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## On Class-Not-Race

**Samuel R. Bagenstos**

Throughout the civil rights era, strong voices have argued that policy interventions should focus on class or socioeconomic status, not race. At times, this position-taking has seemed merely tactical, opportunistic, or in bad faith. Many who have opposed race-based civil rights interventions on this basis have not turned around to support robust efforts to reduce class-based or socioeconomic inequality. That sort of opportunism is interesting and important for understanding policy debates in civil rights, but it is not my focus here. I am more interested here in the people who clearly mean it. For example, President Lyndon Baines Johnson—who can hardly be accused of failing to support robust race-based *or* class-based interventions—advised Dr. Martin Luther King after Congress passed the Voting Rights Act that the race-neutral, class-based Great Society programs had to be counted on to eliminate race inequality from that point forward.<sup>1</sup> William Julius Wilson famously argued that our policies should focus on “the truly disadvantaged” of all races and spelled out a rather aggressive approach to promoting economic development in American cities.<sup>2</sup> And Richard Kahlenberg and Richard Sander have urged that universities should get rid of race-based affirmative action in admissions but replace that policy with preferences for members of disadvantaged socioeconomic groups.<sup>3</sup>

Calls for class-not-race interventions are likely to grow stronger over the next few years. The Supreme Court’s recent decision in *Fisher v. Uni-*

*versity of Texas at Austin*<sup>4</sup>—which did not formally change the law governing affirmative action in higher education admissions but did highlight the vulnerability of the policy with the current Supreme Court—has been read by some commentators as auguring a decisive turn toward class-based affirmative action.<sup>5</sup> The Supreme Court's decision upholding Michigan's state constitutional prohibition on race-based affirmative action in *Schuette v. Coalition to Defend Affirmative Action*<sup>6</sup> predictably led to renewed calls for class-based preferences.<sup>7</sup> This, then, seems an opportune time to examine the class-not-race position that underlies them.

There is a lot that can be said about the beyond-race interventions favored by class-not-race advocates. And I say a lot of it elsewhere.<sup>8</sup> Here, I want to focus on a single aspect of the argument. I want to develop an understanding of what sincere advocates of the class-not-race position mean and offer an initial assessment of whether that position is a sensible one.

It seems to me that sincere advocates of the class-not-race position are making one of two distinct arguments. The first argument is basically a strategic one. That argument accepts that racial inequality is a fundamental problem that we must attack. It argues, however, that for a variety of pragmatic reasons, race-targeted approaches are not likely to be the most successful ways of attacking them. There is much to this argument, but it seems to suffer a basic flaw. Problems of race inequality go well beyond problems of economic or class inequality. And there is a lot of reason to believe that efforts to respond to class inequality that do not take race into account either will not help or actually will exacerbate race inequality. I discuss those points in Part I below.

These points lead to the second distinct argument that advocates of the class-not-race position may be making. That argument is that race inequality is not in fact the fundamental problem that we should attack but is at best an example or a consequence of class or economic inequality. If we have a limited reservoir of enforcement resources, redistributive largesse, or public compassion, the argument implies, we should focus that reservoir on eliminating class-based inequality. I think some argument like this explains why many people influenced by traditional left politics support the class-not-race position. But I nonetheless believe that the argument is wrongheaded. The problem of racial inequality overlaps with, but is importantly distinct from, economic disadvantage. I discuss these points in Part II.

In Part III, I assess the prospects for getting beyond the class-not-race position. Although I find some reasons for hope on this score, I am, ultimately, pessimistic.

