

Getting Real About Race and Class: An Evaluation of the Constitutionality of Class-based, Socioeconomic Affirmative Action Without *Grutter*

Junis L. Baldon*

I. INTRODUCTION	19
II. FACIAL NEUTRALITY AND THE UNCONSTITUTIONAL RACE-CONSCIOUSNESS OF CLASS-BASED, SOCIOECONOMIC AFFIRMATIVE ACTION	21
III. THE DEMISE OF <i>GRUTTER</i> AND THE AFFIRMATIVE ACTION EXCEPTION	24
A. <i>The Constitutionality of Class-based, Socioeconomic Affirmative Action Without Grutter</i>	24
B. <i>After the Demise of Grutter: A New Approach With Old Problems</i>	28
IV. CONCLUSION.....	33

I. INTRODUCTION

The concept of “racial neutrality” remains omnipresent in our political and judicial discourse about the use of race in college and university admissions. Proponents of “race neutrality” have advocated for the use of class-based, socioeconomic affirmative action as a possible alternative to the explicit use of race in college and university

* B.A., University of Kentucky, 2005; J.D., The Ohio State University Moritz College of Law, 2009. The author is a senior associate in the business litigation and appellate practice groups at the law firm of Frost Brown Todd LLC in Louisville, Kentucky. He served as counsel to a group of law professors from the University of Louisville Brandeis School of Law that filed an amicus brief in support of the Respondents in the 2015 sequel to *Fisher v. University of Texas at Austin*. The views expressed in this Essay should not be attributed to Frost Brown Todd and belong to the author alone.

admissions.¹ Indeed, even Justice Scalia and Justice Thomas have argued that the use of class-based, socioeconomic affirmative action is an acceptable, constitutional race-neutral alternative to race-based affirmative action.² And in *Fisher v. University of Texas at Austin*, the Supreme Court seemingly endorsed race-neutral class-based, socioeconomic affirmative action by imposing on colleges and universities “the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.”³

Not surprisingly, the briefs and oral argument in the sequel to *Fisher I* suggest that class-based, socioeconomic affirmative action could be a “workable race-neutral alternative” to the University of Texas’ use of race in its admission criteria.⁴ But I’m not convinced that’s possible. I instead see class-based, socioeconomic affirmative action as a rhetorical device to make the abolishment of race-based affirmative action more palatable to the Court. Recent public opinion polls show that a majority of Americans—including a vast majority of racial and ethnic minorities—continue to support the limited use of race in college and university admissions.⁵ In my view, proponents of class-based, socioeconomic affirmative action—who, incidentally tend to be opponents of race-based affirmative action—seek to soften the blow if the Court offs race-based affirmative action by providing the possibility of a race-neutral alternative.

¹ See Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CAL. L. REV. 1037, 1060 (1996).

² 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 (1979) (“I do not, on the other hand, oppose—indeed, I strongly favor—what might be called . . . ‘affirmative action programs’ of many of types of help for the poor and disadvantaged.”); see also Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, 5 YALE L. & POL’Y REV. 402, 410-11 (1987) (“Any preferences given should be directly related to the burdens that have been unfairly placed in those individuals’ paths, rather than on the basis of race and gender, or on other characteristics that are often poor proxies for true disadvantage.”).

³ *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2420 (2013) (“*Fisher I*”).

⁴ Transcript of Oral Argument at 31-34, *Fisher v. University of Texas at Austin*, --- U.S. --- (No. 14-981); see also Brief for Richard D. Kahlenberg Supporting Petitioner Brief of Richard D. Kahlenberg as Amicus Curiae in Support of Neither Party at 13-15, *Fisher v. Univ. of Texas at Austin*, --- U.S. --- (No. 14-981), 2015 WL 5345843 (U.S.).

⁵ Bruce Drake, *Public strongly backs affirmative action programs on campus*, PEW RESEARCH CENTER, (Apr. 22, 2014), <http://www.pewresearch.org/fact-tank/2014/04/22/public-strongly-backs-affirmative-action-programs-on-campus/>; see also Frances Kai-Hwa Wang, *New Study Shows Asian American Support for Affirmative Action*, NBC NEWS, (Oct. 6, 2014, 5:09 PM), <http://www.nbcnews.com/news/asian-america/new-study-shows-asian-american-support-affirmative-action-n213976>.

