include “a more redistributive tax system, higher minimum wages, support for collective bargaining, reducing the cost of higher education, refinancing of sub-prime mortgages, labor market reform (like current campaigns against arbitrary and flexible part-time work schedules), legalization of ‘dreamers,’ [and] expansion of Medicaid in states that have refused it . . . .” Sheryll Cashin & Richard Rothstein, *Affirmative Action, Race or Class: An Exchange*, AM. PROSPECT (Aug. 1, 2014), <http://prospect.org/article/affirmative-action-race-or-class-exchange>. Rothstein notes that the progressive economic policy for which he advocates, and not class-based affirmative action, “will enable many more students from low-income neighborhoods to succeed in K–12 schools and then in post-secondary education and will make it more likely that in the next generation their own children will become competitive for the most selective colleges.” Affirmative action cannot shoulder the entire burden of the fight against American inequality and blocked mobility.”*Id.*

<sup>127</sup> See Yin, *supra* note 64, at 223 (“[S]tandardized tests typically exhibit an income bias, meaning that average test scores rise with family income.”).



Advanced Placement classes, acquiring experience through unpaid internships, participating in extracurricular activities, traveling, volunteering, and having developed an artistic talent (like playing a musical instrument or being a trained dancer).<sup>128</sup> But, this is also the stuff of class privilege. Many underfunded high schools do not, and cannot offer Advanced Placement classes.<sup>129</sup> And the other characteristics listed above are all activities in which indigent persons find it difficult, if not impossible, to engage.<sup>130</sup>

I am reminded of Justice Thomas's opposition to race-based affirmative action—an opposition that he most passionately articulated in his dissent in *Grutter v. Bollinger*.<sup>131</sup> There, he voiced his sense that race-conscious admissions programs like the one that had been implemented by the University of Michigan Law School were incapable of destabilizing the massive racial stratification that is part and parcel of the landscape of the United States.<sup>132</sup>

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<sup>128</sup> See *Admission Decisions: What Counts*, COLLEGE BOARD, <https://professionals.collegeboard.com/guidance/applications/decisions> (last visited Jan. 22, 2017) (advising that “highly selective colleges look for students who: . . . [e]nroll in several college-prep or college-level courses (such as AP® . . . and perform well[;] [t]ake four years of a world language . . . [.]” “involve themselves in great depth in extracurricular activities; and have lived or studied overseas).

<sup>129</sup> See William S. Koski, *The Politics of Judicial Decision-Making in Educational Policy Reform Litigation*, 55 HASTINGS L.J. 1077, 1144 n.285 (2004) (“[P]oor school districts do not offer the same curricular diversity, including far fewer advanced placement courses, foreign language offerings, science offerings and the like.”).

<sup>130</sup> See, e.g., Mike Tolson, *Supreme Court to Take Up UT Admission Case*, CHRON (Oct. 8, 2012, 6:45 AM), <http://www.chron.com/news/houston-texas/article/Supreme-Court-to-take-up-UT-admission-case-3927014.php> (quoting Abigail Fisher, who challenged the race-conscious element of Texas's Ten Percent Plan, as follows: “I took a ton of AP classes, I studied hard and did my homework—and I made the honor roll . . . I was in extracurricular activities. I played the cello and was in the math club, and I volunteered. I put in the work I thought was necessary to get into UT.”); see also James, *supra* note 66, at 428 (“[Fisher] seemed unaware that the very things she identified as examples of her hard work also demonstrated privilege bestowed on her through no effort of her own. For instance, [she] was able to participate in extracurricular activities because her family's financial stability likely freed her from the necessity of an afterschool job; she could become a cellist because she had free time for instruction, possibly paid for by her parents; and she could enroll in AP classes because, even though many schools throughout the United States do not offer such courses, the one that she attended did.”)

<sup>131</sup> 539 U.S. 306, 349 (2003) (Thomas, J., dissenting).

<sup>132</sup> See *id.* at 354 n.3 (“It must be remembered that the Law School's racial discrimination does nothing for those too poor or uneducated to participate in elite higher education and therefore presents only an illusory solution to the challenges facing our Nation.”); see also *id.* at 372 n.11 (arguing that the Law School's admission program will not solve “real problems like the crisis of black male underperformance”).

Unfortunately, Thomas likely does not identify as cause of the “crisis of black male underperformance” structural determinants—such as discourses and cultural narratives that assert that criminality is simultaneous to blackness (most specifically, young, male, black bodies), the fact that property taxes fund public schools (which results in the dramatic underfunding of schools in low-income neighborhoods relative to schools in wealthier neighborhoods), the disappearance of medium-skill jobs from the labor market, the country's decision to pursue

Indeed, he is likely correct that the admission of less than a hundred black students, a couple dozen Latino students, and ten or so Native American students to the Law School every year will not bring an end to racial inequality and bring to realization the racial utopia of which advocates for racial justice have always dreamed.<sup>133</sup> Race-conscious admissions programs leave in place the mechanisms that make needed race-consciousness in admissions.<sup>134</sup> They do not attempt to change, nor do they problematize, the macro processes and structures that make it necessary for admissions offices that are interested in admitting underrepresented racial minorities to elite institutions to alter the traditional

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mass incarceration as the solution to social ills and to disenfranchise persons who have been convicted of crimes, even minor ones, etc.

Based on his philosophy about why black students fail to achieve high scores on the LSAT, it is likely that Thomas believes that individual shortcomings are to blame for the “crisis of black male underperformance.” To explain, elsewhere in his *Grutter* dissent, he notes that white applicants scoring between 163 and 167 on the LSAT were rejected from the Law School in significant numbers. *Id.* at 377 (Thomas, J., dissenting). However, because the Law School’s race-conscious admissions program allowed it to look beyond LSAT scores for underrepresented minorities, black applicants were almost guaranteed admission if they scored above 155. *Id.* Thomas philosophizes from this fact, “[a]s admission prospects approach certainty, there is no incentive for the black applicant to continue to prepare for the LSAT once he is reasonably assured of achieving the requisite score.” *Id.* Thus, Thomas locates the cause of black test takers’ failure to earn scores on the LSAT that rival those of their white counterparts as those test takers’ lack of effort. This is a profoundly individualist explanation of racial disparities in LSAT scores. Moreover, it is one that significantly ignores non-individualist explanations of these disparities—explanations that look to theories of stereotype threat or that hypothesize, quite commonsensically, that the relative underfunding of the segregated public schools that black test takers disproportionately attend likely contributes to black test takers’ relative underperformance on the LSAT. For an example of one stereotype threat, which refers to a psychological phenomenon in which individuals have anxiety about confirming stereotypes regarding the group to which they belong, see Steven J. Spencer, Claude M. Steele & Diane M. Quinn, *Stereotype Threat and Women’s Math Performance*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 4 (1999); see also Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613 (1997); Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995); Claude M. Steele, Steven J. Spencer & Joshua Aronson, *Contending with Group Image: The Psychology of Stereotype and Social Identity Threat*, 34 ADVANCES IN EXPERIMENTAL AND SOC. PSYCHOL. 379 (2002).

<sup>133</sup> *Grutter*, 539 U.S. at 354 n.3 (Thomas, J., dissenting) (denying that race-based affirmative action implemented by elite institutions of higher learning will “actually help[] those who are truly underprivileged”).

<sup>134</sup> *Id.* at 369–70 (“[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.”).

Brown-Nagin has argued that Justice Thomas recognizes that the LSAT is a poor tool with which to measure merit. See Tomiko Brown-Nagin, *The Transformative Racial Politics of Justice Thomas?: The Grutter v. Bollinger Opinion*, 7 U. PA. J. CONST. L. 787, 804 (2005) (arguing that Justice Thomas was skeptical “that traditional admissions’ criteria measure merit . . .”). She observes that this represents a point of departure between Justices Thomas and Scalia, as Scalia appears uncritically to buy into the belief that the LSAT measures aptitude. See *id.* at 803–04 (“Justice Thomas’s advocacy of race neutral criteria in *Grutter* was, in fact, different from the meritocratic platitudes of Justice Scalia. Justice Scalia uncritically accepted the plaintiffs’ simplistic views of merit and their corresponding narrative of entitlement to admission.”).

criteria for admission.<sup>135</sup> It does not interrogate why those traditional criteria are racially exclusionary in the first instance.