## I. The Strategic Argument for Class-Not-Race

Many of the reasons offered for the class-not-race position are essentially strategic. These arguments assert not that class-not-race is superior as a matter of principle or first-best policy but that approaches that target class instead of race are more likely to succeed in the political or legal process than are approaches that focus directly on race. This is most apparent in the context of affirmative action. Many of the advocates of class-based affirmative action—particularly after the Supreme Court decisions making *race*-based affirmative action more difficult to defend—believe that targeting class rather than race will place the practice of affirmative action on stronger *legal* ground. The legal-doctrinal argument is certainly a key talking point for some of the most prominent advocates of class-based affirmative action.<sup>9</sup>

Viewed purely as a tactical gambit to shore up the legality of affirmative action, it is unclear whether a focus on class instead of race will work. Under current doctrine, it is a nice question whether admissions preferences for people of particular socioeconomic statuses are constitutional when they are motivated by a desire to achieve a particular racial outcome. The argument that they are unconstitutional involves a seemingly straightforward application of *Washington v. Davis*<sup>10</sup> and its progeny (which held that race-neutral practices that are motivated by race are the equivalent of racial classifications) and *Adarand Constructors v. Peña*<sup>11</sup> and its progeny (which held that the constitutionality of racial classifications is the same no matter which race is benefited or burdened). We know that if a school adopted a class-based preference for applicants from higher socioeconomic classes and did so with an aim of increasing the proportion of whites that are admitted, that action would violate the Fourteenth Amendment. Given *Adarand*'s holding that equal protection analysis does not depend on which race is burdened or benefited, shouldn't the result be the same when a school adopts a preference for applicants of lower socioeconomic classes, with an aim of increasing the proportion of minorities who are admitted?<sup>12</sup>

But the Court has never been called on to add up the *Davis* and *Adarand* lines of cases in this precise way. And there are substantial reasons to think that it will balk before ruling race-motivated but class-based affirmative action unconstitutional.<sup>13</sup> One is that in its cases invalidating affirmative action programs, the Court has looked carefully to ensure that race-neutral means could not achieve the same ends.<sup>14</sup> Although that analysis does not logically compel the conclusion that race-neutral affirmative action programs are constitutional, a contrary conclusion would stand in great tension with it. Moreover, Justice

Kennedy's pivotal concurrence in the *Parents Involved* case<sup>15</sup> suggests that he would vote to uphold class-based affirmative action programs. In that concurrence, Justice Kennedy explained his decision to provide the fifth vote to invalidate race-based student assignment plans in K–12 schools. He indicated that race-neutral efforts to achieve diversity and overcome racial isolation would be constitutional—and indeed probably would not even be subject to strict scrutiny.<sup>16</sup> As a pure predictive matter, then, it seems unlikely that five justices on this Supreme Court would invalidate class-based affirmative action.

Other strategic arguments for the class-not-race position are political rather than legal in nature. William Julius Wilson emphasizes many of these points in *THE TRULY DISADVANTAGED*.<sup>17</sup> Policies that aim overtly at protecting or advancing the interests of particular disadvantaged racial groups may be especially politically vulnerable. This may be because of implicit or overt racial bias in the political process, including the phenomenon of selective sympathy and indifference.<sup>18</sup> It may be because of a general support for color-blindness among the public and political leaders—a sense that race should not matter. (Query how much overlap there is between these two positions.) Or it may be because of simple majoritarianism. Policies that obviously provide benefits to a minority of the population may be politically vulnerable to efforts by the majority to get some of those benefits for itself.

As Wilson makes explicit, these arguments tie rather directly to arguments among social policy experts regarding targeted versus universal social-welfare policies.<sup>19</sup> Many experts argue that social-welfare policies are more politically durable when they are framed in universal terms.<sup>20</sup> Means-tested programs like welfare (or, perhaps now, food stamps) are understood to be more vulnerable than universal social insurance programs like Social Security. There are a couple of reasons for this. One, again, is simple majoritarianism—if everyone feels they can benefit from a program, it will be easier to persuade them to support it than if they are paying for the benefit of someone else. Another is a sense of desert. Universal programs are more easily understood in solidaristic terms as a reciprocal covenant among all citizens. As a result, solidaristic and reciprocal principles of distribution make sense—one deserves to receive benefits because one is a citizen and has contributed to the system.<sup>21</sup> But the public expects one to prove desert for targeted benefits more specifically—if an individual is receiving government benefits to which other individuals are not entitled, the public expects the beneficiaries to demonstrate that they really deserve them. As a result, targeted programs are administered in a much more stingy fashion than universal ones. And scandals regarding alleged waste, fraud, and abuse arise

far more easily in targeted programs and are far more likely to delegitimize those programs than they are to delegitimize universal programs of social insurance.