But substituting class and socioeconomic factors in the place of race in college and university admissions simply asks institutions to hide the ball, and use class and socioeconomic factors as proxies for race. In fact, one civil rights organization has already challenged a California school district's student assignment plan on the basis that it used class and socioeconomic factors as unconstitutional proxies for race.⁶ While that challenge failed as a matter of state law, the "proxy for race" argument would seemingly doom any class-based, socioeconomic alternative to race-based affirmative action under the Equal Protection Clause.

This Essay seeks to provide some clarity about the push for class-based, socioeconomic affirmative action. Although facially neutral, class-based, socioeconomic affirmative action suffers from many of the same constitutional problems as race-based affirmative action. Just like its race-based counterpart, class-based, socioeconomic affirmative action is tainted by the race-conscious motive of increasing the number of racial and ethnic minorities on college campuses. That alone should make class-based, socioeconomic affirmative action unconstitutional under the Court's existing non-affirmative action equal protection jurisprudence.

Yet the Court's affirmative action decisions, *Bakke* and *Grutter*—the very decisions that proponents of class-based, socioeconomic affirmative action want overruled—provide colleges and universities a limited exception to experiment with race-neutral and race-conscious affirmative action measures. Those decisions are vital to the constitutionality of class-based, socioeconomic affirmative action, and without them, class-based, socioeconomic affirmative action is vulnerable to constitutional challenge under a number of theories. But even if a new constitutional framework is developed in the absence of *Bakke* and *Grutter*, class-based, socioeconomic affirmative action is so laden with the same alleged practical problems as race-based affirmative action that perhaps we are better off with the express use of race instead.

II. FACIAL NEUTRALITY AND THE UNCONSTITUTIONAL RACE-CONSCIOUSNESS OF CLASS-BASED, SOCIOECONOMIC AFFIRMATIVE ACTION

In *Washington v. Davis*, the Court concluded that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory motive."⁷ Less than a year later, in *Village of Arlington Heights v. Metropolitan Housing Development*

⁶ See *Am. Civil Rights Found. v. Berkeley Unified Sch. Dist.*, 90 Cal. Rptr. 3d 789, 798-99 (Cal. Ct. App. 2009).

⁷ 426 U.S. 229, 240 (1976).

Corporation, the Court simplified the holding in *Davis* into a general rule: “Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”⁸ Thus, under *Davis* and *Arlington Heights*, discriminatory motive by the government is the constitutional touchstone for the Court’s equal protection analysis. Indeed, even when a statute is facially neutral in regards to race, the Court has consistently concluded that it will be deemed unconstitutional under the Equal Protection Clause.⁹ *Davis* and *Arlington Heights* therefore have profound implications for the constitutionality of class-based, socioeconomic affirmative action.

Because “any official action that treats a person differently on account of his race or ethnic origin is inherently suspect,” all racial classifications, whether designated “benign” or “remedial,” are subject to strict scrutiny.¹⁰ If all strict scrutiny did was set an exceedingly high burden for the government’s use of racial classifications, then class-based, socioeconomic affirmative action could be a constitutionally “workable” alternative to race-based affirmative action. But strict scrutiny purports to do more; it is designed to provide a “most searching examination” of the government’s use of racial classifications to “‘smoke out’ illegitimate uses of race.”¹¹ This “smok[ing] out” feature of strict scrutiny is consistent with the language of *Davis* and *Arlington Heights* regarding facially neutral laws.¹² Strict scrutiny requires the Court to go beyond the text of a facially neutral policy and inquire into the government’s asserted interest for its adoption.¹³ If that’s true, then class-based, socioeconomic affirmative action should also be subject to strict scrutiny.

The fundamental problem with class-based, socioeconomic affirmative action is that while it eliminates the need to use racial classifications, it does not address the discriminatory motives that

⁸ 429 U.S. 252, 265 (1977).

⁹ See, e.g., *Davis*, 426 U.S. at 241; see also *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).

¹⁰ *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2419 (2013); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

¹¹ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223, 226 (1995) (quoting *Croson*, 488 U.S. at 493).

¹² See *Feeney*, 442 U.S. at 272 (noting that under *Davis* and *Arlington Heights* that “even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose”).

¹³ See *Croson*, 488 U.S. at 495 (citation omitted); see also *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (“The task of assessing a jurisdiction’s motivation . . . is not a simple matter; on the contrary, it is an inherently complex endeavor, one requiring the trial court to perform a ‘sensitive inquiry into such circumstantial and direct evidence of intent as may be available.’”).

supposedly underlie race-based affirmative action programs generally. Proponents of class-based, socioeconomic affirmative action suggest that such programs are analytically distinct from race-based affirmative action because class and socioeconomic status are not suspect categories, unlike race.¹⁴ But that addresses the issue of classification, not motive. If *Davis* and *Arlington Heights* are correct, then the relevant constitutional inquiry for class-based, socioeconomic affirmative action should not focus on whether classifications are used, but on the government's motives for adopting class-based, socioeconomic affirmative action as a purported race-neutral alternative.