Similarly, class-based affirmative action does not attempt to change the macro processes and structures that make alterations to traditional criteria of admission necessary if elite institutions are to admit a significant number of poor students. Class-based affirmative action does not interrogate why, pursuant to traditional criteria of merit, the vast majority of poor students find it impossible to be meritorious. It does not problematize the fact that: the schools that the poor must attend cannot offer Advanced Placement class and cannot prepare them to perform at highly competitive levels on standardized tests; poor students frequently are compelled to work and cannot engage in extracurricular or volunteer activities; the poor do not have the means to travel extensively or at all; and financial constraints leave the poor unable to develop a talent that those

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<sup>135</sup> It is imperative to make clear that although Justice Thomas appears to oppose race-based affirmative action because he believes that it is wholly incapable of reducing the disparity in educational achievement between black students and other students, his jurisprudence outside of the context of affirmative action makes it impossible for individuals and states to actually undertake the efforts that will reduce that disparity. It may be stating the obvious to observe that black people are disproportionately poorer than other racial groups. See CARMEN DE NAVAS-WALT & BERNADETTE D. PROCTOR, CENSUS BUREAU, U.S. DEP'T OF COMMERCE, INCOME AND POVERTY IN THE UNITED STATES: 2014: CURRENT POPULATION REPORTS 12–14 (2015), <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p60-252.pdf> (showing that of those living in poverty in 2014, only 10.1% were “non-Hispanic white,” while 26.2% were black—although black people only comprise 13% of the population). Moreover, public schools are largely financed through property taxes. Nina J. Crimm, *Core Societal Values Deserve Federal Aid: Schools, Tax Credits, and the Establishment Clause*, 34 GA. L. REV. 1, 52 (1999) (“During the twentieth century, local property taxes have been the mainstay of public school funding.”) Finally, racial segregation in housing is still at impossibly high levels. See Rima Wilkes & John Iceland, *Hypersegregation in the Twenty-First Century*, 41 DEMOGRAPHY 23, 23–24 (2004) (showing that high levels of residential segregation persist—especially for black persons). The combination of these facts results in poorer black children attending schools that are grossly underfunded relative to the schools attended by their white counterparts. The underperformance of black children relative to their white counterparts must have some undeniable relationship to the relative underfunding of the schools that they attend.

There are, at least, three approaches to remedying this problem. First, we can change the way that we finance public schools. Second, we can integrate neighborhoods, helping to ensure that because the races live in the same communities as one another, they attend the same schools. And third, we can integrate schools, thereby reducing the likelihood that there will be disparities in school funding, as wealthier parents will have an incentive to ensure that the schools their children attend are well funded. While Justice Thomas has not weighed in on the legality of the first approach, he has voted to strike down laws that represent the second and third approaches. See *Tex. Dep't of Hous. and Cmty. Affairs v. The Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2531 (2015) (Thomas, J., dissenting) (arguing that the Fair Housing Act, which is designed to eliminate racial discrimination in housing and can help reduce residential racial segregation, should be interpreted narrowly and ought not to recognize disparate impact claims); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 755 n.8 (2007) (Thomas, J., concurring) (arguing that the Equal Protection Clause prevents school districts that are interested in achieving racially integrated schools from being conscious of the race of students when assigning them to schools).

with power will value.<sup>136</sup> Neither does class-based affirmative action interrogate why it is that the aforementioned characteristics and behaviors are considered the stuff of merit. It does not ask why we have to *alter* the criteria by which merit is measured in order to conceptualize as merit the fact of having survived living in a resource-poor neighborhood and learning in an under-resourced school.

Essentially, class-based affirmative action leaves in place the systems that combine to disadvantage poor students. By no means does it represent a large-scale structural change. It is no vast redistribution of wealth. As Malamud has noted, and as mentioned above, it simply takes an opportunity from the weakest of the “haves” and gives it the strongest of the “have nots.”<sup>137</sup>

However, this shortcoming in class-based affirmative action is not a reason for abandoning it altogether.<sup>138</sup> Quite the opposite, this shortcoming in class-based affirmative action might be a reason for pursuing it *alongside* other techniques that will result in large-scale structural change and, in so doing, reduce the incidence and effects of poverty. Yet, we might be worried about the possibility that efforts to fight poverty will be met with less sympathy and less political support the more ubiquitous they become. The analogy is to Darren Hutchinson’s concept of racial exhaustion.<sup>139</sup> He describes racial exhaustion as

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<sup>136</sup> Brown-Nagin discusses another facet of how macro processes function to make indigent students unable to perform at levels that rival their wealthier counterparts. She observes that children “who grow up in affluent and lower-income homes tend to be socialized differently regarding the cultural traits and linguistic skills required for success in secondary school and higher education.” Brown-Nagin, *supra* note 52, at 470. She notes that “[u]pper-class and even well-connected middle-class parents engage in concerted efforts to cultivate achievement in their children.” *Id.* Some of these strategies include “organized leisure and cultural activities, conversations to teach comfortable interaction with authority figures, intervention in school placement and course selection decisions, and enrollment in after-school enrichment programs, among other efforts.” *Id.* However, poor parents do not, and cannot, make these efforts. Instead, they “nurture their children by emphasizing autonomy in play and in school. . . . Lower-income parents leave children to their own devices, in part because the parents must focus on the necessities of daily existence: work, shelter, and food.” *Id.* Brown-Nagin notes that, while there is nothing inherently inferior about the parenting approach that poor parents take, it functions to disadvantage poor children. “[I]n the context of the highly competitive American school system in which a more interactive approach is culturally dominant, the more autonomy-driven childrearing style can place the children of lower-income households at a disadvantage.” *Id.*

<sup>137</sup> See *supra* note 120 and accompanying text.

<sup>138</sup> This distinguishes me from Justice Thomas, who believes that race-based affirmative action’s ultimate incapacity to solve the racial stratification crisis in the United States is a reason for not implementing such programs. Indeed, Justice Thomas believes that because race-based affirmative action will not undo racial stratification altogether, this is a reason why such programs are not only bad policy, but are *unconstitutional*. See *Grutter*, 539 U.S. at 378 (Thomas, J., dissenting) (concluding that race-based affirmative action “can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause”).

<sup>139</sup> Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 926 (2009).

a rhetoric that contends “that persons of color (most often blacks) have benefitted from a protracted and costly social project that has defeated and adequately remedied racism.”<sup>140</sup> He identifies several aspects that comprise racial exhaustion, including the societal sense that:

- “The United States has already waged a sustained, taxing, and successful battle against racism, thus obviating the need for remedial state action”;<sup>141</sup>
- “State actors should avoid excessive, burdensome or redundant attention to race by placing rigid time or substantive limitations around remedies for racial inequality”;<sup>142</sup> and
- “State actors should decline to address racial inequality because the law cannot alter race relations, and efforts to utilize law in this fashion would waste societal resources.”<sup>143</sup>

That class-based affirmative action will come to trigger, or exacerbate, something that we might call “poverty exhaustion” or “socioeconomic inequality exhaustion” is quite possible if people largely understand such programs to be antipoverty tools and they come to be pervasive. One can easily imagine that these programs—which, it is important to keep in mind, may trigger resentment in those wealthier students who lose “their” seats in the entering classes of elite institutions to more economically disadvantaged students<sup>144</sup>—will be perceived as “excessive, burdensome, and redundant” in light of the fact that the United States has already waged a “war on poverty” and that an extensive social safety net already exists. It may be that the persistence of poverty after the widespread implementation of class-based affirmative action—which may come to be appreciated as *yet another* antipoverty program—will work to foment a societal sentiment that poverty actually is not capable of eradication, or even reduction, and we, as a society, should stop making efforts to achieve the impossible.

### B. *The Racialization of Deservingness*

The most prominent danger presented by the fact that class-based affirmative action programs are imagined to benefit the deserving poor is that the

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 927.

<sup>143</sup> *Id.*

<sup>144</sup> See Malamud, *supra* note 120, at 1865 (writing that because class conscious admissions programs will only produce “[s]light differences in relative economic position” between the economic “haves” and the economic “have nots,” they will likely “generate all the more resentment as a result”).

deserving/undeserving poor dichotomy has always been a racialized, and frequently racist, one. That is, it has been difficult for indigent black people to access the ranks of the deserving poor—a category that, within the cultural imaginary, has been peopled predominately by those with racial privilege. Indeed, historically, the line between the deserving and undeserving poor has shifted to maintain black people on the undeserving side of the binary.

Illustrative is cultural constructions of unemployed mothers without husbands. At the dawn of the federal welfare state, society largely understood this group to be situated on the deserving side of the binary. The 1935 legislation that created the Social Security system included the Aid for Dependent Children program (ADC), which eventually became Aid for Families with Dependent Children, or AFDC.<sup>145</sup> At its inception, and for years afterward, this program was uncontroversially understood as benefiting the deserving poor—those who were blameless with respect to their indigence and, therefore, the rightful subjects of charitable public assistance.<sup>146</sup> However, today it is a rarity to hear defenses of poor single mothers; indeed, one rarely hears arguments that these women are not to blame for their indigence and therefore deserve our compassion and governmental largesse.<sup>147</sup> The program that is designed to assist

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<sup>145</sup> See Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1665–66 (2005) (“In 1935, President Franklin Delano Roosevelt laid the groundwork for the modern welfare state when he signed the Social Security Act. One small part of this large public assistance structure was Aid to Dependent Children (ADC), which later became Aid to Families with Dependent Children (AFDC) . . . .” (footnote omitted)).

<sup>146</sup> *Id.* at 1666 (“[T]he American public accepted [AFDC at its inception] as a necessary component of its campaign against poverty largely because of the ‘deservingness’ of its primary beneficiaries . . .”).

<sup>147</sup> See Morgan Whitaker, *Family Decay, Single Moms Get Blame for Poverty from the GOP*, MSNBC (Jan. 12, 2014, 11:15 AM), <http://www.msnbc.com/politicsnation/gop-single-moms-still-blame-poverty> (quoting speeches made by congressmen on the 50th anniversary of the War on Poverty that, variously, blame poor mothers for their indigence, including Senator Marco Rubio, who said, “[t]he truth is, the greatest tool to lift children and families from poverty is one that decreases the probability of child poverty by 82%. But it isn’t a government spending program. It’s called marriage.”). *But see* LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 96 (2009) (observing that in 2002, a year marked by economic health, the kinds of jobs held by poor mothers who would otherwise rely on TANF were not the kinds of jobs that would shield a family from poverty and reporting that the median wage that these mothers earned “was \$8.06 per hour, barely above the hourly minimum and far below the wage needed to lift a family of three above the poverty line (around \$11 per hour)”).