This is a very controversial issue in the social policy world. Professors Schuck and Zeckhauser make a strong theoretical argument that targeted programs more efficiently achieve their aims and therefore are more likely to draw political support than are less efficient universalist ones.<sup>22</sup> Basic public choice theory also suggests that targeted programs will generate fervent support from their beneficiaries, while the broad spreading of the costs will dampen opposition from those who do not receive the benefits.<sup>23</sup> (This point seems more plausible when the beneficiaries are not as socially and politically disempowered as the beneficiaries of race-based interventions, however.) And the empirical evidence on targeting versus universalism is mixed. Social Security is, to be sure, far more politically stable than was welfare. But when we look at smaller programs for classes of poor people, the targeted ones (that focus on people with disabilities or children in poverty) have, on occasion, seemed more resilient than the broader universalist ones.<sup>24</sup>

In the race-versus-class context as well, the strategic argument for universalism is not obviously correct. For one thing, class-based interventions (like class-based affirmative action) may readily come to be understood in the public mind as really targeted toward minorities.<sup>25</sup> That is particularly true because in many cases, the alternative to race-based interventions is not universal social insurance; it is a policy that really is targeted at disadvantaged people, just a bit more broadly than at minorities. Think about welfare in this regard and the general axiom that programs for the poor are poor programs. One reason programs for the poor are politically vulnerable is that they are often associated in the public mind with racial minorities. Efforts to target class-based disadvantage as a way of eliminating racial disadvantage often are understood as being “really” about race and provoke political resistance accordingly—a point George Romney, U.S. Secretary of Housing and Urban Development from 1968 to 1973, learned when his efforts to achieve economic integration in housing provoked fierce resistance from white suburbanites who feared that racial integration would be the result.<sup>26</sup> William Julius Wilson’s critique of the Great Society is apt here. Wilson argued that the Great Society’s reliance on means-tested antipoverty programs associated it with minorities and made it politically vulnerable.<sup>27</sup> Unless efforts to focus on class rather than race take the form Wilson’s effort does—by employing truly broad-scale economic development programs—they will likely remain politically vulnerable as targeted programs. And the truly universal proposals urged by Wilson and

others have virtually no hope of being achieved in our current political environment, in which austerity sets the terms of economic policy debates.

Class-based policies, then, may not be especially politically strong. And there may be circumstances in which programs targeted at racial minorities are quite strong politically—precisely because they appeal to a shared commitment to equal opportunity. To the extent that race-focused programs are understood as overcoming the particular injustice of discrimination or the legacy of slavery and segregation, many people will see that disadvantage as not being the fault of the beneficiaries (unlike poverty in general). In those circumstances, candid use of race will be politically superior to the use of class as a proxy for race.

I do not doubt, however, that class-focused approaches are likely to be more defensible, legally and politically, than race-focused ones in many cases. But this brings us to the deeper problem with the strategic arguments for class-not-race. Recall that the premise of the strategic argument is that race-based injustice is a distinct and important concern that the law should address; the argument for class-not-race is that class is a more legally and politically stable way to address that concern than is targeting racial injustice directly. But that argument depends on class disadvantage being a good proxy for race disadvantage. And it is not. In other words, even if class is a more stable way of addressing the problem, it does not address the problem very well. In part, that is because there are so many more poor white people than poor minorities that any help to poor people in general dilutes what minorities get (assuming a sort of constant budget of compassion). But there is a more fundamental reason class disadvantage is not a good proxy for race disadvantage. The strategic argument assumes that racial disadvantage is a subset, a specific application, of class disadvantage—or at least that there is a large overlap between the two categories. There is certainly some overlap, but racial disadvantage is in fact quite distinct. Racial disadvantage in the United States involves economic deprivation, to be sure, but it also involves stigma and stereotypes with a variety of consequences for the day-to-day lives of even economically advantaged members of racial minority groups.<sup>28</sup>

