A Prison of the Imagination: Higher Education in *Bakke*

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In the Supreme Court's jurisprudence addressing the use of race as a factor in admissions decisions by selective colleges and universities, the question of the proper goal of the institution of higher education has gone almost entirely unaddressed. From Regents of the University of California v. Bakke *forward, the Justices have taken for granted a particular notion of institutional mission: elite institutions admit those who have already demonstrated excellence and reject those who have not. For its legitimacy, this paradigm rests on the scarcity of elite-level higher education — a scarcity that is artificial and lacks moral grounding. The criteria typically used in admissions disadvantage applicants who are members of groups, such as African Americans and Latinos, that have been historically excluded from education opportunities. This Essay examines the presumed role and goal of elite higher education in the Supreme Court's cases addressing the role of race in selective institution admissions, provides a critique of that goal, and outlines alternatives that elite colleges and universities might pursue to promote greater equity in higher education access.*

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INTRODUCTION

Forty years ago, the Supreme Court found the admissions regime of the medical school of the University of California, Davis ("UC Davis") unconstitutional, because the institution set aside a fixed number of slots for students from "certain minority groups."[1] The Court also ruled that race could still be a factor in admissions decisions.[2] Since then, the complexion of higher education in the United States has changed dramatically. When *Regents of the University of California v. Bakke* was decided, about eleven million students were enrolled in degree-granting institutions. More than eighty percent of them were White. In 2016, the most recent year for which the federal Department of Education has released data, the total had risen to 19.8 million, and nearly half of these students — forty-six percent — were not White.[3]

This does not mean that there are not troubling gaps in enrollment and completion. Students who are White or of Asian descent are more likely to enroll in college[4] and to finish a course of study in four, five, or six years than those who are African American or Latino.[5] Students whose families are well-off are more likely to pursue higher education[6] and both reason and compelling evidence suggest that these students are also more likely to graduate.[7] The more selective the institution,

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[1] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 270 (1978).

[2] *Id.* at 271-72.

[3] *Table 306.10. Total Fall Enrollment in Degree-Granting Postsecondary Institutions, By Level of Enrollment, Sex, Attendance Status, and Race/Ethnicity of Student: Selected Years, 1976 Through 2016*, NAT'L CTR. FOR EDUC. STAT. (2017), https://nces.ed.gov/programs/digest/d17/tables/dt17_306.10.asp?current=yes (last visited Mar. 22, 2019).

[4] *Table 302.20. Percentage of Recent High School Completers Enrolled in 2- and 4-year Colleges, by Race/Ethnicity: 1960 Through 2013*, NAT'L CTR. FOR EDUC. STAT. (2017), https://nces.ed.gov/programs/digest/d14/tables/dt14_302.20.asp (last visited Mar. 22, 2019) [hereinafter *Table 302.20*].

[5] *Table 326.10. Graduation Rate from First Institution Attended for First-time, Full-time Bachelor's Degree- Seeking Students at 4-year Postsecondary Institutions, by Race/Ethnicity, Rime to Completion, Sex, Control of Institution, and Acceptance Rate: Selected Cohort Entry Years, 1996 Through 2010*, NAT'L CTR. FOR EDUC. STAT. (2017), https://nces.ed.gov/programs/digest/d17/tables/dt17_326.10.asp?current=yes (last visited Mar. 22, 2019) [hereinafter *Table 326.10*].

[6] *Table 302.30. Percentage of Recent High School Completers Enrolled in College, by Income Level: 1975 Through 2016*, NAT'L CTR. FOR EDUC. STAT. (2017), https://nces.ed.gov/programs/digest/d17/tables/dt17_302.30.asp?current=yes (last visited Mar. 22, 2019).

[7] *Completion Rates by Family Income and Parental Education Level*, C. BOARD, https://trends.collegeboard.org/education-pays/figures-tables/completion-rates-family-income-and-parental-education-level (last visited Mar. 22, 2019).

the more prevalent are students who are rich,[8] White,[9] or — likely enough — both.[10] Conversely, students who are African American or Latino disproportionately attend educational institutions associated with worse outcomes, including lower completion rates, lower postgraduate earnings, and greater likelihood of default on student debt.[11] Overall, selectivity matters: the more selective the institution, the greater the likelihood that a student will graduate on time[12] and that a student who matriculates at the bottom of the income distribution will move toward the top after graduation.[13] Doubtless, these institutions contribute to these positive outcomes; and doubtless, so do characteristics of the students they admit.

But few college students attend highly selective institutions. More than three-fourths of students enroll at institutions that accept at least half of all applicants; nearly one-third enroll at institutions that accept seventy-five percent of applicants.[14] For these students, the greater

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[8] *See* Raj Chetty et al., *Mobility Report Cards: The Role of Colleges in Intergenerational Mobility* 1 (NBER Working Paper No. 23618, 2017), https://opportunityinsights.org/wp-content/uploads/2018/03/coll_mrc_paper.pdf (last visited Mar. 22, 2019) [hereinafter *Mobility Report Cards*].

[9] Or of Asian descent — although their numbers are small, the proportion of students of Asian descent who graduate from high school and go on to pursue higher education is higher than that of Black, Latino, or White students. *Table 302.20*, *supra* note 4. This table illustrates that a smaller share of African American and Latino students graduate from high school and go on to enroll in college.

[10] *Mobility Report Cards*, *supra* note 8 ("[C]hildren from families in the top 1% are 77 times more likely to attend an Ivy-Plus college compared to the children from families in the bottom quintile."); *see also* SEAN F. REARDON ET AL., RACE, INCOME, AND ENROLLMENT PATTERNS IN HIGHLY SELECTIVE COLLEGES, 1982–2004, at 5 (Aug. 3, 2011), https://cepa.stanford.edu/sites/default/files/race%20income%20%26%20selective%20college%20enrollment%20august%203%202012.pdf; JONATHAN ROTHWELL & SIDDHARTH KULKARNI, BEYOND COLLEGE RANKINGS: A VALUE-ADDED APPROACH TO ASSESSING TWO- AND FOUR-YEAR SCHOOLS 1, 10 (Apr. 2015), https://www.brookings.edu/wp-content/uploads/2015/04/BMPP_CollegeValueAdded.pdf.

[11] Jonathan Rothwell, *The Stubborn Race and Class Gaps in College Quality*, BROOKINGS (Dec. 18, 2015), https://www.brookings.edu/research/the-stubborn-race-and-class-gaps-in-college-quality/ (finding that "black, Hispanic, and low-income students attend colleges with significantly worse outcomes than White, Asian-American, and foreign students").

[12] *Table 326.10*, *supra* note 5.

[13] *Mobility Report Cards*, *supra* note 8, at 3 (finding that "Ivy-Plus colleges have the highest success rates, with almost 60% of students from the bottom quintile reaching the top quintile").

[14] *Table 305.40. Acceptance Rates; Number of Applications, Admissions, and Enrollees' SAT and ACT Scores for Degree-granting Postsecondary Institutions with First-year Undergraduates, by Control and Level of Institution: 2016–17*, NAT'L CTR. FOR EDUC. STAT. (2017), https://nces.ed.gov/programs/digest/d17/tables/dt17_305.40.asp?current=yes (last

obstacle to obtaining a college degree is likely to be finding money to pay the cost, not gaining admission.[15] Not even five percent of students enroll at colleges or universities that accept less than one-fourth of applicants.[16] Nonetheless, it is these highly selective institutions that occupy an outsize place in the higher education pantheon and their admissions practices — and the values they reflect — are the subject of popular concern,[17] legislative attention,[18] and with some regularity, litigation.[19] This Essay examines Supreme Court jurisprudence on the topic.

Considering race in decision-making at selective institutions remains a political and cultural flashpoint. There are at least three important reasons for this. First, from the perspective of the individual student, the credential offered by these institutions matters. Attending a highly selective college or university provides a pathway not just to wealth but to power and influence. A degree from such an institution is a key to opportunity. Second, from the perspective of those running these highly selective institutions, credibility of their claim to excellence is all-important. Excellence turns on accepting few applicants and doing so in a way that reassures students, families, and society at large that the criteria used are legitimate.[20] Third, at the highest levels, these colleges and universities have amassed such

visited Mar. 22, 2019).

15 Jonathan D. Glater, *Student Debt and Higher Education Risk*, 103 CALIF. L. REV. 1561, 1572 (2015).

16 *Id.* at 1572 n.45.

17 This is evident from the sheer number of articles, books, Web sites and other resources devoted to the subject of how to gain admission to highly selective institutions. *See, e.g.*, STAFF OF THE HARVARD CRIMSON, HOW THEY GOT INTO HARVARD: 50 SUCCESSFUL APPLICANTS SHARE 8 KEY STRATEGIES FOR GETTING INTO THE COLLEGE OF YOUR CHOICE (2005); Anemona Hartocollis, *Getting into Harvard is Hard. Here Are 4 Ways Applicants Get an Edge.*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/getting-into-harvard.html; *Tips for Success in Selective Admissions*, UNIV. OF CHI., https://collegeadmissions.uchicago.edu/community-based-organizations/selective-admissions-tips (last visited Feb. 2, 2019); TOP TIER ADMISSIONS, https://www.toptieradmissions.com/ (last visited Mar. 22, 2019).

18 Lawmakers in Texas, for example, have adopted regimes that allocate slots in their selective public institutions to high-achieving high school students. *See* Tex. Educ. Code Ann. § 51.803 (2019).

19 *See, e.g.*, Students for Fair Admissions, Inc., v. President & Fellows of Harvard Coll., 807 F.3d 472 (1st Cir. 2014) (challenging admissions practices of Harvard College).

20 These two characteristics may not move in tandem. Criteria that exclude one's children may be automatically suspect, unless the quality of the admitted children is very obvious. Objective and fair criteria may produce results perceived as illegitimate if students who are convinced of their own merit are not recognized.

wealth and produced such influential research that they are significant players on their own. Elite institutions are generators of persuasive ideas and potent perspectives.