And that is where class-based, socioeconomic affirmative action runs into trouble. Discriminatory intent “exists whenever the government selects a course of action at least in part ‘because of’ its adverse—or beneficial—effects upon a racial group.”¹⁵ Proponents of class-based, socioeconomic affirmative action recognize that the primary purpose of such programs is to increase the number of racial and ethnic minorities on college campuses.¹⁶ Thus, while class-based, socioeconomic affirmative action programs are facially neutral and avoid the use of “highly suspect” racial classifications, the purpose behind them is undoubtedly race-conscious. In a class-based, socioeconomic affirmative action admissions program, class and socioeconomic status are used as proxies for race. That should subject class-based, socioeconomic affirmative action programs to strict scrutiny under *Davis* and *Arlington Heights*.

Thus, the race-conscious motive underlying class-based, socioeconomic affirmative action should cast substantial doubt on its constitutionality. Indeed, as one commentator has observed, “[i]f facially neutral affirmative action schemes are subject to an equal protection challenge on the grounds of discriminatory intent, it follows that a

¹⁴ Kahlenberg, *supra* note 1, at 1064 (“[C]lass-based preferences provide a constitutional way to achieve greater racial and ethnic diversity, because they do not use a suspect category for decision making.”); *see also* Genevieve Campbell, Note, *Is Classism the New Racism? Avoiding Strict Scrutiny’s Fatal in Fact Consequences by Diversifying Student Bodies on the Basis of Socioeconomic Status*, 34 N. KY. L. REV. 679, 695-96 (2007) (“Economic affirmative action is defined as a race neutral alternative to diversifying student bodies on the basis of race.”).

¹⁵ Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2348 (2000).

¹⁶ Kahlenberg, *supra* note 1, at 1097 (“For the most part, however, class-based preferences are designed to *supplant*, rather than supplement, race-based preferences.”) (emphasis in original); *see also* Scalia, *supra* note 2, at 156 (“It may well be the many, or even most, of those benefited by [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.*”) (emphasis in original).

government instituting a class-based preference may have to demonstrate that the preference is not racially motivated.”¹⁷ The only saving grace for class-based, socioeconomic affirmative action may be the case that many of its proponents abhor: *Grutter v. Bollinger*.¹⁸

III. THE DEMISE OF *GRUTTER* AND THE AFFIRMATIVE ACTION EXCEPTION

A. *The Constitutionality of Class-based, Socioeconomic Affirmative Action Without Grutter*

Because the Court in *Grutter* recognized that colleges and universities have a “compelling interest in attaining a diverse student body,” it operates as an exception to *Davis* and *Arlington Heights* for colleges and universities to consider class-based, socioeconomic affirmative action.¹⁹ While the government’s use of racial classifications and policies with discriminatory motives are presumptively unconstitutional, *Grutter* permits colleges and universities to experiment with race-specific means and race-neutral alternatives to achieve a diverse student body in order to obtain certain educational benefits.²⁰ Indeed, *Grutter* can be read as requiring the use of race-neutral alternatives before a college or university can turn to the express use of race in admissions. Justice Kennedy’s opinion in *Fisher I* certainly suggests as much.²¹

Although *Grutter* appears to allow the use of class and socioeconomic factors to serve as proxies for race in college and university admissions, many proponents of class-based, socioeconomic affirmative action believe that the case was wrongly decided. Justice Thomas, for example, has described *Grutter* as “a radical departure from our strict-scrutiny precedents,” and has explicitly stated that it should be

¹⁷ Chapin Cimino, *Class-Based Preferences in Affirmative Action Programs After Miller v. Johnson: A Race-Neutral Option, or Subterfuge?* 64 U. CHI. L. REV. 1289, 1301 (1997).

¹⁸ *Grutter v. Bollinger*, 539 U.S. 306 (2003); see also *id.* at 356 (Thomas, J., concurring in part and dissenting in part); *id.* at 347 (Scalia, J., concurring in part and dissenting in part); *Fisher I*, 133 S. Ct. at 2424 (Thomas, J., concurring).

¹⁹ See *Grutter*, 539 U.S. at 309.