And efforts to focus on class disadvantage may actually reinforce the structures that promote racial disadvantage. We know this, in part, from history. The New Deal took what was well understood as a class-not-race approach. It led to substantial economic development. But because of the lines of eligibility its programs drew—lines that were formally race-neutral—it also entrenched racial hierarchy and subordination.<sup>29</sup> As insightful recent work by Jessica Clarke and KT Albiston argues,

these problems are not confined to history.<sup>30</sup> They argue that formally gender-neutral efforts to expand women's opportunities in the workplace, like the Family and Medical Leave Act, have actually entrenched gender hierarchy in workplaces. Deborah Malamud makes the same point about class-based affirmative action.<sup>31</sup>

I do not mean to deny that class-based approaches might be a possible second-best solution to the problem of racial disadvantage. Legal and political developments may substantially limit the prospect of relying on race-based approaches, so class-based ones might be the best available way of achieving those ends. But the same legal, and especially political, developments are likely to limit the utility of class-based approaches in achieving racial justice. If the class-not-race position is a purely strategic one, it is a deeply problematic one.

## II. The Substantive Argument for Class-Not-Race

I have argued that class-based interventions are not likely to be an especially effective way of overcoming race-based disadvantage. But what if race-based disadvantage is not what we think of as the essential problem? What if the basic problem is class-based disadvantage? While race- and class-based disadvantage overlapped in the past, one might argue, there is a substantial disconnect between the two problems now, and it is class, not race, on which our policy interventions should focus. I call this the substantive argument for class-not-race. This argument is implicit or explicit in many critiques of race-based affirmative action. Numerous affirmative action critics ask why the child of the Huxtables, or of a rich African immigrant family, should get a preference over a poor white kid from Appalachia. William Julius Wilson asks why we should have policies that benefit the most advantaged blacks but do very little for the least advantaged blacks—those whom he called “the truly disadvantaged.” The argument is basically that racial disadvantage may have at some point overlapped with class disadvantage but that the two have diverged. Now that they have diverged, we should identify which of these is the real problem. And, the advocates of class-not-race argue, the real problem is class. The influence of traditional left-wing thinking on this position is patent.

There is obviously something to this argument. In a nation in which economic inequality continues to grow, and our public services shrink, life chances and opportunities depend greatly on the socioeconomic circumstances in which one is born.<sup>32</sup> And this is true for people of all races. Policy interventions that focus on ameliorating economic inequal-



ity and class disadvantage are important tools to attack this serious problem.

But I think the substantive class-not-race argument ultimately reflects a category mistake in treating race-based policies as ultimately aimed at alleviating economic inequalities. Antidiscrimination law and affirmative action have of course provided economic advancement to some women and minority group members. And that is a significant goal of these bodies of law. Scholars tend to agree, in particular, that the first decade of enforcement of Title VII was associated with a dramatic increase in the earnings of African Americans relative to those of whites.<sup>33</sup>

But why must we choose which is the *real* problem? Both economic inequality and racial disadvantage are, it seems to me, real problems. We can acknowledge that members of disadvantaged socioeconomic classes face common barriers to opportunity, whatever their race. And, as I have argued, there are more poor whites than there are poor blacks and Latinos (though a much higher proportion of the black or Latino population than of the white population is poor). The problems of poor people of all races are best addressed by race-neutral programs of economic development and public assistance.

But race remains an important axis of disadvantage in America, even of its own accord. Some of this disadvantage is economic. Even middle- and upper-middle-class blacks are more likely to hold that status precariously than whites. They have less wealth on average, they are more likely to have relatives in poverty, and they are more likely to have children who are downwardly mobile economically.<sup>34</sup>