Elsewhere, I have offered a defense of poor single mothers, conceptualizing their insistence upon their fertility and their motherhood as an act of resistance against institutions and discourses that deny the value of their reproductive bodies.

[R]esistance might be seen in the fact of . . . poor, pregnant women’s bodies. That is, in the face of the discursive problematization of their fertility, despite polemical attestations that their reliance on governmental aid is “un-American” and figures them outside of the deserving body politic, and notwithstanding that mythical and fantastical ideas of their children as the future scourges of

them, TANF (which replaced AFDC in 1996), is currently one of the most politically unpopular programs of those that comprise the safety net.<sup>148</sup> Moreover, the program is punitive, stigmatizing, and only reluctantly charitable, imposing time limits on benefits and requiring beneficiaries to labor outside of the home (even when the children that they are parenting are infants).<sup>149</sup> Which leads to the question: why the shift? Why were poor single mothers once thought to be the apotheosis of deservingness, but now largely understood to be the embodiment of undeservingness? What explains this reconceptualization of poor mothers without husbands?

Some look to the reason why poor single mothers have no male wage on which to depend. They note that the beneficiaries of AFDC in its early years were women whose husbands had died.<sup>150</sup> They were sympathetic widows—completely faultless with respect to their husbands’ deaths and, thus, completely faultless with respect to their inability to support themselves and their children. However, the beneficiaries of AFDC in its later years and TANF at present were women who had divorced their husbands, had been deserted by their husbands, or who had never had husbands in the first instance; that is, they had not married the fathers of their children.<sup>151</sup> As such, the argument is that these women are not sympathetic; they are to blame for their poor decisionmaking about their romantic partners, their failed relationships, or their refusal to formalize their relationships through the institution of marriage.<sup>152</sup>

Yet, any explanation that does not foreground the racial demographics of AFDC in its early years versus the racial demographics of AFDC in its later years (and now TANF) is ultimately incomplete. To be precise, early-AFDC largely aided white women, while later-AFDC aided (and TANF now aids) a

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society exist in the national imagination, the patients at Alpha Hospital embrace their fertility. They give birth to their babies and love them unconditionally. This, I believe, ought to be understood as a powerful, material act of resistance.

KHIARA M. BRIDGES, *REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION* 257 (2011).

<sup>148</sup> See *supra* note 147 and accompanying text.

<sup>149</sup> See Khiara M. Bridges, “*TANF and the End (Maybe?) of Poor Men*,” 93 B.U. L. REV. 1141, 1147–51 (2013) (discussing TANF’s work requirements).

<sup>150</sup> See Onwuachi-Willig, *supra* note 145, at 1666 (describing AFDC’s initial beneficiaries as “pitiable . . . widows”).

<sup>151</sup> *Id.* at 1667, 1669 (noting that the beneficiaries of AFDC in its later years were women who had failed “to establish links with husbands who could support them and their children”).

<sup>152</sup> *Id.* at 1670 (noting that the beneficiaries of AFDC in its later years were believed to have “brought their [poverty] upon themselves and were undeserving of public aid”).

large and disproportionate number of women of color, specifically black women.<sup>153</sup>

At the inception of AFDC, 85% of the program's beneficiaries were white, while only 13% were black.<sup>154</sup> However, shortly after AFDC's establishment, the "Survivor's Insurance" program was created, which provided assistance to the surviving family members of, typically white,<sup>155</sup> workers who qualified for retirement benefits under the Social Security Act.<sup>156</sup> The poor white widows who would have been beneficiaries of AFDC became eligible for Survivor's Insurance, and most of them flocked to the latter program.<sup>157</sup> The exodus of white widows from the universe of AFDC beneficiaries functioned to designate AFDC as the program that would assist those women who were connected to

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<sup>153</sup> See *Characteristics and Financial Circumstances of TANF Recipients, Fiscal Year 2010*, U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF FAMILY ASSISTANCE (Aug. 8, 2012), <http://www.acf.hhs.gov/programs/ofa/resource/character/fy2010/fy2010-chap10-ys-final> (showing that 31.9% of TANF recipients were black in 2010). Interestingly, although white women are underrepresented on TANF rolls (relative to their representation in the general population), they still comprised 31.8% of TANF recipients in 2010. See *id.*

<sup>154</sup> See Onwuachi-Willig, *supra* note 145, at 1668. AFDC was essentially a federalization of state "Mothers' Pensions" Programs, which provided economic assistance to "worthy" poor mothers (i.e., white widows) to enable these women to care for their children in their own homes and to avoid the necessity of sending them to orphanages or, even worse, abandoning them. *Id.* at 1665–67.

<sup>155</sup> See LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890–1935*, at 4–5 (1994) (noting that the workers who were eligible for Social Security were predominately white). The workers who were eligible for Social Security benefits were typically white because the program did not cover laborers in the agricultural and domestic sectors of the economy. See *id.* ("Social Security excluded the most needy groups from all its programs, even the inferior ones. These exclusions were deliberate and mainly racially motivated, as Congress was then controlled by wealthy southern Democrats who were determined to block the possibility of a welfare system allowing blacks freedom to reject extremely low-wage and exploitive jobs as agricultural laborers and domestic servants."). Roughly 65% of black persons who were gainfully employed—as compared to 27% of white persons who were gainfully employed—worked in these excluded sectors. See CENSUS OF POPULATION AND HOUSING, GENERAL REPORT ON OCCUPATIONS 1930, CENSUS BUREAU, U.S. DEP'T OF COMMERCE 74, <https://www2.census.gov/library/publications/decennial/1930/population-volume-5/41129379v5ch3.pdf>.

<sup>156</sup> See Onwuachi-Willig, *supra* note 145, at 1666. When the Social Security Act was first passed in 1935, only the workers themselves were eligible for benefits. See *Historical Background and Development of Social Security*, SOC. SECURITY, <https://www.ssa.gov/history/briefhistory3.html> (last visited Jan. 23, 2017) (noting that the Social Security Act of 1935 "created a social insurance program designed to pay retired workers age 65 or older a continuing income after retirement"). However, the Act was amended in 1939 to expand the universe of program beneficiaries from solely workers to the spouse and minor children of a retired worker as well as to the family of a deceased worker. See *id.* (noting that the 1939 amendments "added two new categories of benefits: payments to the spouse and minor children of a retired worker (so-called dependents benefits) and survivors benefits paid to the family in the event of the premature death of a covered worker").

<sup>157</sup> See Onwuachi-Willig, *supra* note 145, at 1666–67 ("Almost immediately upon implementation of the [Survivor's Insurance] Program, 43% of the 254,000 AFDC families were transferred to Survivor's Insurance. Such transfers dramatically reduced the percentage of widows in the welfare program from 43% in 1937 to 7.7% in 1961." (footnote omitted)).



men who were *ineligible* for Social Security benefits. As the workers who were ineligible for Social Security benefits were disproportionately black, the beneficiaries of AFDC after the establishment of the Survivor's Insurance program were disproportionately black. Furthermore, the 1960s witnessed a surge in agitation from women of color around the accessibility of welfare benefits.<sup>158</sup> These women were responding to the multitude of techniques that welfare administrators had used historically to keep nonwhite women from accessing the assistance to which they were otherwise entitled.<sup>159</sup> These activists secured some important wins in the courts, and their successes made possible a dramatic increase in the number of black women who received benefits from AFDC.<sup>160</sup> It was around this time—at the precise moment when black women began to preponderate on AFDC rolls—that public support of the program dramatically decreased.<sup>161</sup>

Thus, when the indigent mother who sought public assistance that would enable her to stay at home and raise her children was imagined to be a white woman, she was figured as a member of the deserving poor—blameless with respect to her indigence and wholly worthy of governmental largesse. Hence the popular support for the program that would assist her. However, when the indigent mother who sought public assistance that would enable her to stay at home and raise her children was imagined to be a nonwhite woman, she was figured as a member of the undeserving poor—rightfully blamed for her poverty and desperately unworthy of taxpayers' money.<sup>162</sup> Hence the popular disdain of the program that would assist her. As Angela Onwuachi-Willig summarizes this history:

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<sup>158</sup> See William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 *FORDHAM L. REV.* 1821, 1847–50 (2001) (describing the agitation around access to welfare in which poor black women engaged in the 1960s).

<sup>159</sup> See, e.g., *id.* at 1840 (“Throughout the nation, local administrators in the early 1960s still vigorously enforced man-in-the-house rules. Through home visits, unannounced nighttime searches, and other means, they removed from the rolls any woman found to be associating with a man, especially if the man seemed to live in her house.”).

<sup>160</sup> See Onwuachi-Willig, *supra* note 145, at 1669 (“By the late 1960s, a string of cases had made welfare a statutory right in the United States, which enabled the number of black women on welfare rolls to continue to increase.”).

<sup>161</sup> See *id.* at 1664 (arguing that “[r]acist assumptions” have deprived AFDC (and now TANF) of public support).