The excellence imperative,[21] along with the prestige and respect that it engenders, shapes thinking about elite higher education. Excellence has particular connotations: excellence is scarce and for that reason valuable, something to be hoarded. Excellence is also vulnerable and not to be squandered; it must be protected. Elite-level education is not for everyone, not least because there exists a practical, if artificial, constraint in the form of scarcity. Thus, a particular view of the role of higher education as an institution in society is implicit in and maintained by this imperative. The dominant mission of preserving excellence undermines pursuit of possible, additional, or even competing goals, such as wider accessibility, because of the acceptance of excellence as dependent upon scarcity and exclusivity. The disparities in representation on elite campuses described above result from the choice of criteria used in admissions, and those criteria are used because elite education is in short supply.

Accepting this excellence paradigm means that one path forward for institutions would be to adopt admissions criteria that do not disproportionately disfavor members of historically excluded groups, who remain under-represented on the campuses of highly selective colleges and universities. For example, an admissions regime could undertake some form of outlier analysis, identifying applicants who have achieved significantly more than their local peers and/or more than would be predicted based on their socioeconomic and other, nonracial characteristics. This tactic accepts that the mission of the selective institution is to pursue academic merit, to identify and admit those who are the best. This approach addresses the challenge of finding these students and, perhaps but not necessarily, reconsidering what it means to be the best.[22] Focusing on identifying students

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[21] RONALD G. EHRENBERG, TUITION RISING: WHY COLLEGE COSTS SO MUCH 265 (Harvard Univ. Press ed., 2002) (finding that selective colleges and universities continue to spend — and raise tuition — in order to "attract[] more resources so that it can maintain and try to improve both its absolute quality and its relative position among the selective institutions").

[22] Studies that have identified high-performing, low-income students have used traditional measures of achievement, such as standardized test scores, rather than attempting to implement a different conception of merit. *E.g.*, Caroline Hoxby & Christopher Avery, *The Missing "One-Offs": The Hidden Supply of High-Achieving, Low-Income Students*, BROOKINGS PAPERS ON ECON. ACTIVITY 2 (2013) [hereinafter *The Missing "One-Offs"*] (identifying high achievers using scores on the SAT and ACT college entrance exams).

suggests that the flaw in admissions practices is overlooking candidates who have what it takes to succeed.

A more radical move, involving shifting strategy as well as tactics, would require adopting a different perception of which are the best institutions, not just of who are the best students. The best institution may be the one that produces superior results for more students who have not previously enjoyed advantages in access to education, rather than the one that accepts only such students.[23] Put another way, the college that admits more students whose socioeconomic status and other indicators predict a poor outcome and turns more of those students into successful graduates is the best institution. This is not about finding "diamonds in the rough" overlooked using current admissions practices, but — to pursue the metaphor too far — about finding students who by all the typical, conventional metrics are actually not capable of becoming diamonds.[24] The admissions process at such an institution would focus on which applicants will get the most out of the education provided, rather than who has already demonstrated ability to succeed. This may sound like a naive dream but some of the implications of this radical re-visioning may yet be realized, perhaps by carefully leveraging arguments not for equity but for institutional accountability.[25]

The reasoning of *Bakke* and later cases leads neither to using the outlier identification tactic nor to the rethinking of higher education access. The analyses by the Justices lie firmly inside a prison of the imagination, a constrained vision and understanding of what excellence means. And the opinions of the bitterly divided Court have shaped discussion of the subject now for forty years; the doctrinal arguments made today would be familiar to advocates who argued in

[23] *See* ORSON SCOTT CARD, ENDER'S GAME 191 (1985) ("Did they know they were giving him obscure but excellent boys? . . . . Or was this what any similar group could become under a commander who knew what he wanted . . . .").

[24] Thus, this vision differs from that motivating projects to identify high-achieving, low-income students who are potentially "undermatch[ed]" in the current colleges and university admissions process. *See, e.g.*, Hoxby & Avery, *The Missing "One-Offs*,*" supra* note 22, at 14 (identifying "at least" 25,000 low-income, high-achieving students in the United States); *id.* at 10 (defining the challenge for selective institutions as resulting from the fact "that most high-achieving, low-income students do not apply to any selective college, so they are invisible to admissions staff").

[25] *See, e.g.*, Michael Simkovic, *A Value-Added Perspective on Higher Education*, 7 UC IRVINE L. REV. 123, 125 (2015) (arguing for assessment of institutional contribution to student outcomes, taking into account student characteristics upon admission).

Bakke.[26] The logic of Justice Powell's concurrence has provided the thread from which race-conscious admissions have hung in surviving subsequent challenges that reached the Supreme Court, in *Grutter v. Bollinger*,[27] *Gratz v. Bollinger*,[28] and both rounds of *Fisher v. University of Texas*.[29] These cases provide the material for this Essay's analysis.

The discussion that follows has two Parts. The first traces the conception of higher education as a reward to the meritorious, of elite higher education as scarce, and of colleges and universities in sorting society. These linked conceptions are consistent throughout the Court's jurisprudence on selective admission processes but they are almost always implicit and their implications obscured. Part I identifies the assumptions underlying this conception and develops a critique. It notes tension inherent in purporting to be a superlative provider of education and simultaneously accepting only those who have proven themselves most able to learn. Part I describes the implications of accepting that the most prestigious, best resourced, and ostensibly highest quality colleges are the most scarce and serve the smallest number of students.

Part II looks beyond the Court's jurisprudence to identify the problem posed by conventional definitions of merit, assessed by standardized tests that tend to reproduce preexisting societal hierarchies of privilege. Part II outlines two alternative visions of the goals and roles of higher education — one focused on more sophisticated evaluation of applications for admission to selective institutions and one focused on accountability of colleges and universities by asking how well they serve their students. After all, there are reasons to be optimistic about reform in admissions, especially at the most elite and selective levels, where a different

[26] Indeed, Justice Powell's opinion, which ruled out justifications for taking race into account in selective college admissions, shaped the argument in the most recent cases to reach the Court on the subject. For example, in *Fisher v. University of Texas* (*Fisher II*) the plaintiff's argument to the Court focused on (1) whether the "compelling interest" justifying considering race was stated with sufficient clarity, (2) whether the state's interest really was compelling given the degree of diversity already achieved, (3) whether the use of race actually worked to promote diversity, and (4) whether the university could have adopted "race-neutral" alternatives. Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S. Ct. 2198, 2210 (2016). Each point of contention rested on the analysis and arguments considered in *Bakke*. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[27] 539 U.S. 306 (2003).

[28] 539 U.S. 244 (2003).

[29] 136 S. Ct. 2198 (2016); Fisher v. Univ. of Texas at Austin (*Fisher I*), 570 U.S. 297 (2013).

conception of the function institutions of higher education may have taken hold. Increasingly, leaders of these institutions have expressed the conviction that they should enroll more students who belong to historically marginalized groups.[30] This is evident in recruitment efforts colleges and universities have taken to increase diversity on their campuses.[31] These moves suggest increasing sensitivity to the needs of the public and to perceptions held by the public: lack of diversity increasingly undermines claims of excellence. However, while a new appreciation and acceptance of what it means to serve the public may be welcome after decades of *de jure* exclusion, overt discrimination, and more subtle bias, that is not enough to achieve equitable access. Even the broadest *noblesse oblige* will not — without a deeper shift in understanding of the role higher education should play in shaping society — produce a state of equity.

Part III concludes.

I. EVOLUTION OF DOCTRINE

By the time that Allan Bakke filed his lawsuit challenging the admissions process at the UC Davis medical school, the Supreme Court had adopted a skeptical perspective toward integration. Significant opinions had already limited the scale and scope of efforts to undo the legacy of centuries of segregation enforced by law, custom, and both state and private violence. These decisions betrayed increasing skepticism toward state action promoting integration, as well as increasing concern for the burden of remedial efforts on members of historically privileged groups — i.e., White applicants. The decisions suggest the belief that the burden is justifiable only in cases of overt, intentional discrimination. These cases, along with *Bakke* itself, formed part of a trend toward adoption of formal "colorblindness" that entailed opposition to policies that explicitly considered race and, at the same time, reluctance to find discrimination in the absence of explicit consideration of race.[32]

[30] *See, e.g.*, David Leonhardt, *Top Colleges, Largely for the Elite*, N.Y. TIMES (May 24, 2011), https://www.nytimes.com/2011/05/25/business/economy/25leonhardt.html (describing new commitments to find and admit meritorious students whose families were not wealthy and/or high-income).

[31] For example, wealthy institutions over the past decade significantly and with much fanfare have widened eligibility for financial aid, potentially putting their higher education offering within reach of more students. *See* Jonathan D. Glater, *Stanford Set to Raise Aid for Students in Middle*, N.Y. TIMES (Feb. 21, 2008), https://www.nytimes.com/2008/02/21/education/21tuition.html.

[32] Ian Haney Lopez, "*A Nation of Minorities": Race, Ethnicity, and Reactionary*

In 1974, in *Milliken v. Bradley*,[33] the Court ruled that a lower court's desegregation effort could not involve mandatory busing of students across school district lines, ensuring that parents who had the means and the desire could move themselves beyond the reach of integration. The majority worried that "[t]o approve the remedy ordered by the [trial] court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy,"[34] evincing concern that desegregation would impose a burden on parties not found to have done something wrong. Thus the majority accepted that integration was akin to punishment and that those who might have benefitted from *de jure* segregation in the past or discriminatory practices in the present had not affirmatively done anything to justify imposing a policy designed to undo the effects of past and present unfairness.[35] Thus, White applicants could characterize themselves as innocent victims of government policy favoring members of other societal groups. Two years later, in *Washington v. Davis*, an employment case, the Court expanded on these ideas, which were fully expressed in *Bakke*. The Court ruled in *Washington v. Davis* that intentional, purposeful discrimination on the basis of race violated the Constitution, but use of facially neutral criteria that had a disproportionate impact, without more, did not.[36] That a test administered to job applicants had a disparate effect on members of historically subordinated groups did not matter.[37]

This Part briefly describes and analyzes the development of doctrine in the context of higher education admissions in *Bakke* and forward through the Court's evaluation of the claims in *Grutter*, *Gratz*, and *Fisher I* and *II*. While other scholars have analyzed these opinions extensively, the emphasis here is on excavating the Court's vision and understanding of the role and mission of selective colleges and universities, on the subtle incorporation of a paradigm of scarcity.