Some of this disadvantage relates directly to continuing discrimination. Housing discrimination keeps African Americans segregated in less desirable neighborhoods, which limits educational opportunities.<sup>35</sup> Employment discrimination continues to limit job opportunities.<sup>36</sup> Discrimination extends beyond economic opportunities: use of race by law enforcement drives home the salience of race in the day-to-day lives of members of racial minority groups, for example.<sup>37</sup> And racial bias in the criminal justice system has a pervasive effect on minority communities.<sup>38</sup> In a provocative recent paper, Betsey Stevenson and Justin Wolfers argue that “the fruits of the civil rights movement may lie” beyond economic opportunities but “in other, more difficult to document, improvements in the quality of life—improvements that have led to rising levels of happiness and life satisfaction for some blacks.”<sup>39</sup> As they note, however, “these improvements have taken decades to be realized, and even if current rates of progress persist, it will take several more decades to fully close the black-white happiness gap.”<sup>40</sup>

Much of this continuing race-based disadvantage results from subtle, unconscious, or implicit racial bias.<sup>41</sup> But the disadvantage also results from the persistence of racial stereotypes. These stereotypes and biases make it necessary for minority group members in many jobs to engage in constant impression management to demonstrate that they do not conform to the stereotypes. This impression management imposes a significant personal cost. But it also can be self-defeating, by discouraging the sort of risk-taking that leads to success in many employment settings.<sup>42</sup> (There is obviously a similar double-bind in the case of women in workplaces.) Even the most economically advantaged African Americans face these constraints, as the example of the fine line President Obama has had to walk in managing racialized expectations demonstrates.<sup>43</sup>

These problems are distinct from the problems of socioeconomic class. And we know that ameliorating economic inequality and disadvantage will not necessarily eliminate these problems of racial inequality. Rather, the most effective way we know to ameliorate problems of racial discrimination is an affirmative focus on promoting racial integration throughout society. Intergroup contact and work on common projects on terms of equality remain the best ways to break down stereotypes and bias.<sup>44</sup> Although there are substantial legal and political barriers to achieving that goal—something I have lamented in my earlier work<sup>45</sup>—policies that specifically target racial discrimination and inequality are the first-best way to respond to those problems. To say that our policy should focus on class instead of race is to say that we should not address these problems. And I can think of no good substantive, as opposed to strategic, argument for doing that.

### **III. Class-and-Race: The Civil Rights Act and the Great Society**

I should emphasize that to be against class-not-race is not to favor the opposite policy—race-not-class. We live in a big, complex world, one with many axes of disadvantage. I do not know of any advocate for racial justice who is against ameliorating class-based injustice. Nobody seriously proposes including racial diversity as a factor in a higher-education admissions policy but refusing to consider class or economic disadvantage. Advocates of expanded antidiscrimination law typically strongly support antipoverty laws and broad-based economic development policies. Consider, in this regard, how race-oriented civil rights laws, antipoverty policies, and broad-based social insurance were all crucial pieces of the Great Society. There may be tactical questions about how and when to press different pieces of the agenda, but there is no

reason we must choose to ameliorate disadvantages along only class or only race axes.

Indeed, I would argue that the most effective social justice strategies are those that, like the Great Society, combine efforts to eliminate the effects of group-targeted discrimination with broader efforts to promote social welfare. The Civil Rights Act of 1964 guaranteed nondiscrimination in employment, which helped African Americans gain access to job opportunities that had previously been closed to them. But the Elementary and Secondary Education Act, Head Start, and other Great Society Programs provided educational opportunities that made it more likely that more African Americans could take advantage of those new job opportunities. In my earlier work, I have argued that the Americans with Disabilities Act's effects on employment for people with disabilities have been significantly limited by the failure to pursue social welfare interventions (like universal health insurance and investment in accessible transportation) that would break down deep-rooted structural barriers to employment.<sup>46</sup> And women's workplace opportunities have been limited by both narrow interpretations of the Pregnancy Discrimination Act and the failure to provide child care and paid family leave; an effective solution to this problem would combine more robust antidiscrimination protections with more robust social provision.<sup>47</sup> To make further progress against racial inequality will require *both* an aggressive effort to enforce antidiscrimination provisions *and* a broader focus on economic development and providing housing and educational opportunities.<sup>48</sup>