²⁰ *Shaw v. Reno*, 509 U.S. 630, 643 (1993); see also *Grutter*, 539 U.S. at 339-40; *Adarand*, 515 U.S. at 227.

²¹ *Fisher I*, 133 S. Ct. at 2420 (“The reviewing court must ultimately be satisfied that no workable race-neutral alternative would produce the educational benefits of diversity.”).

overruled.²² And commentators that support class-based, socioeconomic affirmative action have described *Grutter* as “flawed” and a “mistake.”²³

I don’t see why that is. Without *Grutter*, diversity is no longer a compelling government interest, and without diversity as a compelling government interest, there is no need to employ either race-specific or race-neutral means to achieve that interest.²⁴ Class-based, socioeconomic affirmative action is totally dependent on *Grutter*’s recognition that diversity is a compelling government interest.²⁵ In fact, some proponents of class-based, socioeconomic affirmative action concede this point.²⁶ If proponents of class-based, socioeconomic affirmative action truly believe that race-specific admissions programs are unconstitutional, then they should focus on the question of whether class-based, socioeconomic affirmative action can lead to equal or greater racial and ethnic diversity on college campuses.

Yet *Grutter* is clearly in the crosshairs of proponents of class-based, socioeconomic affirmative action. For example, the Project on Fair Representation, the non-profit advocacy group behind the *Fisher* litigation, has already filed cases against Harvard and the University of North Carolina with the express intent of having the Court overrule *Grutter* and *Regents of the University of California v. Bakke*.²⁷ And if those challenges to *Grutter* and *Bakke* are successful, where does that leave the constitutionality of class-based, socioeconomic affirmative action? The answer is that without *Grutter*, class-based, socioeconomic affirmative action is susceptible to constitutional challenges on two grounds.

²² *Id.* at 2422.

²³ L. Darnell Weeden, *Employing Race-Neutral Affirmative Action to Create Educational Diversity While Attacking Socio-Economic Status Discrimination*, 19 ST. JOHN’S J. LEGAL COMMENT. 297, 309 (2005); Joshua P. Thompson & Damien M. Schiff, *Divisive Diversity at the University of Texas: An Opportunity for the Supreme Court to Overturn its Flawed Decision in Grutter*, 15 TEX. L. & POL. 437, 486 (2011).

²⁴ See Brian T. Fitzpatrick, *Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?* 13 MICH. J. RACE & L. 277, 291 (2007) (noting that Texas had no compelling interest to enact its race-neutral Top Ten Percent Plan before *Grutter*).

²⁵ Fitzpatrick, *supra* note 24, at 291 (“[G]iven that [colleges and universities] have a compelling interest in pursuing racial diversity directly, surely they also have a compelling interest in pursuing it indirectly.”).

²⁶ See Weeden, *supra* note 23, at 321 (“It is conceded under *Grutter*’s diversity rationale a public law school may look at race-neutral [socioeconomic status] factors for both African-Americans and whites as a positive plus factor in the admission process.”).

²⁷ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); see also Lyle Denniston, *Direct new challenges to Bakke ruling (FURTHER UPDATE)*, SCOTUSblog, Nov. 17, 2014, <http://www.scotusblog.com/2014/11/direct-new-challenges-to-bakke-ruling/>.

First, as noted above, class-based, socioeconomic affirmative action and race-based affirmative action share a race-conscious motive. Class-based, socioeconomic affirmative action, though facially neutral, seeks to provide a benefit to racial and ethnic minorities by using class and socioeconomic status as proxies for race and ethnicity to increase the number of those students on campus.²⁸ But the Court has made clear that whether a facially neutral law adversely affects or benefits racial and ethnic minorities is immaterial.²⁹ And although some white students may benefit under a class-based, socioeconomic affirmative action admissions program, *Davis* and *Arlington Heights* make the results of a facially neutral policy virtually irrelevant in the constitutional analysis.³⁰ The race-conscious purpose behind such a program alone is sufficient to deem it unconstitutional.³¹

Similarly, Chapin Cimino has described the Court's ban on facially neutral race-conscious laws as a principle against "subterfuge."³² Relying upon the Court's legislative redistricting cases, Cimino argues that when race-neutral measures such as class-based, socioeconomic affirmative action "appear[] to be motivated by a desire to benefit racial minorities, it is open to a subterfuge challenge."³³ Thus, the Court's prohibition against subterfuge precludes the government from using race in "covert" or indirect ways to conceal a race-conscious motive.³⁴ Even if a college or university moves to class-based, socioeconomic affirmative action if *Bakke* and *Grutter* are overruled, the Court "could infer subterfuge" by conducting a "comparative empirical analysis of the beneficiaries of the former race-based preference and the beneficiaries of the replacement, class-based preference[.]"³⁵ The Court could also consider "a pattern of changes in qualifying criteria yielding a constant increase in minority beneficiaries," and on a more basic level, statements by the college or university "stating the intended goals of the class-based preferences."³⁶

²⁸ See *supra* note 16.