Colorblindness, 59 STANFORD L. REV. 985, 1041 (2006) (describing the ahistorical analysis of race-conscious policies that enabled the Court to treat them as equally pernicious as *de jure* race segregation).

[33] 418 U.S. 717 (1974).

[34] *Id.* at 745.

[35] *Id.* at 749-50.

[36] Washington v. Davis, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.").

[37] Rather, the Court held that the government had a legitimate interest in hiring those applicants who had better communication skills, which the employment test purported to measure. *Id.* at 245-46.

Once scarcity is accepted as given, so are the priorities of selective admissions: identifying meritorious applicants and preserving elite status by admitting only those applicants and rejecting others. When merit turns on evaluations that are themselves positively correlated with societal advantage, then tension arises between pursuit of merit and pursuit of equity. In both majority opinions and dissents, scarcity goes almost entirely unacknowledged and indeed lies almost entirely buried. Yet it helped to limit and in retrospect, helps to explain the outcome in each of these cases.

The first section that follows identifies the unspoken acceptance in *Bakke* of three implications of scarcity of higher education opportunity: the need to select meritorious applicants for admission, the objectivity of the measures of academic merit used, and the disparities along lines of race that result from application of these measures. The second describes the results of enshrining these ideas in doctrine as applied in *Grutter* and *Gratz*, in which the Court accepted a tension between academic excellence and elite status, on the one hand, and diversity of the student body, on the other. It is Justice Thomas who exploits this tradeoff explicitly in his bitter criticism of the defenses of race-conscious admissions in each case; his writing comes closer than that of any other Justice to addressing precisely the assumptions underlying selective admissions practices. The third section describes the further entrenchment in *Fisher I* and *II* of the ideas underlying the scarcity paradigm and explains the difficulty of challenging those ideas. The fourth section summarizes the doctrinal state of play, analyzing how acceptance of scarcity hinders reform efforts aimed at bolstering equity in access.

A. Bakke*: Implications of the Acceptance of Scarcity of Elite Higher Education*

In challenging the denial of his application to the medical school at UC Davis, Bakke asserted that the University had discriminated against him because it had taken into account the race of applicants by reserving sixteen spots in the entering class for students who were members of minority groups, defined as "Blacks," "Chicanos," "Asians," or "American Indians."[38] Bakke argued that the practice of setting aside places in the entering class available only to self-identified members of the specified minority groups violated his rights[39] under the Equal Protection Clause of the Fourteenth

[38] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 274-75 (1978) (Powell, J.).

[39] *Id.* at 277-78. In making this argument, the plaintiff essentially contended that

Amendment,[40] section 21 of the California constitution,[41] and Title VI of the Civil Rights Act.[42] This Essay is concerned with the implications[43] of the constitutional claim.

The Court fractured. Four Justices[44] found that neither UC Davis's admissions program nor consideration of race in admissions generally violated the Constitution. Another four Justices[45] avoided the constitutional question by concluding that the UC Davis admissions program violated Title VI.[46] Justice Powell found that although UC Davis's admissions program was unconstitutional, consideration of race need not always offend the Constitution.[47] Justice Powell thus

had he not been White, he would have been admitted. The University stipulated to this argument only in order to achieve expedited higher court review; the trial court did not concur. *See* Rachel F. Moran, Bakke*'s Lasting Legacy: Redefining the Landscape of Equality and Liberty in Civil Rights Law*, 52 UC DAVIS L. REV. 2569, 2575-77 (2019). Regardless, Justice Goodwin Liu offered a sophisticated critique of this perception, targeting the weakness of the causation claim that *Bakke* had to rely on. Goodwin Liu, *The Causation Fallacy:* Bakke *and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1063-65 (2002) (noting that gaps in test scores that correlate with race are not solely the result of "preferences" in admissions). Little has changed in challenges to selective institutions' admissions practices in the decades since *Bakke* was decided.

[40] U.S. CONST. amend. XIV ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[41] CAL. CONST. art. I, § 21 ("No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.").

[42] 42 U.S.C. § 2000d (2018) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.").

[43] That is, the question of the appropriate standard of review, for example, and of whether the justification offered by UC Davis for its admissions program is sufficiently "compelling" and "precisely tailored," are not particularly relevant to the project of unearthing the vision of the university implicitly espoused by the Justices. *Bakke*, 438 U.S. at 299.

[44] *Id.* at 325-26 (The plurality consisted of Justices Brennan, White, Marshall, and Blackmun.).

[45] *Id.* at 421 (The four Justices were Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens.).

[46] *Id.* at 410-12 (Stevens, J.).

[47] *Id.* at 269-72 (Powell, J.). Indeed, the degree of disagreement is actually greater, because Justices White, Marshall, and Blackmun, wrote additional opinions

straddled the two groups, forming a majority with four of his brethren on one conclusion and one with an entirely different set of four on another. Justice Powell's opinion has consequently drawn considerable scholarly attention. Yet for present purposes, the views of the Justices who reached the constitutional issue also matter. All nine Justices share a conception of what a selective institution like UC Davis is, what it does, and what it should strive to do, despite their disagreement over how it may do it.

The four Justices who agreed that considering race in admissions decisions was constitutionally permissible and would have upheld UC Davis's program asserted that "racial classifications are not *per se* invalid under the Fourteenth Amendment."[48] After all, the Justices wrote, no fundamental right was violated by the university,[49] and Bakke did not belong to a "suspect class[]."[50] Nevertheless, in determining what standard of review the Court should apply to the UC Davis admissions program, the Justices recognized that using a classification that "divides classes on the basis of an immutable characteristic" runs counter to the belief that the law should respond to individual responsibility "and that advancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at the least on factors within the control of an individual."[51] In this critical language, then, the four Justices who *favored* consideration of race in admissions decision-making confessed that to do so was less than "ideal[]." Rather, as they seemed to contend in the pages that follow this excerpt, taking race into account was a remedial step that, as the vestiges of *de jure* discrimination were eliminated, would cease to be necessary.[52]

elaborating upon their views. *Id.*

48 *Id.* at 356 (Brennan, J.).

49 *Id.* at 357. Here, the four Justices cited to *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29-36 (1973), in which the Court held that education did not constitute a fundamental right.

50 *Bakke*, 438 U.S. at 357 (Brennan, J.) ("[W]hites as a class . . . [lack] the 'traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection.'" (quoting *San Antonio Indep. Sch. Dist.*, 411 U.S. at 28)).

51 *Id.* at 360-61.

52 *See id.* at 362-65. This view is striking in light of Justice O'Connor's opinion in *Grutter v. Bollinger*, in which the Justice explicitly contemplates societal evolution that will render the need for consideration of race in admissions unnecessary within twenty-five years. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

Assuming race had to be taken into account as a remedial measure, as these four Justices contended, they next addressed the possibility that members of minority groups who had not individually suffered from racial discrimination could benefit from a remedial effort[53] by an institution that may not have engaged in intentional discrimination.[54] They argued that it was enough if beneficiaries were "within a general class of persons likely to have been the victims of discrimination," and stated that it did not matter that a "preference for minorities will upset the settled expectations of nonminorities."[55] Analogizing to the employment law context, the Justices noted that nonminority employees' expectations of advancement could be upset by a shift to non-discriminatory employment practices, but that consideration did not counsel against an employer's change in policy.[56] The implication in the context of higher education admissions was clear: Allan Bakke may have been "innocent"[57] in that he did not intentionally do anything wrong that would justify excluding him from this educational opportunity, but that did not mean that a remedy that could have reduced his likelihood of admission had to fail. Put differently, Bakke may have been an innocent party, but so too were members of minority groups disadvantaged by prior *de jure* discrimination, and excluding a White applicant did "not inflict a pervasive injury upon individual Whites in the sense that wherever they go or whatever they do there is a significant likelihood that they will be treated as second-class citizens because of their color."[58] The critical elements of the scarcity paradigm were reflected in this reasoning because the fact that there was a limited number of spaces in the entering medical school class made selection essential and the need to preserve the elite academic status of the school in turn mandated admitting those who had already demonstrated quantifiable, academic merit.

In concluding that UC Davis's admissions program failed to pass constitutional muster, Justice Powell focused on what he viewed as two fundamental problems. First, distinguishing between uses of racial classifications to help particular groups and uses intended to subordinate and stigmatize was a task too ephemeral and fraught. The Justice expressed strong misgivings about the wisdom of adopting an

[53] *Bakke*, 438 U.S. at 363 (Brennan, J.).

[54] *Id.* at 365-66 (analogizing to the employment context to make the point).

[55] *Id.* at 363.

[56] *Id.* at 365.

[57] *Id.* at 308 (plurality opinion) (quoting Justice Powell).