So why do we have this endless fight? One reason I assumed away at the outset—bad faith. What about people who sincerely support class-oriented, but not race-oriented, interventions? The essential reason, I think, is strategic, but in a broader sense than I discussed in Part I. For many years, one of the only commitments that united both edges of the progressive movement—those influenced by social democratic politics at the left edge and mainstream centrists at the right edge—was the conviction that identity politics was bad for the movement. Each faction had a slightly different reason for, or way of articulating, its position: those on the Left believed that identity politics undermined class solidarity among the working class, while the centrists believed that identity politics made it difficult to appeal to “mainstream” Americans. But however derived, the policy agenda of both the leftists and the centrists eschewed race-oriented solutions in favor of class-oriented ones.

There is some reason to believe that political conditions now have evolved in a way that might make it possible for each of these factions newly to endorse race-focused interventions. Labor unions have achieved great success in recent years by appealing to identity politics

and incorporating race- and sex-focused goals into broader class-focused ones. It appears, then, that identity politics need not undermine the class solidarity that those on the left of the progressive spectrum aim to achieve. And Barack Obama won two consecutive presidential elections by assembling a coalition of racial minorities, together with a sizeable minority of whites. So identity politics perhaps need not impede mainstream political success. In this environment, race-oriented interventions may seem less threatening to the success of progressive politics in general, and advocates of class-not-race may be persuaded to rethink the notion that there must be a choice between race- and class-based approaches.

Yet there are substantial grounds for pessimism on this score. Despite the makeup of his electoral coalition, President Obama tended to emphasize class-focused remedies at the expense of race-focused ones.<sup>49</sup> And the Supreme Court's evolving jurisprudence of antidiscrimination law and affirmative action are likely to make race-focused interventions less tenable, at least for the near future. Ultimately, then, the class-not-race position may be the best we can do, despite its problems.

### About the Author

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### Notes

1. See, e.g., JAMES T. PATTERSON: *EVE OF DESTRUCTION: HOW 1965 TRANSFORMED AMERICA* (2012).
2. See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987).
3. See RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1987); Richard H. Sander, *Class in American Legal Education*, 88 *DENV. U. L. REV.* 631, 663, 668 (2011).
4. 570 U.S. , 133 S. Ct. 2411 (2013).
5. See John B. Judis, *The Unlikely Triumph of an Affirmative Action Prophet*, *NEW REPUBLIC*, July 18, 2013.
6. 134 S. Ct. 1623 (2004).
7. See, e.g., *Room for Debate: Should Affirmative Action Be Based on Income?*, *N.Y. TIMES*, Apr. 27, 2014, available at <http://www.nytimes.com/roomfordebate/2014/04/27/should-affirmative-action-be-based-on-income>.
8. See Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights after Shelby)*, 123 *YALE L.J.* 2838 (2014).
9. See *supra* note 3.