²⁹ See *supra* note 15; see also *Shaw*, 509 U.S. at 642-43.

³⁰ *Davis*, 426 U.S. at 240 (noting that disproportionate impact "[s]tanding alone . . . does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations"); see also *Arlington Heights*, 429 U.S. at 265.

³¹ See *Miller v. Johnson*, 515 U.S. 900, 913 (1995).

³² Cimino, *supra* note 17, at 1301.

³³ *Id.* at 1294.

³⁴ *Id.* at 1298.

³⁵ *Id.* at 1304; cf. Derek W. Black, *Fisher v. Texas and the Irrelevance of Function in Race Cases*, 57 How. L. J. 477, 489 (2014) ("[D]emographics can serve as proxy in almost every metropolitan area in the country . . .").

³⁶ Cimino, *supra* note 17, at 1304.

Second, if *Grutter* and *Bakke* are overruled, it's not like a college or university can immediately enact a class-based, socioeconomic affirmative action program. The Court could also infer "subterfuge" by looking at the temporal proximity between the overruling of *Grutter* and *Bakke* and the adoption of a class-based, socioeconomic affirmative action program by a college or university.

The Court's decision in *Lane v. Wilson*, a voting rights case cited approvingly in *Arlington Heights*, is illustrative of how temporal proximity can deem a class-based, socioeconomic affirmative action program unconstitutional under the Equal Protection Clause.³⁷ In *Lane*, the Court declared an Oklahoma statute passed in reaction to a previous decision by the Court unconstitutional under the Fifteenth Amendment.³⁸ In *Guinn v. United States*, the Court declared Oklahoma's provision providing "grandfather clause" immunity from state voting registration requirements, which essentially prohibited African-Americans from voting, unconstitutional under the Fifteenth Amendment.³⁹ The Oklahoma legislature replaced the "grandfather clause" immunity provision with a statutory scheme that required registration as a prerequisite to voting.⁴⁰ The scheme required all individuals—mostly African-Americans—who had not voted in the previous election to register within a span of twelve days.⁴¹ Failure to register within that span constituted a permanent forfeiture of the right to vote.⁴² The Court concluded that this scheme "was obviously directed toward the consequences of the decision in *Guinn v. United States*."⁴³

Because the scheme was primarily directed at African-Americans and enacted as a means to circumvent the Court's holding in *Guinn*, the Court held the scheme unconstitutional.⁴⁴ In so finding, the Court looked to the historical background of the Oklahoma statutory scheme as evidence of its discriminatory purpose.⁴⁵ The practical and unconstitutional effect of the scheme, then, was "to accord to the members of the [African-American] race who had been discriminated against in the outlawed registration system of 1914, not more than 12 days within which to reassert constitutional rights which this Court found in the *Guinn* case to have been improperly taken from them."⁴⁶

³⁷ 429 U.S. at 267 (citing *Lane v. Wilson*, 307 U.S. 268 (1939)).

³⁸ *Lane*, 307 U.S. at 269-70 (citing *Guinn v. United States*, 238 U.S. 347 (1915)).

³⁹ *Id.* at 269-71.

⁴⁰ *Id.* at 270.

⁴¹ *Id.* at 271.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 277.

⁴⁵ *Id.* at 275.

⁴⁶ *Id.* at 276.

The Court's decision in *Lane*, in addition to *Arlington Heights*, prevent a college or university from immediately considering class-based, socioeconomic affirmative action if *Bakke* and *Grutter* are overruled. Imagine that *Bakke* and *Grutter* are overruled, and a week later, a college or university adopts a class-based, socioeconomic affirmative action admissions program. Under *Lane*, the temporal proximity between the Court's hypothetical opinion overruling *Bakke* and *Grutter* and the decision to adopt a facially neutral class-based, socioeconomic affirmative action admissions program could be evidence that the program is also unconstitutionally tainted by a race-conscious motive.⁴⁷ In *Lane*, the fact that the Oklahoma legislature enacted its facially neutral statute a mere 12 days after the Court's decision in *Guinn* was dispositive in the Court's analysis. A class-based, socioeconomic affirmative action program adopted by a college or university right after the overruling of *Bakke* and *Grutter* would most likely reach the same fate as the statutory scheme in *Lane*.