[58] *Id.* at 375 (plurality opinion).

understanding of equal protection that would require such a nuanced analysis by courts, to assess whether a policy or practice harmed members of a societal group deemed in need of special protection. In his view such an evaluation was too treacherous:

> There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups.[59]

In other words, Justice Powell worried that because relative positions in the social pecking order would change as members of different groups ascended and descended, courts would apply the Constitution inconsistently.[60] The Justice did not want courts to engage in social engineering, which would have to try to respond to evolving relationships within society and would require constant reassessment and reevaluation. This was the proper concern of the political process, Justice Powell asserted.[61]

The second, profound concern was related. The Justice worried that the race-conscious admissions regime burdened "innocent persons."[62] White applicants to UC Davis who had done nothing wrong were penalized by the institution's practices. This concern was related to Justice Powell's fear of social engineering because it rested on a narrow conception of "innocence." It may well have been that White applicants enjoyed other advantages in a highly race-conscious society in which opportunity was shaped by race, but that was not the fault of individual Whites like Bakke and so would not justify imposing a burden on them.[63] Later in the opinion, Justice Powell rejected

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59 *Id.* at 296-97 (Powell, J.).

60 *Id.* at 299.

61 *See id.* In so concluding, Justice Powell sets aside the concern that minority groups might not be able to defend themselves in the political process because individuals still have the right to seek judicial review if legislation touches upon race or ethnicity, for example. *See id.*

62 *Id.* at 298.

63 Implicit here is the idea expressed in Washington v. Davis, 426 U.S. 229 (1976) and text accompanying *supra* note 36, that only intentional wrongdoing should be punished, and because an "innocent" White applicant has not intentionally done anything wrong, that applicant should not be penalized by a race-conscious selection scheme. *See Davis*, 426 U.S. at 239.

"helping . . . victims of 'societal discrimination'" as an interest sufficiently compelling to withstand the strict scrutiny demanded by the Equal Protection Clause.[64]

The rationale that Justice Powell settled upon, the only one that satisfied the demands of the Constitution as he construed them, was diversity. And not a narrow conception of diversity taking into account only race and ethnicity, for example, but a broad conception, reflecting geography, extracurricular activities, and life experiences.[65] It is a view that treats race like playing a particular musical instrument — an equivalence possible only because the element of fairness has been explicitly ruled irrelevant.[66] This conception reinforces the vision of the elite university as selecting students based on their merit, a function of what they bring with them, what they offer to the institution and to their classmates, not what the institution offers to students or the wider community.[67] Diversity is thus a tool, the method by which educational quality is enhanced, rather than the result of a fair and equitable admissions process.

The differences between Justice Powell, on the one hand, and the four Justices who view consideration of race as necessary to remedy the effects of past discrimination, on the other, are telling. The five Justices accepted the same understanding of the goals of selective institutions but they assigned different weights to the burdens of pursuing those goals. After all, Bakke's challenge forced the Court to attempt to reconcile competing principles. First, these five Justices agreed that opportunity should not be denied on the basis of race. But they differed on a second and more difficult principle, that "innocent" parties should not be made to sacrifice opportunity to give an advantage to another whom they had not wronged. Third and relatedly, they implicitly disagreed on the propriety of the Court's engagement with social engineering, with Justice Powell leery of the

[64] *Bakke*, 438 U.S. at 310 (Powell, J.).

[65] *Id.* at 314.

[66] *See id.* at 310 ("[T]he purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of 'societal discrimination' does not justify [using] a classification that imposes disadvantages on persons like respondent."); *see also* Ian F. Haney Lopez, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1040 (2007) (describing criticism of Powell's move to "reject[] fostering integration or responding to societal discrimination as compelling interests, but h[o]ld that encouraging racial diversity satisfied strict scrutiny").

[67] *Bakke*, 438 U.S. at 313 (Powell, J.) (discussing whether "universities must be accorded the right to select those students who will contribute the most to the 'robust exchange of ideas'").

notion and the four other Justices committed to it, at least until the dismantling of the legacy of segregation. And finally, they accepted that the university relied on indicia of applicant quality that were objective, even if disproportionately favoring applicants who were members of historically empowered groups, with an eye to identifying those who should be admitted on the basis of merit. These principles undergirded the reasoning of all the opinions in *Bakke* and recurred in subsequent cases addressing the consideration of race in admissions.

B. Grutter *and* Gratz*: The Meaning of Merit*

In companion cases decided by the Court in 2003, White students separately denied admission to the University of Michigan and to the University of Michigan School of Law filed lawsuits challenging the use of race as a factor in each institution's admissions process. In *Gratz v. Bollinger*, a majority found the undergraduate program's admissions regime in violation of the Equal Protection Clause.[68] In *Grutter v. Bollinger*, however, a slightly different — but still bare — majority of the Court upheld the constitutionality of the law school's admissions program.[69] In both cases, the majority applied strict scrutiny, its most searching standard of review requiring a compelling justification and narrow tailoring, or design, of the policy using race. And in both cases, the majority affirmed the validity of Powell's diversity rationale in *Bakke*. The divergent outcomes resulted from different assessments of how each admissions regime worked.

In *Gratz*, the Justices found unconstitutional an undergraduate admissions program that used a point system that awarded twenty out of 150 points on the basis of "membership in an underrepresented racial or ethnic minority group."[70] This mechanical method of taking into account race did not provide "individualized consideration" of each applicant but instead made an automatic presumption and rewarded a student on the basis of race.[71] The majority cited to Justice Powell's opinion in *Bakke* for the principle that no "single characteristic [should] automatically ensure[] a specific and identifiable contribution to a university's diversity."[72] The majority accordingly rejected the undergraduate admissions program. In *Grutter*, on the other hand, a majority of the Justices found that the

[68] Gratz v. Bollinger, 539 U.S. 244, 275-76 (2003).
[69] Grutter v. Bollinger, 539 U.S. 306, 343-44 (2003).
[70] *Gratz*, 539 U.S. at 255.
[71] *Id.* at 271.
[72] *Id.*

law school's admissions practices *did* appropriately treat each applicant as an individual.[73] The law school's process did not automatically, mechanically give a clear and measurable advantage to applicants on the basis of race, as the undergraduate program did.[74] Writing for the majority, Justice O'Connor noted that under the law school's program, "all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions."[75] In her conclusion, she contemplated that the need to consider race in admissions would vanish within twenty-five years, by 2028.[76]

Justice Thomas's opinion in *Grutter* is much more interesting, for purposes of this Essay's analysis, than the majority's reluctant preservation of Powell's vision of diversity. Thomas analyzed the diversity rationale, concluding that considering race was a means to achieving educational quality, not an end.[77] Thomas was the only Justice to take on the question of what the mission of the public university — in this case, the public law school — was and should be.[78] In doing so, he grappled with different possible meanings of merit and excellence, at times directly, other times implicitly. His dissent in *Grutter* came closer to addressing questions about admissions criteria used by selective institutions than any of the other opinions. After all, Thomas argued, the law school had various options in deciding how to choose whom to admit. If diversity of the student body was a paramount goal, considering race was not essential. There were constitutionally permissible ways to do it, he noted. For example, the law school could simply admit more students with lower scores on the LSAT, the law school entry exam.[79] However, he acerbically noted that the law school "adamantly disclaims any race-neutral alternative that would reduce 'academic selectivity,' which would in turn 'require the Law School to become a very different institution, and to sacrifice a core part of its educational mission.'"[80] Notwithstanding the Justice's

[73] *Grutter*, 539 U.S. at 334.

[74] *Id.* at 337.

[75] *Id.*

[76] *Id.* at 343.

[77] *Id.* at 355 (Thomas, J., concurring in part and dissenting in part).

[78] *See id.* at 354-56.

[79] *See id.* at 355-56.

[80] *Id.* at 355 (quoting Brief for Respondent Bollinger at 33-36). This is not to argue that every highly selective college or university necessarily defines itself through its selectivity; that is, it is not by rejecting a greater number of applicants that an elite institution becomes elite. Because the influential rankings by U.S. News & World Report do not take this data into account, colleges and universities have no real incentive to focus on it. However, rejecting a greater share of applicants may certainly

cynical interpretation, the law school's worry need not mean that selectivity is the essential characteristic of an elite institution, though a larger number of applicants in itself suggests that the institution offers something deemed valuable. Rather, the nature of the education must be affected as the characteristics of the students change.

Thomas identified an apparent tension between the law school's elite status, dependent largely on its selectivity, and the achievement of student body diversity, which he dismissed as the law school's pursuit of a particular "aesthetic."[81] He continued in a caustic footnote that is worth reprinting in full:

> The Law School believes both that the educational benefits of a racially engineered student body are large and that adjusting its overall admissions standards to achieve the same racial mix would require it to sacrifice its elite status. If the Law School is correct that the educational benefits of "diversity" are so great, then achieving them by altering admissions standards should not compromise its elite status. The Law School's reluctance to do this suggests that the educational benefits it alleges are not significant or do not exist at all.[82]

In Thomas's view, the school had to choose whether to achieve diversity in a constitutionally permissible way by lowering its requirements, or to preserve its selectivity in a constitutional way by abandoning consideration of race. The law school "cannot have it both ways";[83] the law school could not continue to use criteria, like LSAT scores, for admissions to the disadvantage of members of historically excluded groups, and then make up for the impact by considering race. Further, Thomas later argued, if the law school believed that the LSAT imperfectly predicted performance, then its decision not to abandon it and thereby achieve greater diversity did not deserve judicial deference.[84]

Thomas thus challenged *Bakke*'s diversity rationale because it allowed deviating from considering merit, as reflected in test scores.

reflect the intangible, elite-ness of the institution: what the college or law school offers is valuable and the evidence of value is the appeal that its program holds. Were the law school to be less selective, it might no longer maintain its prestige, and this explanation appears to be what Justice Thomas mocked.

[81] *Id.* at 354 n.3 ("[T]he Law School wants to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them.").

[82] *Id.* at 356 n.4.

[83] *Id.* at 361.

[84] *Id.* at 369-70.