<sup>162</sup> Analogously, when white women sought to perform the labor involved in staying in the home and raising children, this labor was conceptualized as valuable and deserving of governmental subsidy. However, when nonwhite women sought to perform the labor involved in staying in the home and raising children, this labor was conceptualized as not really labor. Hence, we arrive at TANF's insistence that its beneficiaries leave the home and sell their labor in the wage labor market. See 42 U.S.C. § 607(d) (2012).

Racist assumptions have turned public opinion and policy against providing the American poor with welfare benefits as the image of its primary beneficiaries changed from deserving, chaste white widows to lazy, never-married black baby-makers. As welfare recipients became racialized as black, standard rhetoric changed to implicitly blame unwed welfare mothers for the impoverished conditions in which they and their families live and, consequently, for societal problems that often stem from poverty.<sup>163</sup>

There is reason to fear that history will repeat itself in the context of class-based affirmative action. While this Article has endeavored to demonstrate that, at present, the beneficiaries of class-conscious admissions programs largely are imagined to be victims of structural disadvantages that make them deserving of departures from traditional indicia of merit in admissions decisions, this conceptualization need not endure. Again, if history is a teacher, we might expect to witness a reimagining of the deservingness of the beneficiaries of class-based affirmative action *if the beneficiaries of these programs, once implemented, are predominately black.*

Professor Randall Kennedy has offered a similar prediction, arguing that if class-based affirmative action functions to benefit racial minorities in disproportionate numbers, then we can expect its political popularity to wane.<sup>164</sup> As he explained:

This is the fate that has befallen social assistance programs that were truly nonracial in origin and application—think of the racial stigmatization of ‘welfare’ in the 1960s, ’70s, and ’80s. It will surely be the fate of social assistance programs that are aimed at helping the racial-minority needy, albeit through so-called race-neutral means.<sup>165</sup>

And as Gilens powerfully summarizes his empirical work, which shows that ideas about the race of those who are thought to benefit from a government assistance program have an overwhelming influence on whether the public will support the program,<sup>166</sup> “Americans who mistakenly believe that most welfare

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<sup>163</sup> Onwuachi-Willig, *supra* note 145, at 1664 (footnote omitted).

<sup>164</sup> See KENNEDY, *supra* note 34, at 93.

<sup>165</sup> *Id.*

<sup>166</sup> See Gilens, *supra* note 68, at 593. Gilens’s studies purport to show that “the perception that blacks are lazy has a larger effect on white Americans’ welfare policy preferences than does economic self-interest, beliefs about individualism, or views about the poor in general.” *Id.* His data lead him to argue that “[w]hatever other reasons whites may have for opposing welfare, their negative views of blacks appear to constitute an important factor in generating that opposition.” *Id.* at 597. He concludes: “white Americans’ welfare views are clearly not ‘race-neutral’ expressions of their economic self-interest, commitment to individualism, or evaluations of poor

recipients are black are substantially more likely to view welfare recipients as ‘the undeserving poor.’”<sup>167</sup> This point is important to underscore: there are numerous studies documenting that most persons believe that poor *black persons*, quite specifically, are to blame for their poverty.<sup>168</sup> Wilson cites studies that demonstrate the ubiquity of the “perception that Blacks are responsible for their own economic predicament and therefore undeserving of special government support.”<sup>169</sup> He explains that individualist explanations, which “deemphasize the structural origins” of poverty, are quite popular.<sup>170</sup> He then observes that these individualist explanations are especially popular when the indigence of black persons is at issue.<sup>171</sup> He looks to a study that shows that a majority of people believes that one can explain disproportionate levels of black poverty in terms of the personal shortcomings of those black people who are mired in that poverty. He writes:

A recent Pew Research Center national survey (2007) reported that “fully two-thirds of all Americans believe personal factors, rather than racial discrimination, explain why many African Americans have difficulty getting ahead in life; just 19% blame discrimination.” Nearly three-fourths of U.S. Whites (71%), a majority of Hispanics (59%), and even a slight majority of African Americans (53%) “believe that blacks who have not gotten ahead in life are mainly responsible for their own situation.”<sup>172</sup>

Which is to say, indigent black people do not typically get the benefit of having their poverty attributed to shifting economies, illnesses, disabilities, and sheer bad luck. Instead, people—including other black people—tend to suppose that poor black people’s poverty is the result of their personal moral and behavioral failures. Thus, the requisite discourses already exist for

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people in general. Instead, those views are strongly rooted in their beliefs about blacks, and particularly their perceptions of black welfare recipients.” *Id.* at 600.

<sup>167</sup> GILENS, *supra* note 78, at 140. Hopkins has also shown that persons who perceived the poor as white were “less likely to adopt individualistic explanations for poverty.” Hopkins, *supra* note 71, at 745. As discussed above, individualistic explanations of poverty attribute poverty to the personal moral and behavioral failings of the impoverished individual. According to individualist explanations, people are poor because of their own shortcomings—not forces outside of their control. Thus, pursuant to these explanations, the poor are necessarily undeserving, as they could have avoided falling into destitution. Hopkins’s study shows, then, that when the poor are thought to be white, they are more likely to be conceptualized as deserving. The converse is true as well: if the poor are thought to be black, they are likely to be conceptualized as undeserving.

<sup>168</sup> Wilson, *supra* note 99, at 6.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 7.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

understanding class-based affirmative action, if it disproportionately benefits black people, as an antipoverty program that, like TANF and unlike Social Security, benefits the undeserving poor. Should class-conscious admissions programs come to be conceptualized as such, we should expect their political popularity to dwindle to abysmal levels. *And we should expect such programs to be politically unpopular among conservatives and liberals alike.*

With respect to the last claim, one ought not to ignore that former President Bill Clinton, a Democrat, was at the wheel when Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act, which inaugurated TANF.<sup>173</sup> Indeed, when campaigning for election, Clinton had promised to “end welfare as we have come to know it.”<sup>174</sup> TANF was certainly a fulfillment of that promise. The program brought many changes to the government’s relationship with indigent families: it changed the nature of cash assistance for poor families from an entitlement to one that is contingent on the availability of funds;<sup>175</sup> it authorizes states to impose family caps, limiting the ability of beneficiaries to receive a grant that corresponds to their changing needs;<sup>176</sup> it makes the receipt of cash assistance contingent on the beneficiary engaging in “work activities”;<sup>177</sup> it generally limits the length of time that persons can receive TANF funds to five years;<sup>178</sup> and, it allows states to use TANF funds on “marriage promotion” in lieu of actually giving cash to families.<sup>179</sup> It is important to recognize that TANF’s punitive (and, again, only reluctantly charitable nature) is attributable to the general sense of revulsion that the country felt toward AFDC. The disdain was so bipartisan that a Democrat president felt empowered to replace the decades-old program with a newer program that wears its contempt for the undeserving poor on its sleeve. Which is to say: those who are imagined to be the undeserving poor, and the efforts that are imagined to benefit them, are reviled across party lines. As such, we might be wary about the future of class-based affirmative action if it comes to be conceptualized as a program that aids the undeserving poor.

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<sup>173</sup> See Michele Estrin Gilman, *The Return of the Welfare Queen*, 22 AM. U. J. GENDER SOC. POL’Y & L. 247, 248 (2014) (“In 1996, President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act promising to ‘end welfare as we have come to know it’ and implementing TANF.”).

<sup>174</sup> See *id.*

<sup>175</sup> See 42 U.S.C. § 601(b) (2012) (declaring that TANF “shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part”).

<sup>176</sup> See Gilman, *supra* note 173, at 249 & n.9.

<sup>177</sup> See 42 U.S.C. § 607(c)(1)(A) (2012).

<sup>178</sup> See 42 U.S.C. § 608(a)(7) (2012).

<sup>179</sup> See 42 U.S.C. § 603(a)(2)(A)(iii)(I)–(VII) (2012) (listing a series of activities that may promote “healthy marriage,” all of which states may fund with TANF money).

Now, it is important to be precise about what this Article is arguing. It is not contending that, should class-based affirmative action come to disproportionately benefit racial minorities (black people, particularly), society will perceive such class-conscious admissions programs to be “just like” AFDC and TANF and revile them as a result. Instead, the Article posits something much more nuanced than that: it proposes that, historically speaking, AFDC and TANF demonstrate that society has been quite willing to see undeservingness in black bodies. This Article offers that these historical lessons might, and should, lead us to wonder about the sustainability of class-based affirmative action’s current political popularity should black persons come to be overrepresented among the beneficiaries of these programs. Quite distinct from arguing that class-based affirmative action will be imagined to be “just like” AFDC and TANF, this Article simply identifies a characteristic that is present in AFDC and TANF, and it speculates about the future of class-based affirmative action should that characteristic come to be found in these programs as well.

An argument that AFDC and TANF can serve as a close historical analogue to class-based affirmative action is quite difficult to make, as AFDC and TANF have some significant differences from class-based affirmative action. For one, there is the matter of sexuality. AFDC and TANF are programs that implicate women’s sexuality inasmuch as they have come to be understood as programs that assist women whose sexuality has not been domesticated by, or cabined within, a marriage.<sup>180</sup> That is, as the beneficiaries of the program shifted from widows to single women whose unmarried status had nothing to do with death, the program became identified as one that assists women whose sexuality had not been expressed in traditional ways and within traditional institutions. Class-based affirmative action, on the other hand, does not directly implicate women’s, or anyone’s, sexuality. Thus, if AFDC and TANF are condemned in part because the public condemns women who have rejected sexual and procreative conventions, then the fact that class-based affirmative action does not involve sexuality at all makes it difficult to look at AFDC and TANF as class-based affirmative action’s historical analogue.