B. *After the Demise of Grutter: A New Approach With Old Problems*

The overruling of *Bakke* and *Grutter* may require a substantial rewrite of the Court's precedent to accommodate class-based, socioeconomic affirmative action. One commentator, Frederick A. Morton, Jr., has suggested that class-based, socioeconomic affirmative action would "have more appeal and would be less suspect as a diversionary tactic if the socioeconomically disadvantaged received an adequate level of protection under the Constitution."⁴⁸ Morton argues that being poor and socioeconomically disadvantaged should be treated as a protected class.⁴⁹ But he also acknowledges that the Court has been generally hostile to claims that would treat education, the receipt of welfare benefits, and housing—basic necessities for the indigent—as fundamental rights under the Constitution.⁵⁰

Treating class and socioeconomic status as a protected class creates sensitive line-drawing problems. Because class and socioeconomic status can change over time, they do not bear any similarities to immutable characteristics such as race, ethnicity, sex, or national origin.

⁴⁷ See *id.*; see also *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 44-45 (1971) (declaring state statute banning busing and race-conscious remedies enacted during school desegregation litigation unconstitutional).

⁴⁸ Frederick A. Morton, Jr., Note, *Class-based Affirmative Action: Another Illustration of America Denying the Impact of Race*, 45 RUTGERS L. REV. 1089, 1120 (1993).

⁴⁹ See *id.* at 1120 ("A more direct way to assist the poor would first be to acknowledge their special status.").

⁵⁰ *Id.* at 1119.

Affirmative action was originally conceived as a program that sought to remedy discrimination based upon immutable characteristics, not indigence.⁵¹ Further, the Court would be charged with answering the question of how poor must one be in order to be a member of the protected class. What is the monetary threshold? Does the threshold index for inflation? These kinds of problems are legislative in nature, and not the kind the Court should consider in deciding the constitutionality of a class-based, socioeconomic affirmative action program.

One promising potential post-*Grutter* analytical framework that may support the constitutionality of class-based, socioeconomic affirmative action comes from the Court's legislative redistricting cases. In his concurring opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, Justice Kennedy listed a number of race-neutral measures school districts could use to combat resegregation.⁵² In doing so, Justice Kennedy cited to the Court's plurality opinion in *Bush v. Vera*, in which it observed that "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race."⁵³ Some commentators have argued that Justice Kennedy's inclusion of this language suggests that facially neutral class-based, socioeconomic affirmative action programs may be constitutionally permissible, even when adopted with a race-conscious motive.⁵⁴ Justice Kennedy does urge elected officials in his concurrence to be candid in their diversity-oriented motivations if they employ race-neutral means.⁵⁵ And

⁵¹ *Id.* at 1123 ("There is nothing in the history of affirmative action . . . that would suggest that race was used as a proxy or that class was originally the basis for such programs."); *see also id.* at 1125 ("The brief legislative history of affirmative action, coupled with the Supreme Court's interpretation of the law, suggests that there is simply no basis for arguing that affirmative action was designed to combat indigence.").

⁵² *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring).

⁵³ *Id.* at 789 (quoting *Bush v. Vera*, 517 U.S. 952, 958 (1996)); *see also id.* (discussing race-neutral mechanisms that could be used by school districts to prevent resegregation and noting that "[t]hese mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible").

⁵⁴ George La Noue & Kenneth L. Marcus, *Serious Consideration of Race-Neutral Alternatives in Higher Education*, 57 CATH. U. L. REV. 991, 1012-13 (2008). Before Justice Kennedy, Professor Goodwin Liu had previously drawn a similar legal analogy between legislative redistricting and secondary school student assignment plans. *See* Goodwin Liu, *Seattle and Louisville*, 95 CAL. L. REV. 277, 301-02 (2007).