Considering race was an effort to straddle equity and excellence and was vulnerable to criticism that it perpetuated stereotypes and imposed stigma on all students perceived to benefit. This is one of Thomas's consistent criticisms, that no one "can differentiate between those who belong and those who do not" — that those students who would have been admitted under a race-blind admissions regime are stigmatized alongside those who would not have been admitted.[85] But for all the criticism heaped on consideration of race, Thomas did not consider an alternative that would not involve what the university portrayed and he accepted as a lowering of its standards. Thus, although Thomas criticized the law school's commitment to preserving selectivity and thereby protecting the institution's elite status, he did not contemplate that elite status could either bear hallmarks other than exclusivity and/or could adopt criteria other than test scores to maintain it. As will be discussed further below,[86] there are alternative ways of defining both applicant merit and institutional excellence, but adopting these different measures would require a leap of imagination.

C. Fisher I *and* II *and the Acceptance of Scarcity as a Constraint*

Subsequent litigation attacking consideration of race in selective institution admissions processes did not advance novel arguments or uncover hidden facts. Rather, artful complaints on behalf of applicants characterized as *Bakke*'s innocent victims simply continued to appear. For example, the arguments made in *Hopwood v. Texas*, which persuaded a panel of the Fifth Circuit Court of Appeal to discount *Bakke* and prohibit consideration of race in admissions,[87] were not unlike those made later in *Grutter* and *Gratz*. In *Fisher v. Texas*,[88] once again targeting the admissions practices of the University of Texas ("UT"), there is nothing striking or new — just another effort, banking on the changing composition of the Supreme Court, to undo what the Court had done previously. Advocates in the *Bakke* litigation would recognize all the arguments made in the cases that followed.

The plaintiff in *Fisher v. Texas*, Abigail Fisher, contended that she did not receive an offer of admission because she was White and that, doctrinally, the university's use of race as a criterion violated the Equal

[85] *See id.* at 373.

[86] *See infra* Parts II.B, II.C.

[87] Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *overruled by Grutter*, 539 U.S. at 325.

[88] *Fisher I*, 570 U.S. 297 (2013).

Protection Clause.[89] The district court granted summary judgment to the defendant university.[90] This decision was upheld on appeal.[91] The Supreme Court granted *certiorari* and in an opinion by Justice Kennedy, concluded that the lower courts had shown too much deference to the university when assessing whether "the means chosen . . . to attain diversity [were] narrowly tailored to that goal."[92] Thus, Kennedy hewed to the diversity rationale developed by Powell, but expressed concern that the method of achieving diversity could yet violate the Constitution.[93] A reviewing court, applying strict scrutiny to a selective institution's use of race, must engage in a "careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications."[94] The Court remanded the case so that the lower courts could apply the correct standard in assessing UT's justifications of its practices.[95]

Justice Thomas penned a vociferous concurrence, agreeing that the lower court was too deferential to the justification offered by UT for considering race.[96] But he went on to argue that *Grutter* was wrongly decided and reviewed cases in which the Court had struck down racial segregation even when the defendant school districts warned that desegregation would result in White flight and drastic cuts in public education funding.[97] If the end of public education could not justify segregation, Thomas wrote, "It follows, *a fortiori*, that the putative educational benefits of student body diversity cannot justify racial discrimination."[98] Rather, Thomas concluded, the use of race in admissions, in this case, was an effort to engage in "discrimination [that] helps, rather than hurts, racial minorities."[99] But the Justice did not return to his critique of the pursuit of diversity under what he described in *Grutter* as the self-imposed constraint of maintaining selectivity. Like the other Justices, Thomas accepted the scarcity of elite education and as a consequence, the preservation of exclusivity based largely on standardized test scores.

89 *Id.* at 306.
90 *Id.*
91 *Id.*
92 *Id.* at 311.
93 *Id.* at 310-11.
94 *Id.* at 312.
95 *Id.* at 314.
96 *See id.* at 315 (Thomas, J., concurring).
97 *Id.* at 318-21.
98 *Id.* at 322.
99 *Id.* at 328.

On remand, the trial court and the Fifth Circuit again found that UT's use of race did not violate the Equal Protection Clause.[100] The Supreme Court again granted *certiorari* and this time around, upheld UT's use of race.[101] Justice Kennedy once more wrote for the majority and emphasized in his opinion the lengths to which the university went in exploring alternatives to consideration of race.[102] While Kennedy concluded that the university established that its methods were narrowly tailored to achieving diversity, the last paragraphs of the opinion noted that the university also would face a continuing obligation to monitor the results of its admissions practices and revise them as circumstances dictated or allowed.[103] Thus, the majority opinion in *Fisher II* further entrenched the idea that institutional excellence depends on exclusivity and that decisions about whom to exclude are based on measures of academic achievement that disproportionately mark applicants from historically excluded groups as less meritorious. In addition, in spelling out limits on colleges' power to decide how to pursue diversity and the requirement that they will continuously evaluate whether they need to take race into account, Justice Kennedy made clear the expectation that admissions processes will, if anything, weigh putatively objective measures of merit more in the future, rather than less.

Not surprisingly, Justice Thomas dissented, but in just a few, brief paragraphs.[104] Justice Alito offered a lengthier attack on the majority opinion, but did not pursue the arguments that Thomas had made in *Grutter* hinting at the possibility of a different mission of the university. Rather, Alito took the majority to task for failing to apply strict scrutiny properly to the university's offered rationales.[105] Alito did not set out to assess any relationship between student body diversity and the mission of the university but instead offered a

[100] Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 637 (5th Cir. 2014), *aff'd*, 136 S. Ct. 2198, 2215 (2016).

[101] *Fisher II*, 136 S. Ct. 2198, 2215 (2016).

[102] *See, e.g.*, *id.* at 2211, 2213 (pointing out that "[b]efore changing its policy the University conducted 'months of study and deliberation, including retreats, interviews, [and] review of data'" (internal citations omitted) and that "the University spent seven years attempting to achieve its compelling interest using race-neutral holistic review").

[103] *Id.* at 2214-15.

[104] *See id.* at 2215.

[105] *See id.* at 2222 ("UT has failed to define its interest in using racial preferences with clarity. As a result, the narrow tailoring inquiry is impossible, and UT cannot satisfy strict scrutiny.") (Alito, J., dissenting).

critique of the justifications given by the majority for using race.[106] Thus, Alito accepted the existing structure determining accessibility of elite higher education as given, even as natural, and viewed consideration of race as introducing a distortion into a neutral, objective system — a perspective not grounded in the real history of exclusion at elite institutions but consistent with the views of the *Bakke* justices who supported race-conscious admissions and, because not made explicit, requiring no defense against alternatives.

D. How the Implications of the Scarcity Paradigm Hinder Pursuit of Equity

The cases on selective admissions shaped the doctrinal battlefield that confronts advocates of greater equity in higher education access. In *Bakke*, Justice Powell took as given that elite higher education like that offered by the medical school at UC Davis was scarce. He accepted that the proper way to allocate this scarce resource was on the basis of merit as determined by past academic achievement, and allowed for consideration of applicants' contribution to diversity because, he contended, the varied backgrounds of students would enhance the educational experience for all. And he rejected other justifications for considering applicant diversity, which he defined as including but not limited to race. The constraints and priorities that Powell, along with the four Justices who viewed consideration of race as a necessary but temporary accommodation, were further entrenched in the subsequent cases on selective institution admissions. In the opinions produced in those subsequent cases, Justice Thomas directly addressed these constraints, questioning the University of Michigan's effort to justify consideration of race in admissions by asserting that other paths to diversity would sacrifice its elite status. Other Justices did not pick up the critique.

These opinions complicated efforts to achieve a more diverse student body at selective institutions. Not only was equity — taking into account societal discrimination — explicitly ruled irrelevant, but implicitly, so were the validity and fairness of the tests used to assess merit. In *Fisher II*, Justice Kennedy went further, suggesting that selective colleges and universities should monitor their admissions processes to see whether they can abandon considering race and still achieve diversity. His implication was that institutions should move toward greater reliance on ostensibly objective measures of merit.

[106] For example, achieving a critical mass of students of diverse backgrounds. *Id.*

The evolution of doctrine makes it difficult to assail those evaluations of academic merit. No Justice has disputed their validity so far, and that correspondingly makes it difficult to avoid a tradeoff between merit and diversity. As long as such a conflict appears, opponents of race conscious admissions will themselves have an apparently race-neutral basis for their criticism: they may claim that to take race into account is to sacrifice excellence. In this view, it is but unfortunate happenstance that the ostensibly race-neutral definition of merit operates to exclude disproportionately the same applicants who previously were excluded through the explicitly racist operation of law and policy and disproportionately favors those who previously were advantaged by those same exclusionary laws and practices. It is telling that opponents of race consideration in admissions have not demanded an end to other practices that disproportionately advantage applicants who historically were already advantaged, such as the children of alumni and the children of college and university donors.[107] The benefit of such preferences accrues in large part because overt exclusion in the past ensured that the alumni population was overwhelmingly White, as is the population of wealthy donors to elite colleges and universities.