While this is true, two things are worthy of mention. First, one should be aware that women’s sexuality and patriarchy are not directly implicated in general assistance programs, the beneficiaries of which tend to be males.<sup>181</sup>

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<sup>180</sup> See Gilman, *supra* note 173, at 249.

<sup>181</sup> See Jonathan Zasloff, *Children, Families, and Bureaucrats: A Prehistory of Welfare Reform*, 14 J.L. & POLITICS 225, 277 n.163 (1998) (noting that California’s general assistance program primarily benefits single men without children).

Nevertheless, those programs are politically unpopular. Similarly, one might conclude that although sexuality and patriarchy are not directly implicated in class-based affirmative action, this fact will not save these programs from political unpopularity.

The second riposte is more elaborate. It begins by noting that to claim that the political unpopularity of AFDC and TANF is due solely or predominately to public disdain for women's rejection of sexual and patriarchal norms is to ignore the fact that those norms do not operate independent of race. In reality, race is quite implicated in patriarchy.<sup>182</sup> Further, we should be aware that the race of those living inconsistently with gender norms may make the rejection of those norms seem more reprehensible. As I have argued elsewhere,

[W]ithin a hegemonic devaluation of Blackness and Black people, a behavior is more easily censurable and subject to moral opprobrium when it is performed by a Black person. In other words, divorce, desertion and never-marrying can be aligned with less difficulty with "immorality" when it is Black women who are divorcing, deserting and being deserted, and never-marrying.<sup>183</sup>

Similarly, within a hegemonic devaluation of blackness and black people, the violation of patriarchal norms might become more reprehensible when a black woman is doing the violating. Divorce, desertion, and never-marrying—that is, a woman's rejection of traditional channels for expressing her sexuality—becomes even more unacceptable when that woman is black. All of this is to say: it is true that one must pay attention to patriarchal discourses when explaining the political unpopularity of AFDC and TANF. Yet, racial discourses are very much embedded within those patriarchal discourses, rendering race very much relevant to explanations of AFDC and TANF's unpopularity. Inasmuch as those same racial discourses might come to be implicated in class-based affirmative action, then it is altogether appropriate to look to AFDC and TANF for insight about the trajectory that class-based affirmative action may take.

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<sup>182</sup> See generally Kimberle Crenshaw, *Demarginalizing the Intersection of Race And Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (arguing that feminist theory is viewed narrowly from the white female perspective and omits the intersectionality between Black women and patriarchy).

<sup>183</sup> BRIDGES, *supra* note 147, at 215.

### 1. *Race-Neutral Characteristics that Strongly Correlate with Race*

It is important to underscore that the likelihood that class-conscious admissions programs would be reimagined as benefiting members of the undeserving poor hinges on those programs disproportionately benefiting racial minorities. And it is important to underscore that the question of whether such programs will disproportionately benefit racial minorities is an open one. This is simply because, while poor white college applicants have been disadvantaged by their class, poor nonwhite applicants have been disadvantaged by their class *and* race.<sup>184</sup> Accordingly, all other variables being equal, white college applicants within a given income range tend to score higher on standardized tests than nonwhite college applicants within that same income range.<sup>185</sup> As such, if an institution sought to implement a class-based affirmative action program that consists of admitting the “best” (according to traditional indicia of merit) students in lower income ranges, the lower-income students that the institution will admit disproportionately will be white. Consequently, whether racial minorities benefit disproportionately from a class-based affirmative action program depends on how the program is crafted; it depends on how determined the crafters of the program are to identify race-neutral characteristics that strongly correlate with race.<sup>186</sup>

Accordingly, the architects of those class-conscious admissions programs that have as its underlying goal the admission of racial minorities, have identified several race-neutral characteristics that strongly correlate with race.

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<sup>184</sup> See Wilson, *supra* note 99, at 8 (arguing that affirmative action based on economic need alone would exclude black people, as the “cumulative effects of race” impact their performance on “conventional measures of aptitude”).

<sup>185</sup> See THE BLACK-WHITE TEST SCORE GAP 2 (Christopher Jenks & Meredith Phillips eds., 1998) (“[T]he [black-white test score] gap shrinks only a little when black and white families have the same amount of schooling, the same income, and the same wealth.”); Ezekiel J. Dixon-Román, Howard T. Everson & John J. McArdle, *Race, Poverty and SAT Scores: Modeling the Influences of Family Income on Black and White High School Students’ SAT Performance*, 115 TCHRS. C. REC., Apr. 2013, at 1, 14 tbl.2 (giving findings of test scores by race and household income); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming The Innovative Ideal*, 84 CALIF. L. REV. 953, 988–89 (1996) (comparing the incomes of white and black students and their SAT scores and showing that as income increases, SAT scores increase, but within the income range, white students have scored higher than black students); *The Widening Racial Scoring Gap on the SAT College Admissions Test*, J. BLACKS HIGHER EDUC. (2005), [http://www.jbhe.com/features/49\\_college\\_admissions-test.html](http://www.jbhe.com/features/49_college_admissions-test.html) (discussing how white SAT takers from families with income under \$10,000 scored higher on average than all black students and conversely how black test takers from families with income over \$100,000 still scored lower than the mean score for whites).

<sup>186</sup> See Matthew N. Gaertner, *Advancing College Access with Class-Based Affirmative Action*, in THE FUTURE OF AFFIRMATIVE ACTION 175, 176 (Richard D. Kahlenberg ed., 2014) (arguing that “principled class-based admissions policies . . . should not be contorted into elaborate proxies for race”).

One such characteristic is family status—that is, whether a family is headed by two parents or only one. Writes one observer,

If colleges gave students credit for coming from a low-income ZIP code, black and Latino students would benefit enormously, as they would from the consideration of wealth and family status. Only 27 percent of white students grow up in a single-parent family, compared with 60 percent of black children and 34 percent of Latino children.<sup>187</sup>

With this in mind, we ought to return to the question of the likelihood that the beneficiaries of class-based affirmative action will become conceptualized as members of the undeserving poor—that is, the question of the likelihood that class-based affirmative action will come to be understood as an antipoverty program that is more like TANF than Social Security. This likelihood is great—indeed, it is tremendous—if the reason why individuals are selected to become beneficiaries of these programs is that they possess backgrounds or have experiences that typically are associated with undeservingness. Consider “preferences” given to applicants who come from single-parent families.<sup>188</sup> Unless the programs specify that beneficiaries must come from a family that is a single-parent one because one of the parents has died, then the beneficiaries typically will hail from families that are single-parent because the mother never married the father or has divorced him.<sup>189</sup> When one is looking for a nonracial reason for why AFDC transitioned from being a program that was imagined to benefit the deserving poor to one that presently is understood to benefit the undeserving poor, this is the precise reason that one usually finds: AFDC came to be a program that benefited women who were single parents because they had never married the fathers of their children or who had otherwise been abandoned by them. If class-based affirmative action becomes understood as an antipoverty

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<sup>187</sup> See David Leonhardt, *The Liberals Against Affirmative Action*, N.Y. TIMES (Mar. 9, 2013), <http://www.nytimes.com/2013/03/10/sunday-review/the-liberals-against-affirmative-action.html>.

<sup>188</sup> See, e.g., *Fisher v. Texas*, 631 F.3d 213, 228 (5th Cir. 2011) (noting that admissions officers consider applicants’ “family status” when making admissions decisions under Texas’s Ten Percent Plan), *vacated*, 133 S. Ct. 2411 (2013), *remanded to 758 F.3d 633* (5th Cir. 2014), *aff’d*, 136 S. Ct. 2198 (2016).

<sup>189</sup> See DAPHNE LOFQUIST ET AL., CENSUS BUREAU, U.S. DEP’T COMMERCE, C2010BR-14, HOUSEHOLDS AND FAMILIES: 2010, at 5 (2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf> (showing that while there were over 15 million female-headed households where no spouse was present in 2010, there were only over 5.7 million male-headed households where no spouse was present that year); see also CENSUS BUREAU, TABLE FG6: ONE-PARENT UNMARRIED FAMILY GROUPS WITH OWN CHILDREN UNDER 18, BY MARITAL STATUS OF THE REFERENCE PERSON: 2015 (2015), <https://www.census.gov/hhes/families/data/cps2015FG.html> (showing that 49.2% of single parent households headed by women were formed because the mother never married the father of her children, while 29.6% were created from divorce, 17.5% from separation, and 3.6% because of the death of the spouse).



program that benefits the children of these underserving women, how much hope should we have that the program will remain untarred by this association?

Similarly, some class-conscious admissions programs alter traditional admissions criteria for applicants who grew up in families where English is not spoken at home because this characteristic, like growing up in a single-parent family, strongly correlates with race.<sup>190</sup> However, it is easy to see how poor families who have not prioritized the speaking of English might be conceptualized as undeserving—as responsible for their poverty. That is, there are cultural discourses that describe as “lazy” or “entitled” those who immigrate

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<sup>190</sup> See *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 592 (W.D. Tex. 2009) (noting that, as part of Texas’s Ten Percent Plan, admissions offices can consider whether “languages other than English” were spoken at the applicants’ home).