⁵⁵ *See Parents Involved*, 551 U.S. at 789 ("Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races.").

borrowing the standard from *Vera* and other redistricting cases, Justice Kennedy's concurrence in *Parents Involved* could mean that strict scrutiny should not apply to class-based, socioeconomic affirmative action unless race was the predominant factor for its adoption.⁵⁶

But even if Justice Kennedy's dicta was entitled to some weight, he not only "fail[ed] to grapple with any of the many cases strictly scrutinizing race proxies—many of which he authored or joined—but the only case he cited for his dicta—*Bush v. Vera*—is a voting district case in which the Court applied strict scrutiny to a race proxy (a race proxy designed to help African Americans, no less)."⁵⁷ Justice Kennedy's concurrence in *Parents Involved* could mean that "if the Court adopts the 'predominant' motivation standard from the voting district cases as opposed to the more traditional 'but-for' motivation standard it used in other race-proxy cases, then it will be harder for plaintiffs to make the necessary showing to invoke strict scrutiny."⁵⁸ By contrast, by invoking *Vera*, it could also mean that strict scrutiny will always be the standard, but that a class-based, socioeconomic affirmative action program will generally survive if racial and ethnic diversity is one of several reasons for the program's implementation.

Indeed, one could put forth several motivations for adopting a class-based, socioeconomic affirmative action program. Those motivations could include class and socioeconomic diversity; geographical diversity; diversity of political affiliation; and remedying all types of discrimination and prejudices based upon sex, gender, sexual orientation, religion, national origin, and race and ethnicity.⁵⁹ The statistical evidence is fairly overwhelming in demonstrating that a more diverse campus leads to greater educational outcomes.⁶⁰ And government agencies, the military, and corporations see diversity on college campuses "as a requirement for better goods, products, and services . . . [and] a boon to their self-interest as well as to the society as a whole."⁶¹ These considerations could all play a role in the decision to adopt a class-

⁵⁶ La Noue & Marcus, *supra* note 54, at 1013; *see also* Liu, *supra* note 54, at 307.

⁵⁷ Fitzpatrick, *supra* note 24, at 290.

⁵⁸ *Id.*

⁵⁹ *See* Forde-Mazuri, *supra* note 15, at 2365-71 (arguing that race-neutral means can be used to combat societal discrimination); *see also id.* at 2383-84 (arguing that remedying societal racial discrimination is not constitutionally suspect). Professor Forde-Mazuri is careful to explain that the Court has not ruled that societal discrimination cannot be a compelling government interest, but that it cannot be a compelling government interest when the government uses race-based classifications. *See id.* at 2365.

⁶⁰ *See generally* Derek Black, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L. REV. 923 (2002).

⁶¹ Randall Kennedy, FOR DISCRIMINATION: RACE, AFFIRMATION ACTION, AND THE LAW 97 (2013).

based, socioeconomic affirmative action program by a college or university if *Bakke* and *Grutter* are dismantled. And they will be critical in the Court's constitutional evaluation under a predominant motivation standard.

Setting aside the question of what is the proper legal framework for class-based, socioeconomic affirmative action programs, the remaining question is whether those programs resolve the practical concerns raised by the use of race-conscious affirmative action. Critics of race-conscious affirmative action argue that a class-based, socioeconomic alternative is better because it is "less likely to exacerbate those race-related social problems identified by the Court, such as the perpetuation of stereotypes, inflaming racial hostility and, in general, delaying the day that race no longer has significance in American life."⁶² Justice Thomas has been particularly critical of race-based affirmative action. He contends that race-based affirmative action is steeped in what he deems "racial paternalism" and results in "unintended consequences" by "stamp[ing] minorities with a badge of inferiority" and "taint[ing] the accomplishments of all those who are admitted as a result of racial discrimination."⁶³

But some of these criticisms are overblown and suffer from serious inconsistencies; others lack real empirical support. Take, for instance, Justice Thomas' criticism that race-based affirmative action is steeped in "racial paternalism" and results in stigma. First, these arguments shouldn't even be a part of the equal protection analysis. Policies intended to help racial and ethnic minorities cannot be declared unconstitutional because they have "unintended consequences" or inadvertently cause harm.⁶⁴ Policies such as race-based affirmative action intended to help racial and ethnic minorities obtain undergraduate and professional degrees that have "unintended consequences" differ from laws enacted during the Jim Crow era and segregation because stigmatization and the relegation of African-Americans to second-class citizenship was the *intended purpose* of those laws.⁶⁵ Justice Thomas' concern about "racial paternalism" and stigma is nothing but an effects-based analysis that was soundly rejected in *Davis* and *Arlington Heights*.

⁶² Forde-Mazrui, *supra* note 15, at 2371.

⁶³ *Adarand*, 515 U.S. at 240, 241; *Fisher*, 133 S. Ct. at 2432.

⁶⁴ See *Arlington Heights*, 429 U.S. at 264-65.