Leveraging this apparent tradeoff depends on evidence showing that applicants from particular racial and ethnic groups disproportionately have weaker academic profiles than do applicants from other racial and ethnic groups. If there were no disparities in academic performance along lines of race, there would be no basis for raising concerns about a tradeoff. One important and unanswered question is whether the disparities represent differences in ability to perform at a selective college or university — perhaps they do not. Another is whether or to what extent differences in test performance, whatever tests measure, should play a role in admissions decisions, because if not or if their role should be limited, then the potential for conflict is correspondingly reduced. The core insight that none of the Justices have acknowledged thus far is the malleability of merit: it can be

[107] For example, in the litigation against Harvard College that is ongoing as of this writing, the plaintiffs challenging the college's undergraduate admissions practices explicitly state that they are not asking a reviewing court to enjoin the practice of favoring children of alumni and children of donors in the admissions process. Complaint at 119, Students for Fair Admissions, Inc. v. Pres. & Fellows of Harv. Coll., No. 1:14-cv-14176 (D. Mass. Nov. 17, 2014), http://projects.iq.harvard.edu/files/diverse-education/files/complaint_against_harvard.pdf?m=1446553054 (prayer for relief).

redefined and if redefined, the conflict between achieving a diverse student body and a meritorious one could vanish.[108]

There are additional, good reasons to question the primacy of test scores. For those who do not believe that ability actually tracks race, ethnicity, or wealth, the fact that poorer students and students who are members of historically excluded groups consistently and disproportionately perform less well on them than do students who are White and/or socioeconomically advantaged is itself one reason. Another is the false sense of precision scores may create: test scores create the impression that students can easily and simply be ranked relative to each other, an impression that is almost certainly misleading. Although the College Board, seeking to establish the validity of the SAT as a predictor of future success, finds that those at the top of the distribution experience better outcomes than those at the bottom, there is no claim that small differences have similar significance.[109] It is unclear that admissions committees at selective institutions recognize or act on this, and there are powerful incentives, in the form of rankings of institutional quality that take into account SAT scores, for example, to favor higher-scoring applicants over lower scoring applicants, whatever the difference in scores between two candidates.[110]

II. ALTERNATIVES TO FLAWED MEASURES OF MERIT

Anniversaries are occasions to look forward as well as backward, to consider what the past portends for the future. The path that a majority of the Supreme Court will likely take in coming years is well-laid out, the product of a long and bitterly waged battle by opponents of explicit recognition of race in the allocation of opportunities in all contexts, including selective admissions to elite colleges and universities. Justice Sandra Day O'Connor wrote in *Grutter* that she

[108] It is beyond the scope of this Article to specify the proper definition of merit to be used. The critical point is that the assessment can turn on a host of variables reflecting values that society wishes to pursue. One such variable might be the production of a diverse population of future leaders — a possibility contemplated by the Court in striking down exclusion of a Black applicant to a graduate education program. McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 641 (1950).

[109] *See, e.g.*, EMILY J. SHAW, AN SAT VALIDITY PRIMER 12 (2015), http://files.eric.ed.gov/fulltext/ED558085.pdf (comparing four-year graduation rates of students with a composite score of 1200 on the SAT (which has since been redesigned) to those of students with a composite score of 2100).

[110] *See Frequently Asked Questions: 2019 Best Colleges Rankings*, https://www.usnews.com/education/best-colleges/articles/rankings-faq#9-2 ("What measures of academic quality does U.S. News use in its rankings?").

expected consideration of race in higher education to be unnecessary by 2028,[111] the fiftieth anniversary of the *Bakke* decision that is the subject of this Essay. The future may be veiled, but the odds that the United States will develop in such a way that race will no longer shape and limit opportunity on Justice O'Connor's timetable are low.

Not that this reality is likely to deter a majority of the Justices, who have preferred an understanding of the demands of equal protection that is formally coherent rather than practically effective at promoting equity.[112] This has taken the form of a severe aversion to the use of racial classifications and the recognition of race at all.[113] Barring a major shift in Court personnel, in the near future a majority of the Justices will likely mandate that higher education institutions that receive federal funds eschew consideration of race in their admissions decisions entirely. Insofar as selective colleges and universities anoint and credential students who have already achieved, they will be prohibited from explicitly considering applicants' race or ethnicity, even though the fact is that race and ethnicity may very well have played a role in their achievements and test scores.[114]

A question raised by this likelihood is whether there is an alternative conception of excellence in higher education that would promote greater equity in opportunity. Thus far, as the preceding discussion showed, just one member of the Court appears to have considered the matter at all, and then to characterize greater equity as possible only by sacrificing elite status. This Part takes up the question. The first of the sections that follow identifies flaws in measures of merit currently used in deciding who gains admission to selective colleges and universities. The second section describes a relatively modest effort to enhance equity in admissions at these institutions, while the third outlines a re-imagination of the methods and purpose of the nation's most selective colleges and universities.

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[111] Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

[112] *See* Mark Landler & Maggie Haberman, *Brett Kavanaugh is Trump's Pick for Supreme Court*, N.Y. TIMES (July 9, 2018), https://www.nytimes.com/2018/07/09/us/politics/brett-kavanaugh-supreme-court.html.

[113] The remarkable and much-commented-upon claim by Chief Justice Roberts that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race" apparently equating *de jure* segregation to race-conscious student assignment to integrate public schools, illustrates this aversion. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 551 U.S. 701, 748 (2007).

[114] Devon Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130, 1134 (2013) (describing competing goals admissions officers may pursue in considering applicant achievements and apparent characteristics).

A. Flawed Measures of Merit

It is a simple truth that factors over which applicants have no control — and which have little to nothing to do with ability — can have a profound effect on student performance on the standardized tests that play an outsize role in admissions decisions. Race and gender, which can play a role through the negative impact of stereotype threat on student performance on standardized tests, are only two.[115] Another is family income, which had correlated perfectly with test performance, until at least 2016, when the College Board abandoned reporting on this indicator.[116] That was the last year that Table 10 of the Board's *Total Group Profile* report ("Table 10") showed that the average score on every section of the SAT rose with the income bracket of the test-taker's family, with students in the top income decile earning scores more than 100 points higher than those in the lowest income decile.[117] Now the College Board has stopped reporting this information. Instead, the College Board collects information on the educational background of each test taker's parents,[118] asking for the "highest level of parental education,"[119] and

[115] *See* C.M. Steele & J. Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 799 (1995) (conducting tests of impact of telling students a test was diagnostic, raising the apparent stakes, on performance of Black students).

[116] COLL. BD., 2016 SAT SUITE OF ASSESSMENTS ANNUAL REPORT 4 (2016), https://secure-media.collegeboard.org/digitalServices/pdf/sat/total-group-2016.pdf [hereinafter COLL. BD 2016]. Prior year reports have shown the same pattern. *See, e.g.*, COLL. BD., 2015 SAT SUITE OF ASSESSMENTS ANNUAL REPORT 4 (2015), https://secure-media.collegeboard.org/digitalServices/pdf/sat/total-group-2015.pdf; COLL. BD., 2014 SAT SUITE OF ASSESSMENTS ANNUAL REPORT 4 (2014), https://secure-media.collegeboard.org/digitalServices/pdf/sat/TotalGroup-2014.pdf (in this and prior year reports, the numbers are reported in Table 11); COLL. BD., 2013 SAT SUITE OF ASSESSMENTS ANNUAL REPORT 4 (2013), http://media.collegeboard.com/digitalServices/pdf/research/2013/TotalGroup-2013.pdf; and so on, as far back as 1996, COLL. BD., 1996 COLLEGE BOUND SENIORS NATIONAL REPORT 7 (1996), http://media.collegeboard.com/digitalServices/pdf/research/CBS-96-National.pdf (in this version, it is Table 4-2). All the reports are available here: https://research.collegeboard.org/programs/sat/data/archived/. Beginning with the 2017 report, the College Board has reported on the highest level of parental education rather than "family income," and scores are higher for test-takers whose parents completed more education. COLL. BD., 2017 SAT SUITE OF ASSESSMENTS ANNUAL REPORT 3 (2017), https://reports.collegeboard.org/pdf/2017-total-group-sat-suite-assessments-annual-report.pdf. And the College Board has argued that the test does not just reflect wealth or income; *see* EMILY SHAW, COLL. BD., AN SAT VALIDITY PRIMER 16 (2015), http://files.eric.ed.gov/fulltext/ED558085.pdf.

[117] This does not mean that there are not tens of thousands of lower-income students who perform very well on such tests. *See infra* note 129 and accompanying text.

[118] Higher education typically also correlates with higher income. *See* CLAUDIA

sure enough, according to the most recent report from the College Board, the more educated the parents, the higher their children's scores.[120]

There is perhaps good reason to abandon collecting and reporting scores by income. The perfect correlation suggests that merit can be bought, that the SAT does not measure intrinsic ability or even knowledge accumulation so much as the ability to invest in developing expertise at taking the test. Thus, continuing use of the SAT in admissions decisions at selective colleges and universities rewards and perpetuates the preexisting distribution of privilege among applicants. This undermines, or should undermine, claims about the legitimacy of the SAT as a basis for making admissions decisions. The legitimacy of the SAT matters both for the College Board, which administers the exam, and for colleges and universities, whose claims of excellence may be bolstered by high matriculant scores.

Legitimacy is a contested term and deserves some interrogation here. Legitimacy could be a descriptive claim, meaning that a test like the SAT is legitimate because many people accept it as a meaningful indicator of ability and, correspondingly though not inevitably, of merit. This claim of popular legitimacy is safe, given the widespread use of SAT scores, and understood in this way, legitimacy has no normative significance: to say that the SAT is widely accepted as an indicator of merit is not to say that it should be so accepted.

Legitimacy could also rest on a different positive claim, that SAT scores have value in and of themselves, quite apart from the value given them by students, admissions officers, families, the media, policymakers, and others. That is, perhaps the SAT measures applicant ability or other attributes that cannot be feigned and so reveal fundamental truths about student ability.[121] This second definition, constituting what the discussion that follows refers to as a claim of substantive legitimacy, is most relevant to this Essay, and it is the definition undermined by the correlation between income and score.

GOLDIN & LAWRENCE F. KATZ, THE FUTURE OF INEQUALITY: THE OTHER REASON EDUCATION MATTERS SO MUCH 3 (2009), https://dash.harvard.edu/bitstream/handle/1/4341691/GoldenKatz_EdIneq.pdf?sequence=1&isAllowed=y.

[119] COLL. BD., 2018 SAT SUITE OF ASSESSMENTS ANNUAL REPORT 3 (2018), https://reports.collegeboard.org/pdf/2018-total-group-sat-suite-assessments-annual-report.pdf.