There is the question of whether language and race are sufficiently distinct such that “preferring” applicants on the basis of language is not equivalent to “preferring” applicants on the basis of race. If the two characteristics are indistinct, then a class-based affirmative action program that is conscious of applicants’ relationship to English is a program that is conscious of applicants’ races and, as such, is constitutionally (and more politically) suspect.

The Court’s opinion in *Hernandez v. New York*, 500 U.S. 352 (1991) provides some insight into how the Bench conceptualizes the nature of language and race. The case concerned a prosecutor’s use of peremptory challenges to strike two Latinx persons from a jury. *Id.* at 355. The prosecutor claimed that he sought to remove these two potential jurors because, during the trial, an interpreter was going to translate the testimony of Spanish-speaking witnesses. *Id.* at 356. The prosecutor expressed fear that these bilingual potential jurors would be unable to ignore the witnesses’ direct testimony and heed only the interpreter’s translation of it. *Id.* The Court denied an equal protection challenge to the strikes, holding that the prosecutor had offered a “race neutral” reason for their use. *Id.* at 372. It noted, however, that the Court had not provided a general rule for when language discrimination ought to be conceptualized as race discrimination, observing that there might be times when the two were equivalent. It stated that it, in light of the facts before it, it did not need to address “the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes.” *Id.* at 371. The Court went on to say that it would face a different case if the “prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors.” *Id.* Thus, “[i]t may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.” *Id.* *Hernandez* thus stands for the proposition that the use of language can be—but will not always be—constitutionally equivalent to the use of race. Accordingly, a class-based affirmative action program that “prefers” applicants who come from families where English is not spoken at home may be found to be a race-conscious program if a court determines that language and race are closely correlated in the particular communities from which applicants came, i.e., all or most families in a particular region who do not speak English at home are Latinx. In such circumstances, to “prefer” non-English speakers is to “prefer” Latinx people. Alternately, the program likely will not be found to be a race-conscious program if there is racial heterogeneity among the families in a community who do not speak English at home (i.e., families fitting this description are black, Latinx, Asian, and white). In such circumstances, to “prefer” non-English speakers is not to prefer any particular racial group. The racial heterogeneity of non-English speaking families increases the likelihood that a court will find that the characteristic is not a proxy for race, but rather is a tool for determining which students have been disadvantaged by poverty and should reap the benefits of class-based affirmative action.

to the United States but do not learn English after a short period of time.<sup>191</sup> According to these narratives, these immigrants are not the “good” ones. They do not seek assimilation. They are not members of the “model minority” groups whose embrace of “American” values, like hard work and self-sacrifice, lead them to outperform even native-born Americans.<sup>192</sup> Indeed, if the embrace of “American” values is that which leads to the enormous success of “model minority” groups, then one might conclude that the refusal to embrace “American” values is that which leads to the poverty of other immigrant groups. A family that has not embraced English—a language that in many cultural discourses is simultaneous with “American”—can be presumed to have rejected American values. In so doing, they are responsible for their poverty. Thus, a class-based affirmative action program that benefits the children of these families might be conceptualized as benefiting the underserving poor.

## 2. *The (Un)Deservingness of Children?*

Some may argue that these class-based affirmative action programs will not be imagined to benefit the undeserving poor because, even if single mothers and immigrant parents who have been unable to learn English (or who have chosen not to do so) are constructed as the undeserving poor, class-conscious admissions programs will benefit their *children*. Which is to say, we might expect that the children of undeserving parents will not be tarred with undeservingness. If deservingness is the level of responsibility that an individual has for his poverty, how can a child be held responsible for the choices that his parents have made?

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<sup>191</sup> I provide an example of the consequences of this discourse in *Reproducing Race*, an ethnography of the obstetrics clinic of a large, underfunded, and overburdened public hospital in New York City. During an interview, one of the attending physicians lamented about the hospital’s “Spanish-speaking patients,” of which there were many. See BRIDGES, REPRODUCING RACE, *supra* note 147, at 130. She stated, “Spanish-speaking patients take it for granted that everyone will speak their language. They expect you to speak Spanish with them. That’s the problem: they come here and expect everything to be given to them.” *Id.* “It was unclear whether the “here” to which this attending referred was [the hospital] or the United States more generally.” *Id.* What was clear, however, was that she conceptualized the inability or refusal of “Spanish-speaking patients” to speak English with her as a problem that was a symptom of a general sense of entitlement. *Id.*

<sup>192</sup> See Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CALIF. L. REV. 1053, 1080 (1994) (defining “model minority” rhetoric as explaining why a group that is “racially different from whites succeeds on white terms”). Chiu explains that

[w]hite society . . . sees Asian American economic ‘success’ as evidence of assimilation to white norms and values. Asian Americans are ‘successful’ because they have adopted the American cultural characteristics of self-sufficiency, individuality, and hard work. As the term ‘model minority’ suggests, other minority groups would be well-served to do the same.

*Id.* (footnotes omitted).

There is certainly a thread within law and culture that posits that children should not be held responsible for their parents' choices. Consider the fact that children who are born to unmarried parents are a quasi-suspect class under the Equal Protection Clause and laws that burden them will be reviewed with heightened scrutiny.<sup>193</sup> Part of the reason that the jurisprudence has established this doctrine is the sense that it is unfair to punish children for the choices their parents have made. As the Court declared in *Weber v. Aetna Casualty & Surety Co.*:

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.<sup>194</sup>

Thus, constitutional law reflects a cultural commitment to holding children harmless for their parents' decisions.

But, there is evidence that we have other cultural commitments that conflict with this commitment to holding children blameless with respect to the actions of their parents. To begin, history demonstrates that children have not been held blameless for their indigence; that is, they have not been constructed universally as deserving. Evelyn Brodtkin's work here is instructive.<sup>195</sup> She contests the view that the children of poor parents were generally understood to be morally innocent. She writes that, historically, children have been subjected to probation and forced labor simply because their parents were poor. She explains:

Children of poor families, those ambiguously "at risk" in contemporary policy analysis, were categorized by the juvenile justice system as "dependent," a classification that carried with it important implications. Specifically, it was a label applied to children deemed to be part of families that were "poor by misconduct," the "pauper" class of earlier centuries. The courts regarded these children as "pre-delinquent" and subject to probation, institutionalization, or removal to more "suitable" homes, often on farms where they provided convenient farm labor.<sup>196</sup>

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<sup>193</sup> See *Mathews v. Lucas*, 427 U.S. 495, 505 (1976).

<sup>194</sup> 406 U.S. 164, 175 (1972) (footnote omitted).

<sup>195</sup> See Evelyn Z. Brodtkin, *The Making of an Enemy: How Welfare Policies Construct the Poor*, 18 *LAW & SOC. INQUIRY* 647 (1993).

<sup>196</sup> *Id.* at 662.

Indeed, Handler and Hasenfeld observe that “children in poor families had no moral claim on the state for material well-being”—a lack of moral claim that characterized the undeserving poor.<sup>197</sup> Thus, children have been blamed for the poverty that they inhabit. They are not necessarily saved from the undeservingness that is thought to characterize their parents.

Further, it is important to emphasize that undeservingness is about *blameworthiness* and *responsibility*. And there should be no doubt that this country has been comfortable with conceptualizing children as blameworthy and responsible. This is most evident in the fact that over 250,000 children find themselves within the adult criminal justice system every year.<sup>198</sup> Indeed, the historical arc has bent toward conceptualizing children as blameworthy and responsible with respect to the crimes that they commit:

Between 1979 and 2000, every state enacted provisions that eased transfer of juveniles to adult court. . . . As a result of this legislative flurry, transfers of juveniles to adult court shot up at least 70%, and the number of juveniles under eighteen prosecuted as adults skyrocketed from somewhere between 10,000 and 15,000 a year to 250,000 a year.<sup>199</sup>

At present, all states provide some mechanism by which minors can be prosecuted as adults.<sup>200</sup> Alaska, Delaware, Rhode Island, and Washington allow children to be prosecuted as adults for any crime, *including capital crimes*.<sup>201</sup> Moreover, these states do not specify a minimum age for adult prosecution. Indiana, Kansas, and Vermont specify that children as young as ten years old can be prosecuted as adults.<sup>202</sup> Arkansas, Georgia, Kentucky, and Texas specify that children as young as fourteen years old (thirteen years old in Georgia) can be prosecuted as adults for capital crimes.<sup>203</sup> Which is to say: states’ criminal

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<sup>197</sup> See HANDLER & HASENFELD, *supra* note 90, at 65.

<sup>198</sup> See JASON ZIEDENBERG, NAT’L INST. OF CORR., DOJ, YOU’RE AN ADULT NOW: YOUTH IN ADULT CRIMINAL JUSTICE SYSTEMS 2 (2011), <http://static.nicic.gov/Library/025555.pdf> (“It has been estimated that nearly 250,000 youth under age 18 end up in the adult criminal justice system every year.”); Andrea Wood, Comment, *Cruel and Unusual Punishment: Confining Juveniles with Adults After Graham and Miller*, 61 EMORY L.J. 1445, 1458 n.99 (2012) (“Approximately 250,000 juveniles are prosecuted in adult court each year.”).

<sup>199</sup> Christopher Slobogin, *Treating Juveniles Like Juveniles: Getting Rid of Transfer and Expanded Adult Court Jurisdiction*, 46 TEX. TECH L. REV. 103, 103–04 (2013) (footnotes omitted).