⁶⁵ See *Plessy v. Ferguson*, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting) ("Every one knows that the statute in question had its origin in the purpose . . . to exclude colored people from coaches occupied by or assigned to white persons."); see also *Brown v. Board of Education*, 347 U.S. 483, at 494 (1954) ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

Second, arguments about racial paternalism and stigma are, in reality, a new form of judicial paternalism that presupposes racial and ethnic minorities are incapable of using the political process to support policies they believe are in their best interests. Race-based affirmative action currently has broad support from racial and ethnic minorities.⁶⁶ Recent public opinion polls show that the majority of Americans, including 84% of African-Americans, 80% of Latinos, and 69% of Asian-Americans support affirmative action policies.⁶⁷ If racial and ethnic minorities believe that affirmative action policies are harmful to them, then they are free to opt out by using the referendum process available in many states to place affirmative action bans on the ballot.⁶⁸ It is rather ironic—and seemingly undemocratic—that unelected judges and unaccountable academics have made the broad assumption that racial and ethnic minorities have feelings of inferiority due to race-based affirmative action, and that class-based, socioeconomic affirmative action would be better for them.

Proponents of class-based, socioeconomic affirmative action also fail to recognize that empirical evidence shows that racial and ethnic minorities do not suffer from internal stigma and self-doubt because of race-based affirmative action policies. In a survey concerning the use of affirmative action in law schools, researchers found that racial and ethnic minorities experience low levels of internal stigma and self-doubt, and encounter very little external stigma from their classmates concerning their capabilities.⁶⁹ Proponents of class-based, socioeconomic affirmative action often say that racial and ethnic minorities feel stigmatized and demeaned by race-based affirmative action, but rely upon anecdotal evidence and personal accounts, not independently verifiable quantitative data.⁷⁰

Additionally, class-based, socioeconomic affirmative action may be no less stigmatizing than race-based affirmative action.⁷¹ At most, all class-based, socioeconomic affirmative action purports to do is shift stigma from race to class and socioeconomic status. That doesn't end the

⁶⁶ See *supra* note 5.

⁶⁷ See *id.*

⁶⁸ *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1637 (2014) (“It is demeaning to the democratic process to presume that voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.”).

⁶⁹ See Angela Onwuachi-Willig, Emily Houh, & Mary Campbell, *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CAL. L. REV. 1299, 1332 (2008); see also *id.* at 1339.

⁷⁰ E.g., *Fisher*, 133 S. Ct. at 2432 (Thomas, J., concurring) (citing John McWhorter, *LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA* 248 (2000)).

⁷¹ Morton, *supra* note 48, at 1137-38.

harmful effects that purportedly arise from being stigmatized. Class-based, socioeconomic affirmative action doesn't even resolve whatever harms there are to "innocent victims" of race-based affirmative action. As Morton points out, "[u]nder any redistributive scheme, some group will undoubtedly claim 'innocent victim' status."⁷² Class-based, socioeconomic affirmative action merely shifts those harms to the wealthy, and thereby trades the racial hostility that allegedly results from race-based affirmative action programs for class-based hostility.⁷³ And since race and ethnicity closely correlates with class and socioeconomic status, racial hostility and class-based hostility often go hand in hand.⁷⁴

IV. CONCLUSION

I do not write this Essay as an indictment of class-based, socioeconomic affirmative action. I am all for expanding opportunities for education and social mobility. But there are serious constitutional and practical problems with class-based, socioeconomic affirmative action that are often ignored by its proponents. Until those issues are seriously addressed, I will continue to doubt the sincerity of those that advocate for its use and will not view class-based, socioeconomic affirmative action as a truly "workable" constitutional alternative to race-based affirmative action. Poverty certainly matters, but so does race. The intersection between the two makes it all the more important that we find an appropriate balance that accounts for both.

⁷² *Id.* at 1134.

⁷³ *Id.* at 1134-35. For example, Texas' Top Ten Percent Law came under attack from wealthy parents for admitting students from urban schools over students from high-performing suburban schools. Jonathan D. Glater, *Diversity Plan Shaped in Texas is Under Attack*, N.Y. Times (June 13, 2004), http://www.nytimes.com/2004/06/13/us/0diversity-plan-shaped-in-texas-is-under-attack.html?_r=0. One student commented that she had to overcome the perception that she was "'not equipped to handle' the University of Texas" because she was from an inner city high school. *Id.* This is an example of how class and socioeconomic status can become just as stigmatizing as race or ethnicity.

⁷⁴ Campbell, *supra* note 14, at 687.