[120] *Id.*

[121] LANI GUINIER, THE TYRANNY OF THE MERITOCRACY: DEMOCRATIZING HIGHER EDUCATION IN AMERICA 13 (2016) (describing this as "something [the SAT] cannot deliver").

The next question is whether standardized tests like the SAT *should* be used, if they do not actually measure fundamental applicant ability. A corollary, normative question, taken up below,[122] is to what extent ability should determine admission to a selective institution, whether the SAT measures it accurately or not.

The pattern evident in scores reported by the College Board in Table 10, along with similar patterns elsewhere in the organization's annual reports,[123] should raise serious questions about the substantive legitimacy of this and other widely used standardized tests. Further, the pattern suggests that merit, as measured by the SAT, is inherently unstable and can be redefined. This argument is distinct from the claim that the SAT is a tool protecting access to higher education for those who are already advantaged, though the malleability of merit certainly does allow the SAT to function in that way. This argument is also distinct from that made by critics who have demonstrated that the design of the SAT favors specific types of test-takers, although again, the possibility of modifying the test emphasizes the elusive nature of whatever the test purports to measure. Finally, the argument of this Essay is distinct from that of critics who focus on the disparate effects of use of the test on the educational opportunities of students who belong to historically subordinated groups, in that these disparities are the result of the fluidity of notions of merit.

It is perfectly reasonable to believe that wealth leads to greater ability to perform well on standardized tests, which in turn is captured on the tests. Students from well-off families enjoy greater stability and lower levels of stress in their home lives, as well as access to more learning opportunities, beginning with exposure to a larger vocabulary — their advantages begin early and appear to compound over time.[124] So it is no surprise that the children of the wealthiest families predominate at the most selective colleges and universities. Table 10 in this light simply reflects hard and not necessarily fair facts of life.[125]

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[122] *See infra* Parts II.B and II.C.

[123] For example, students who identified as "Asian" receive higher total scores than students who are "White," "Hispanic/Latino," or "Black/African-American." COLL. BD. 2016, *supra* note 116, at 3.

[124] *See* Ginia Bellafante, *Before a Test, a Poverty of Words*, N.Y. TIMES (Oct. 5, 2012), https://www.nytimes.com/2012/10/07/nyregion/for-poor-schoolchildren-a-poverty-of-words.html.

[125] The College Board argues that colleges and universities should use the SAT along with other factors for more accurate measure. *See SAT Program Participation and Performance Statistics*, COLL. BD., https://research.collegeboard.org/programs/sat/data (last visited Feb. 10, 2019). The goal is reliability of the test as predictor of future performance. *See Sign Up for the National SAT Validity Study*, COLL. BD., https://collegereadiness.

Of course, this "facts of life" rationale is inconsistent with the innate ability model of merit, in that good test performance apparently can be purchased. More significantly, it also rejects as irrelevant any argument about the fairness of the test; the pattern in scores becomes the result of prior unfairness rather than test design.

Fairness should matter for at least two reasons. First, students with less socioeconomic privilege presumably would earn higher scores and be better represented at highly selective institutions but for their lack of resources. To disfavor students because of where their families fall in the socioeconomic distribution is to valorize that distribution, to accept that prior status *should* play a role in determining both which students go to college and what institutions they attend. Disadvantage on the basis of birth is not fair — opportunity should reward effort, not luck.[126] Second, higher education in the United States is mythologized as an engine of socioeconomic mobility. First-year college students say this is one of the most important reasons they pursue higher education.[127] But if opportunity is allocated in a manner that consistently denies or limits access to those seeking to move up the socioeconomic ladder, that reduces the chance that the national myth will reflect reality.[128]

One response to the regressive distribution of elite educational opportunity takes advantage of the fact that although test-takers from wealthier backgrounds perform better on high-stakes tests, these students are not the only people who perform well on such tests. Researchers have identified tens of thousands of students who earn high scores but who are not wealthy; the challenge is ensuring that they apply to and matriculate at selective and highly selective colleges

collegeboard.org/educators/higher-ed/test-validity-design/validity-studies (last visited Feb. 10, 2019). This is further evidence of teleological confusion: does the test measure past achievement, a product of life experience and relative privilege, or forecast future achievement, a product of student intrinsic intelligence and higher education opportunity yet to be enjoyed? If the latter, the close correlation between family income and test scores is suspicious.

[126] This is a clearer application of Justice Powell's intuition that admissions decisions should turn on applicant characteristics that the applicants can control, rather than race, for which each applicant is "innocent." *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 308 (1978) (Powell, J.).

[127] KEVIN EAGAN ET AL., THE AMERICAN FRESHMAN: NATIONAL NORMS FALL 2016, at 8 (2017), https://www.heri.ucla.edu/monographs/TheAmericanFreshman2016.pdf (reporting that more than two-thirds of first-year college students in fall 2016 "identify making more money as a very important reason to attend college," a slight decrease from the preceding year).

[128] *See* JOSEPH F. KETT, MERIT: THE HISTORY OF A FOUNDING IDEAL FROM THE AMERICAN REVOLUTION TO THE 21ST CENTURY 121 (2013).

and universities.[129] Policy interventions that identify these students and nudge them to apply to elite institutions are a critical step toward promoting accessibility of elite higher education.[130] These colleges may have financial resources and aid policies that make higher education more affordable than it would be at another institution that advertises a lower sticker price but is less well-resourced and less likely to produce a positive outcome, like on-time graduation.[131]

Yet admitting different, even if less privileged, students on the basis of high test scores is not an entirely satisfying policy revision if the test scores do not measure what they are popularly perceived to measure. Then the inevitable, next question must be, what is the alternative? We could treat the median score of the bottom decile as equivalent to the median score of the top decile student — effectively multiplying the score of the bottom decile student by a fraction greater than one or multiplying the score of the top decile student by a fraction less than one. This is a simplistic version of "class-based affirmative action." We could also use a similar correction for disparities along lines of race and gender. The admissions scheme at issue in *Bakke* did this by dividing the class, reserving sixteen percent of slots for minority applicants.

Yet these are not entirely satisfying modifications to the *status quo*, either. If the measuring instrument produces flawed results, attempting to correct those results may be more costly and less effective than improving or replacing the instrument. The patterns in standardized test performance discussed above suggest that these assessments do not, or do not only, measure applicant attributes that should determine admissions decisions. The ideal solution would be to develop an assessment tool that measures those applicant characteristics that should figure in the selection process and is not influenced by other characteristics that should not. To be clear, by *should* here, the claim is twofold: that in an ideal world, the assessment would not perfectly correlate with socioeconomic status, and also, that in this flawed world, the results produced by a better tool would not so correlate, either.

[129] Hoxby & Avery, *The Missing "One-Offs," supra* note 22, at 2, 15.

[130] And this is precisely what Professor Hoxby and coauthor Sarah Turner report on in a subsequent paper, finding that providing more information at no cost had a significant effect on low-income, high-scoring student behavior in the college application process. Caroline Hoxby & Sarah Turner, *What High-Achieving Low-Income Students Know About College Options*, 105 AM. ECON. REV. 514, 514-15 (2015).

[131] *Id.* at 515 (noting that students were more likely to apply to a college if the college's materials suggested ample financial aid availability).

The sections that follow offer two visions, one incremental and using our existing understanding of the purpose of institutions of higher education, the other more profound and adopting a different conception of institutional purpose and quality.

B. Unidentified Superstars

That there are thousands of students who have achieved very good scores on standardized tests but who have not applied to schools commensurate with those scores is well-documented.[132] One incremental step toward achieving greater diversity on the campuses of selective colleges and universities is to encourage more of these students to apply to and enroll at such institutions, discussed above.[133] Yet the same patterns along lines of race that are evident in the College Board's annual report on students who took the SAT, discussed above,[134] are evident as well within the population of low-income, high-scoring students: high-scoring, low-income students are disproportionately White and disproportionately Asian.[135] An intervention aimed at encouraging such students to apply to more selective colleges and universities[136] will not correct for these patterns in test performance. Put another way, such interventions accept the validity of the tests in measuring merit and, more fundamentally, the premise that the highest quality, most elite higher education opportunities should be reserved for those who have already excelled. It is not even clear that at highly selective institutions, admissions officers themselves accept that this is what they are doing: documents filed by Harvard in litigation over consideration of race in its undergraduate admissions process emphasize the critical role of other information about applicants.[137] Consequently, while identifying and

[132] *See, e.g.*, Hoxby & Avery, *The Missing "One-Offs*,*" supra* note 22, at 15 (identifying "at least" 25,000 low-income, high-achieving students in the United States).

[133] This is the policy implication of the research by Hoxby and Avery, *id.*

[134] *See supra* note 123 and accompanying text.

[135] Hoxby & Avery, *The Missing "One-Offs*,*" supra* note 22, at 18.

[136] *See* Hoxby & Turner, *supra* note 130 (describing such an intervention designed in the wake of research on the number of high-scoring, low-income potential college students).

[137] Report of David Card at 31, Students for Fair Admissions Inc. v. President & Fellows of Harv. Coll., No. 1:14-cv-14176 (D. Mass. June 15, 2018), https://projects.iq.harvard.edu/files/diverse-education/files/legal_-_card_report_revised_filing.pdf ("[A]lthough Harvard values academic achievements, academic qualifications are only one factor in the evaluation of each candidate").

encouraging more of these students to apply to selective colleges and universities may contribute to greater socioeconomic diversity on elite campuses, such outreach may be less effective at fostering greater diversity along lines of race and ethnicity.