10. 426 U.S. 229 (1976).
11. 515 U.S. 200 (1995).
12. For a careful evaluation of this question, which concludes that the answer might not be the same, see Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331 (2000).
13. For an extensive discussion that argues that the Supreme Court's recent decision in *Texas Dept. of Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015) is best read as clarifying that class-based affirmative action, even if racially motivated, is not constitutionally problematic, see Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After Inclusive Communities*, 101 CORNELL L. REV. \_\_\_\_ (forthcoming 2016).
14. See *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2420–21 (2013); *Grutter v. Bollinger*, 539 U.S. 306, 339–40 (2003).
15. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring in part and concurring in the judgment).
16. See *id.* at 789.
17. See WILSON, *supra* note 2.
18. See Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976).
19. See WILSON, *supra* note 2, at 118.
20. See, e.g., MICHAEL J. GRAETZ & JERRY L. MASHAW, *TRUE SECURITY: RETHINKING AMERICAN SOCIAL INSURANCE* 288–89 (1999); THEDA SKOCPOL, *SOCIAL POLICY IN THE UNITED STATES: FUTURE POSSIBILITIES IN HISTORICAL PERSPECTIVE* 259–72 (1995); see also Samuel R. Bagenstos, *Disability and the Tension between Citizenship and Social Rights* (unpublished manuscript, on file with author).
21. See Amy L. Wax, *Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes, and the Political Economy of Welfare Reform*, 63 L. & CONTEMP. PROBS. 257 (2000); Bagenstos, *supra* note 20.
22. See PETER H. SCHUCK & RICHARD J. ZECKHAUSER, *TARGETING IN SOCIAL PROGRAMS: AVOIDING BAD BETS, REMOVING BAD APPLES* (2006).
23. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).
24. See CHRISTOPHER HOWARD, *THE WELFARE STATE NOBODY KNOWS: DEBUNKING MYTHS ABOUT U.S. SOCIAL POLICY* 92–108 (2007); PAUL PIERSON, *DISMANTLING THE WELFARE STATE? REAGAN, THATCHER, AND THE POLITICS OF RETRENCHMENT* 103, 128 (1994).
25. See RANDALL KENNEDY, *FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW* (2013).
26. See CHRISTOPHER BONASTIA, *KNOCKING ON THE DOOR: THE FEDERAL GOVERNMENT'S ATTEMPT TO DESEGREGATE THE SUBURBS* (2006).
27. See WILSON, *supra* note 2, at 125–39.
28. See *infra* Part II.
29. See, e.g., IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* (2013).
30. See Catherine Albiston, *Institutional Inequality*, 2009 WIS. L. REV. 1093; Jessica A.

- Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219 (2011).
31. See Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847 (1996).
  32. See, e.g., JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE* (2012).
  33. See Paul Burstein & Mark Evan Edwards, *The Impact of Employment Discrimination Litigation on Racial Disparity in Earnings: Evidence and Unresolved Issues*, 28 LAW & SOC'Y REV. 79 (1994); John J. Donohue III & James Heckman, *Continuous versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LITERATURE 1603 (1991); James J. Heckman & J. Hoult Verkerke, *Racial Disparity and Employment Discrimination Law: An Economic Perspective*, 8 YALE L. & POL'Y REV. 276 (1990).
  34. See, e.g., MELVIN OLIVER & THOMAS SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995); Annie Lowrey, *Recession Widened Wealth Gap for Races*, N.Y. TIMES, Apr. 29, 2013, at B1.
  35. See U.S. DEP'T OF HOUSING & URBAN DEV., *HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012* (2013).
  36. See, e.g., Joseph G. Altonji & Rebecca M. Blank, *Race and Gender in the Labor Market*, in 3C HANDBOOK OF LABOR ECONOMICS 3143 (Orley Ashenfelter & David Card eds., 1999).
  37. See, e.g., Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1360–64 (2011).
  38. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).
  39. Betsey Stevenson & Justin Wolfers, *Subjective and Objective Indicators of Racial Progress*, 41 J. LEGAL STUD. 459 (2012).
  40. *Id.*
  41. For my own take on the evidence of implicit bias, see Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477 (2007).
  42. See DEVON W. CARBADO & MITU GULATI, *ACTING WHITE? RETHINKING RACE IN POST-RACIAL AMERICA* (2013).
  43. See RANDALL KENNEDY, *THE PERSISTENCE OF THE COLOR LINE: RACIAL POLITICS AND THE OBAMA PRESIDENCY* (2011); THOMAS J. SUGRUE, *NOT EVEN PAST: BARACK OBAMA AND THE BURDEN OF RACE* (2010); Ta-Nehisi Coates, *Fear of a Black President*, ATLANTIC, Sept. 2012.
  44. See, e.g., CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* (2003).
  45. See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1 (2006).
  46. See Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1 (2004).
  47. See Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 20 DUKE J. GENDER L. & POL'Y 67 (2013); Deborah A. Widiss, *Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961 (2013); Ashley

Nelson, *Confessions of a Stay-at-Home Mom*, THE NATION, July 22–29, 2013. The Supreme Court's recent decision in *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015), provides a step in the direction of the more robust antidiscrimination protections that are necessary.

48. For a strong statement of this position, see Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375 (1995).
49. See SUGRUE, *supra* note 43; Coates, *supra* note 43.