<sup>200</sup> See PATRICK GRIFFIN ET. AL, DOJ, OFFICE OF JUSTICE PROGRAMS, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 2 (2011), <https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf> (“[A]ll states have transfer laws that allow or require criminal prosecution of some young offenders, even though they fall on the juvenile side of the jurisdictional age line.”).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

laws evidence that we, as a country, are open to conceptualizing children as blameworthy, and we are amenable to thinking of them as agents who can, and should, be held responsible for the things that they do and the behaviors in which they engage. It is no large leap to conjecture that we, as a country, are amenable to thinking of young adults applying to college as responsible for their poverty and, consequently, as members of the undeserving poor.

The seeds for conceptualizing young adults applying to college as blameworthy and (ir)responsible have already been sown. In Justice Thomas's dissent in *Grutter*, he philosophized that black students aspiring toward admission to the University of Michigan Law School would not study for the LSAT after earning a 155 on practice tests, as their "admissions prospects approach certainty" with that score.<sup>204</sup> Essentially, Justice Thomas is willing to hold black students responsible for the fact of their underperformance relative to their white counterparts. If one is interested in damning the beneficiaries of class-based affirmative action, one merely needs to shift the subject of Thomas's narrative: indigent applicants can just as easily be blamed for underperforming relative to their wealthier counterparts if a class-conscious admissions program functions to admit poor students with less impressive credentials (when measured according to traditional indicia of merit). Essentially, Thomas previews a cultural discourse that describes young adults hailing from impoverished backgrounds as responsible for the categories used to describe them (i.e., underperforming, disadvantaged, less competitive).

As such, college applicants hailing from single-parent families or from households where English is not spoken—applicants who may become beneficiaries of class-conscious admissions programs seeking to admit significant numbers of racial minorities—may be conceptualized as subjects that can properly be blamed and held responsible for their status as the children of unmarried parents or the members of families who do not speak English at home. They may be tarred by the undeservingness that attaches to their parents who dared to raise them in households without a patriarch or where a language other than English was spoken. These (largely nonwhite) children may be conceptualized as undeserving as well. If so, then the class-based affirmative action program that benefits them may come to be understood as one that benefits the undeserving poor.

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<sup>204</sup> *Grutter v. Bollinger*, 539 U.S. 306, 377 (2003) (Thomas, J., dissenting).

### 3. *The Medicaid Expansion and the Racialization of Deservingness*

The Affordable Care Act's expansion of the universe of persons who are eligible for Medicaid—and the refusal of some states to expand their Medicaid programs after the Court's decision in *NFIB v. Sebelius*<sup>205</sup> gave them permission to do so—is worth examining inasmuch as it reveals that ideas about deservingness are still quite prevalent in the country's cultural and political imaginary. Moreover, it reveals that deservingness continues to be racialized, with people of color tending to fall on the undeserving side of the binary.

In 2010, Congress passed the Patient Protection and Affordable Care Act (ACA), which was intended to enable the millions of individuals who were living without health insurance to access insurance coverage of some kind.<sup>206</sup> The ACA sought to achieve this goal through various mechanisms, the most relevant of which for present purposes was the creation of a new category of eligibility under the Medicaid program. This new category consisted of citizens and documented residents who earn less than 133% of the federal poverty line and who were otherwise ineligible for Medicaid.<sup>207</sup> In some circles, the new category of individuals that the ACA made eligible for Medicaid was significantly different from the old categories of eligible individuals insofar as the new category consisted of people who could be blamed for their poverty. That is, prior to the passage of the ACA, Medicaid-eligible individuals were persons who were poor because they had been widowed, because they were blind, because they were disabled, because they were elderly, etc.<sup>208</sup> As Huberfeld, Leonard, and Outterson state quite plainly, “Medicaid has historically provided health insurance coverage to the ‘deserving’ poor, including women (widows in particular) and their children, the blind, the disabled, and impoverished elderly.”<sup>209</sup> The ACA made eligible for Medicaid people who had “no excuse” for their poverty. They were poor, and they had no

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<sup>205</sup> 132 S. Ct. 2566 (2012).

<sup>206</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of 25, 26, 29, and 42 U.S.C.).

<sup>207</sup> Patient Protection and Affordable Care Act § 2001(a)(1) (2010) (codified at 42 U.S.C. § 1396a (2012)).

<sup>208</sup> Nicole Huberfeld, Elizabeth Weeks Leonard & Kevin Outterson, *Plunging into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Business v. Sebelius*, 93 B.U.L. REV. 1, 25 (2013) (“Each of the pre-ACA categories were both impoverished and shared a common characteristic: poor and elderly, poor and disabled, poor and pregnant, and so forth.”).

<sup>209</sup> *Id.* at 13 (footnote omitted); see also Nicole Huberfeld, *Federalizing Medicaid*, 14 U. PA. J. CONST. L. 431, 439 (2011) (“Certain categories of blameless or ‘deserving’ poor have been assisted by local, state, or federal government since the turn of the twentieth century and consistently have included women (widows) and their children, the blind, the disabled, and impoverished elderly.”); Sandra J. Tanenbaum, *Medicaid Eligibility Policy in the 1980s: Medical Utilitarianism and the “Deserving” Poor*, 20 J. HEALTH POL. POL’Y & L. 933, 933–34 (1995).

explanation for their indigence that existed outside of themselves. They were the undeserving poor.

Most fascinatingly, Justice Roberts's opinion in *NFIB v. Sebelius* reflected the deserving poor/undeserving poor dichotomy and "enrobed this distinction with constitutional significance."<sup>210</sup> Roberts argued that the ACA's offer of coverage to the undeserving poor made the Medicaid program that it instantiated wholly different from the pre-ACA Medicaid program, which had been reserved for the deserving poor. He writes that in offering health insurance to those who did not fit within the traditional categories of neediness—that is, in offering health insurance to the underserving poor—the ACA dramatically transformed Medicaid. He explained:

The Medicaid expansion . . . accomplishes a shift in kind, not merely degree. The original program was designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children. Previous amendments to Medicaid eligibility merely altered and expanded the boundaries of these categories. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level. It is no longer a program to care for the neediest among us . . . .<sup>211</sup>

The most obvious riposte to Roberts's claim that the "new" Medicaid does not "care for the neediest among us" is to note that those who the ACA makes eligible for Medicaid are quite "needy."<sup>212</sup> Justice Ginsburg makes this precise argument, observing that "[s]ingle adults earning no more than \$14,856 per year—133% of the current federal poverty level—surely rank among the Nation's poor."<sup>213</sup> Because Roberts likely recognizes that a person struggling to live off of less than \$15,000 per year is quite "needy" *if that term means "needing help,"* one must conclude that Roberts is employing a different meaning of the term.<sup>214</sup> Indeed, one might offer that when Roberts says "needy," he means "deserving." Accordingly, Medicaid, as transformed by the ACA, "is no longer a program to care for the [*most deserving*] among us."<sup>215</sup>

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<sup>210</sup> Huberfeld, Leonard & Otterson, *supra* note 208, at 25.

<sup>211</sup> *NFIB v. Sebelius*, 132 S. Ct. 2566, 2605–06 (2012).

<sup>212</sup> *Id.* 2606.

<sup>213</sup> *Id.* at 2636 (Ginsburg, J., dissenting).

<sup>214</sup> *See id.* at 2605.

<sup>215</sup> *Id.* at 2606 (emphasis added).

Roberts ultimately leveraged the conceptual distinction that he constructed between the “old” and “new” Medicaid to argue that denying federal funds to states that declined to implement the “new” Medicaid program was coercive. Hence, the remedy to the coercive nature of the ACA was not to strike down the law altogether (as the dissenting Justices would have done), but rather to give states the option to expand their Medicaid programs. If a state decided against doing so, it must still receive federal Medicaid funds. In this way, the Court laid the path for our present political terrain, wherein some states have opted to expand their Medicaid programs while others have not. As of this writing, nineteen states have declined the expansion.<sup>216</sup>

Roberts’s reasoning in *NFIB v. Sebelius* is significant for two reasons. First, it demonstrates the continued salience of ideas about deservingness; indeed, it embeds within constitutional law ideas about the distinction between the deserving and undeserving poor. Second, it allows us to identify the real people who those ideas reference. Doing so permits us to see the racialization of deservingness. To explain: Roberts indexes the 16% of the U.S. population that was uninsured prior to the passage of the ACA as the undeserving poor.<sup>217</sup> (Indeed, had they been deserving, the conceptual apparatus elaborated in Roberts’s opinion suggests that they would have come within one of the existing categories of Medicaid eligibility and, consequently, would have received Medicaid.) Interestingly (and unsurprisingly), racial minorities were disproportionately represented among that uninsured segment of the population. Data from 2010 showed that while “non-Hispanic White” persons made up 64.5% of the total population, they were only 45% of the uninsured population.<sup>218</sup> However, while black persons made up 12.7% of the total population, they constituted 15% of those who were uninsured.<sup>219</sup> And most dramatically, while persons who were “Hispanic (any race)” comprised 16% of the total population, they were 32% of those who were uninsured.<sup>220</sup> In sum,

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<sup>216</sup> See *Status of State Action on the Medicaid Expansion Decision*, HENRY J. KAISER FAMILY FOUND. (Jan. 1, 2017), <http://kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/> (indicating that the states that have chosen not to expand Medicaid are Alabama, Florida, Georgia, Idaho, Kansas, Maine, Mississippi, Missouri, Nebraska, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin, and Wyoming).

<sup>217</sup> See Elizabeth Mendes, *In U.S., 16.4% of Adults are Uninsured in 2010*, GALLUP (Jan. 18, 2011), <http://www.gallup.com/poll/145661/adults-uninsured-2010.aspx>.

<sup>218</sup> *Uninsured Rates for the Nonelderly by Race/Ethnicity*, HENRY J. KAISER FAMILY FOUND. (2015), <http://kff.org/uninsured/state-indicator/rate-by-raceethnicity/?dataView=1&currentTimeframe=0&selectedRows=%7B%22wrapups%22:%7B%22united-states%22:%7B%7D%7D%7D>.

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

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



almost half of the population that Roberts indexed as the undeserving poor was racial minorities in 2010. The fact that racial minorities are represented in this “undeserving” group in large (relatively and absolutely) and disproportionate numbers suggests that the categories of the deserving and undeserving poor have maintained their racial salience.

Further, consider that many of the states that have decided not to expand Medicaid coverage under the ACA have large numbers of black residents.<sup>221</sup> This is significant because it may help to explain why some states have decided not to expand Medicaid. This is not to deny that there are many reasons why policymakers in a state would decide against expanding its Medicaid programs.<sup>222</sup> And surely, some of these more benign reasons have motivated the states that have chosen that option. However, the fact that the decision not to expand state Medicaid programs disproportionately harms racial minorities may explain why such decisions are politically acceptable.<sup>223</sup>

Dorothy Roberts has made this argument in a different context. Writing shortly after the Court delivered its decision in *Rust v. Sullivan*—holding that the Constitution was not offended by a Title X regulation that prohibited providers who largely served poor women from providing information about abortion to their indigent clients—she noted that the decision disproportionately harmed women of color.<sup>224</sup> She then asked why that result was “politically

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<sup>221</sup> See Rachel Garfield & Anthony Damico, *The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid*, HENRY J. KAISER FAMILY FOUND. (Oct. 19, 2016), <http://kff.org/health-reform/issue-brief/the-coverage-gap-uninsured-poor-adults-in-states-that-do-not-expand-medicaid-an-update/>.

<sup>222</sup> These reasons include budget concerns, ideological opposition to a large federal government, and partisan politics, among others. See Gov. Bobby Jindal, *Why I Opposed Medicaid Expansion*, NOLA (July 23, 2013, 11:40 AM), [http://www.nola.com/opinions/index.ssf/2013/07/gov\\_bobby\\_jindal\\_why\\_i\\_opposed.html](http://www.nola.com/opinions/index.ssf/2013/07/gov_bobby_jindal_why_i_opposed.html); Merrill Matthews, *Seven Reasons States Should Just Say No to Medicaid Expansion*, FORBES (Dec. 7, 2012, 12:02 PM), <http://www.forbes.com/sites/merrillmatthews/2012/12/07/seven-reasons-state-should-just-say-no-to-medicaid-expansion/#adbe78a639d9>; Kip Piper, *Medicaid Eligibility Expansion: Arguments for and Against States Opting for ACA Medicaid Expansion*, PIPER REPORT (Sept. 10, 2012), <http://piperreport.com/blog/2012/09/10/medicaid-eligibility-expansion-arguments-for-and-against-states-opting-for-aca-medicaid-expansion/>.

<sup>223</sup> Interesting in this regard are the racial identities of supporters and opponents of the ACA. A public opinion poll conducted in September 2016 by the Kaiser Family Foundation showed that while 72% of the black persons polled had favorable views of the ACA, only 36% of the white persons polled had similar views. *Kaiser Health Tracking Poll: The Public's Views on the ACA*, HENRY J. KAISER FAMILY FOUND., <http://kff.org/interactive/kaiser-health-tracking-poll-the-publics-views-on-the-aca/#?response=Favorable>—Unfavorable&aRange=twoYear (last updated Feb. 24, 2017). While only 19% of black persons polled held unfavorable views, 56% of white persons polled held similar views. *Id.* Meanwhile, 54% of “Hispanics” held favorable views, and 42% held unfavorable views. *Id.*

<sup>224</sup> Dorothy E. Roberts, *Rust v. Sullivan and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587, 597 (1993).

acceptable.”<sup>225</sup> She answers that the race of those whom the policy affected likely explains the government’s willingness to pursue the policy in the first instance and the Court’s willingness to declare the policy as consistent with the demands of the Constitution. She writes:

Race may help to explain the government’s willingness to exclude Title X patients from the privileges that other women enjoy. It may help to explain the Court’s refusal to require that the government provide equal access to medical care. Race generally has proven to be a barrier to social reform in America. White Americans have been unwilling to pay for subsidies perceived to benefit primarily Blacks. As economist Robert Heilbroner noted, the “merging of the racial issue with that of [social] neglect serves as a rationalization for the policies of inaction that have characterized so much of the American response to need.”<sup>226</sup>

A similar phenomenon is operating in the context of the Medicaid expansion. That black people are disproportionately harmed by states’ choices not to expand Medicaid “serves as a rationalization for” this particular “polic[y] of inaction.”<sup>227</sup> That is, the racial composition of the population excluded from Medicaid coverage makes the decision not to expand these programs politically acceptable.

## CONCLUSION

In conclusion, advocates for class-based affirmative action have justified these programs on a variety of grounds.<sup>228</sup> However, one justification that is frequently articulated is that class-based affirmative action is attractive, and superior to race-based affirmative action, because it allows everyone to think beyond the divisive concept of race.<sup>229</sup> Class-based affirmative action, it is argued, allows people who sit at various points on the political spectrum to see a common ground—a common ground that a focus on race makes impossible to

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<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> For an itemization—and critical assessment—of the variety of justifications that supporters of class-based affirmative action have proffered, see Bridges, *supra* note 33, at 57–59.

<sup>229</sup> See, e.g., Cashin, *supra* note 105, at 950 (discussing the resentment that some white people feel towards black people, the backlash that this produces against efforts perceived as being designed to assist racial minorities, and imploring those who continue to champion for race-based affirmative action to “consider whether its benefits are worth the costs of continued racial cleavage”); Kahlenberg, *supra* note 12, at 1062 (“[I]t is the policy of racial preferences that, by its very nature, divides people, often in a way that is politically disastrous for progressives. Class-based preferences, on the other hand, do not suffer from this handicap.”).

recognize. Class-conscious admissions programs, supporters say, will function to address past racial wrongs, ameliorate existing racial stratification, and assist those who are the victims of unearned economic disadvantage. Class-based affirmative action is able to achieve these important ends precisely because it does not require us to think about race, the argument goes.

However, critical theorists of race understand that race is always present and consistently relevant, even when one is not thinking about it. (Arguably, in the post-civil rights era, not thinking about race is the very mechanism by which race and racial inequality are reproduced.<sup>230</sup>) Accordingly, critical theorists of race are attentive to the possibility—indeed, the likelihood—that race will nevertheless insinuate itself into how class-based affirmative action is conceptualized, even though class-conscious programs purport to be race-neutral and purport to allow us all to be colorblind. That class-based affirmative action will come to be regarded, and racialized, as another program in the social safety net that provides benefits to the undeserving poor is an example of the danger of attempting to ignore race by using facially race-neutral means to solve race-salient problems.<sup>231</sup>

The lesson, perhaps, is that we ought not to ignore race and, in so doing, expect that it will just go away. Rather, if we want to make race insignificant, we might need to confront it directly whenever it arises. And, if it is true, as it undeniably is, that race is ubiquitous, then this means that our confrontations of

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<sup>230</sup> See CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xv (Kimberlé Crenshaw et al. eds., 1995) (arguing that one of the consequences of not thinking about race 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>231</sup> In *Croson v. City of Richmond*, 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 city’s lucrative construction industry—ought to be resolved using race-neutral means. 488 U.S. 469, 507–11 (1989). (“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.”) *Id.* at 509–10. The practice of attempting to achieve racial ends with race-neutral means has explicitly been built into the strict scrutiny standard. See *Grutter v. Bollinger*, 539 U.S. 306, 326, 339–40 (2003) (stating that, to pass strict scrutiny, governments that want to implement race-conscious laws have to show “serious, good faith consideration of workable race-neutral alternatives” and evidence that those race-neutral efforts would fail or had failed). Thus, the Court’s Equal Protection jurisprudence now *requires* governments to undertake the problematic task of trying to solve race problems with race-neutral means—means that may function to reproduce race and racial inequality in surreptitious and insidious ways.

race must be ubiquitous as well. This is not a reason for pessimism, but rather a reason to prepare ourselves for a constant, fierce, but winnable battle.

To decide that it is better to ignore race is to decide to open the door to the reproduction of racial inequality in novel and oblique ways. This is what this Article predicts of class-based affirmative action. The moment that class-based affirmative action allows us to say nothing about race is the same moment that its beneficiaries are constructed as undeserving and are racialized accordingly. Class-based affirmative action will enjoy all manner of political support when it is imagined to benefit the implicitly white deserving poor, and it will come to be maligned when it is imagined to benefit the implicitly nonwhite undeserving poor.