More aggressive outreach might target students who are not necessarily high-scoring and low-income but who are capable of performing well in college, who have in other ways demonstrated the ability to excel despite lack of access to superior or even adequate support and resources in secondary school. This is effectively the approach taken, for example, by the state of Texas through its "top [ten] percent" plan, which guarantees a spot at the state's top public universities to students who graduate in the top tenth of their high school graduating class — regardless of other characteristics of the student or the student's school.[138]

A less blunt, more sophisticated effort to identify students likely to succeed in higher education might follow a path like that developed at the University of Colorado, which when faced with a possible ban on consideration of race in admissions processes assessed "race-neutral" alternatives.[139] The voters rejected the ban on consideration of race,[140] but the system that the university developed stands as a model for others to follow to promote equity of access in the face of a judiciary that appears increasingly resistant to explicit consideration of racial disadvantage. Instead of race, the University of Colorado process relied on two critical measures: applicant disadvantage and applicant overachievement.[141] The disadvantage measure took into account variables including an applicant's socioeconomic status, the language spoken in the applicant's home, and parental education level, for example, to develop a prediction of the likelihood of the applicant enrolling in a four-year college or university.[142] Then that probability was compared to the likelihood of college enrollment by a student of the typical socioeconomic status of all students at the applicant's school.[143] This comparison thus illustrated how the socioeconomic status of the student affects the likelihood of matriculation.[144] In turn, the overachievement measure sought to assess how an applicant's high

[138] Tex. Educ. Code Ann. § 51.803 (2019).

[139] Matthew N. Gaertner & Melissa Hart, *Considering Class: College Access and Diversity*, 7 HARV. L. & POL'Y REV. 367, 369 (2013).

[140] *Id.*

[141] *Id.* at 379.

[142] *Id.* at 380.

[143] *Id.* at 381.

[144] *Id.* at 382.

school academic performance compared to that of students with similar socioeconomic backgrounds.[145] Essentially, the result of these analytic efforts was the identification of students who were performing better than would have been predicted based on socioeconomic status and other variables: these were superstar students given their academic and socioeconomic context, even if their performance on a standardized test was not outstanding in absolute terms or relative to the larger pool of test-takers.

This is not quite the same as discounting or supplementing scores based on other applicant characteristics, like family socioeconomic status, because the scores themselves play the same, meaningful role. Taking context into account does not have the effect of automatically raising the score for every student who is poor, for example. Rather, the University of Colorado assessment method favored those applicants who were poor and who performed better than similarly situated students. Any adjustment to the weight given to an applicant's score was thus a function of performance as well as characteristics of the student's educational community, not an attribute, like socioeconomic status, of that student alone.

When the University of Colorado tested the new system alongside the system that took race into account, the results showed that representation of underrepresented racial and ethnic minority students would have increased under the class-based system.[146] So would socioeconomic diversity.[147] By including in admissions decisions a meaningful assessment of students' ability to overcome obstacles, the University of Colorado used racial disparities in the distribution of those obstacles to promote equity in higher education opportunity. However, the underrepresented students identified under the class-based system differed from those admitted under the old system that took race into account. Students whom the class-based system identified as superstars might have more marginal, though not disqualifying, academic credentials.[148] Had the class-based regime been implemented, it would have been very helpful to monitor the academic performance of these students on campus; perhaps they would have continued to outperform their indicators, as in high school.

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[145] *Id.* at 385.
[146] *Id.* at 392.
[147] *Id.* at 393.
[148] *Id.* at 394.

This is not to suggest that the experiment at the University of Colorado has identified a panacea. Student academic trajectories reflect myriad factors, after all. The wider the test score gap between wealthy students and poor students, the potentially more challenging it becomes for an institution to pursue both the current, narrow definition of excellence, on the one hand, and equity, on the other. The tradeoff paradigm[149] retains its force. Research on performance on standardized tests has found a widening gap along socioeconomic lines: students from wealthier and/or higher income families outperform students from poorer backgrounds by a growing margin.[150] This may be the result of widening inequality generally, such that students whose families are toward the high end of the socioeconomic distribution have more resources and more highly educated parents possess an increasingly sizable advantage over peers from the lower end of the distribution.[151]

The University of Colorado model offers a path forward explicitly recognizing that admissions processes can take into account both disadvantage and overachievement or, put another way, that selective colleges and universities can aim to identify strivers. The University of Colorado offers a solution to the problem of finding the best students without perfectly reproducing societal inequity, but still accepts the existing meritocratic construct and does not attempt to rethink what it means to be the best student or, for that matter, the best college or university. This approach will still miss students who would benefit disproportionately from access to the resources of an elite educational institution, the kind of place offering small classes; extensive interaction with faculty members; a high on-time graduation rate; and postgraduate pathways to power, wealth, and influence. To look for outliers is to accept and work within an allocation system that is premised on scarcity and the rewarding of students who have already shown they can excel. Defenders of this notion of selectivity may well respond to this observation by arguing that allocating elite higher education opportunity to those who have already demonstrated an

[149] *See supra* note 108 and accompanying text.

[150] JONATHAN A. PLUCKER, NATHAN BURROUGHS, & RUITING SONG, MIND THE (OTHER) GAP! THE GROWING EXCELLENCE GAP IN K-12 EDUCATION 4 (2010), http://files.eric.ed.gov/fulltext/ED531840.pdf (investigating performance over time and across subgroups on the National Assessment of Educational Progress and finding that over time "[t]he percentage of White, more affluent, and English-language speakers scoring at the advanced level has increased substantially in math while the performance of other groups has remained relatively stable").

[151] Sean F. Reardon, *The Widening Income Achievement Gap*, 70 EDUC. LEADERSHIP 10, 13 (2013).

ability to do well is the goal, not the flaw, of selective admissions processes. What is important to recognize in thinking about this claim is that it is *normative*: the justification for rewarding students who have already shown that they can succeed does not come from the evidence of prior success but from the valorization of that evidence. This difficult conversation, questioning who should enjoy what kind of opportunity on what basis, must occur if there is to be equity in higher education access.

The question is not new, of course. Responses likely vary depending on the degree of faith in the ability of admissions processes to select fairly, however the term "fairly" is defined. Lani Guinier and Susan Sturm outlined the possibility of a lottery, which would presumably be favored by those with the least faith in more subjective decision-making.[152] They suggest that this might be a good option in the context of education.[153] One challenge is readiness: admitting students who have not had the training to do the kind of work that an elite college or university will demand does not serve either the institution or the student well. Indeed, the article that Professor Guinier and Professor Sturm cite in developing their argument proposed a proficiency model, to avoid admission of a student who does not have the skills needed and who will likely flounder in a demanding college setting.[154] A proficiency assessment need not turn on fine gradations among potential students, nor need the bar be set too high; it would simply need to reflect those skills that admissions officers across institutions recognize as prerequisites to succeeding in college.

However, significantly for purposes of this Essay, Professor Guinier and Professor Sturm go on to develop a more sophisticated, and admittedly more subjective, system that they contend could be used in employment or other contexts.[155] They propose that race[156] "serve as both a signal of organizational failure and a catalyst of organizational innovation" beforehand, rather than an after-the-fact corrective to a biased or unfair selection mechanism.[157] Their idea is, the institution doing the hiring should "consider the needs, interests, and possibilities of the particular institutional setting" — put another way,

[152] Lani Guinier & Susan Sturm, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CALIF. L. REV. 953, 1012 (1996).

[153] *Id.*

[154] *Id.* (citing Peter E. Rosenfeld, *Inside the Meritocracy Machine*, N.Y. TIMES, May 19, 1996, at 13 (letter to the editor)).

[155] *Id.* at 1012-13.

[156] And gender. *Id.* at 1014.

[157] *Id.*

the mission of the institution.[158] Attention to the institution, to what it offers and what it needs, is a critical aspect of the vision articulated in the next section.

C. Paradigm Shift: Attending to the Mission of the University

Conversations about merit and how to recognize it are inevitably fraught. Those who are successful in the national contest over higher education access quite naturally may be more comfortable with the notion that their achievements reflect their own hard work, skill, and talent. For these winners, the idea that more arbitrary factors not under the control of the individual student are dispositive is discomforting. To be sure, scholars have addressed bias in standardized tests, prompting some institutions to abandon reliance on them in admissions decisions.[159] Some scholars have attempted to develop tests that do not have the disproportionate effects along lines of race, class, and gender that commonly-used, standardized assessments have.[160] But such initiatives, like the effort to persuade high-scoring students from low-income backgrounds to pursue elite higher education, do not seek to change the underlying paradigm of scarce opportunity and may not interrupt the disproportionate allocation of spoils to the spoiled.

Similarly, those within the academy may be reluctant to question the nature of institutional merit, if doing so may disturb the conventional hierarchy among colleges and universities, with the wealthiest and most selective at the apex and the rest distributed unevenly below.[161] Scholars, like professionals in the private sector, appreciate rules and norms with which they are familiar and may seek to rise within a system rather than to undertake a quixotic effort to

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[158] *Id.* at 1013.

[159] More than 1,000 colleges and universities do not require applicants to take the SAT or ACT, according to the National Center for Fair & Open Testing, a nonprofit organization that has focused on eliminating bias in testing. *More Than 1000 Accredited Colleges and Universities That Do Not Use ACT/SAT Scores to Admit Substantial Numbers of Students into Bachelor-Degree Programs*, FAIRTEST, http://fairtest.org/university/optional (last visited Dec. 14, 2018).

[160] *See, e.g.*, Jonathan D. Glater, *Study Offers a New Test of Potential Lawyers*, N.Y. TIMES (Mar. 10, 2009), https://www.nytimes.com/2009/03/11/education/11lsat.html (describing development of an alternative test to the LSAT that did not produce disproportionately poor scores for test-takers from historically subordinated groups).

[161] *See generally* DAVID LABAREE, A PERFECT MESS: THE UNLIKELY ASCENDANCY OF AMERICAN HIGHER EDUCATION (2017) (explaining the diverse community of institutions of higher learning in the United States and analyzing the consequences of competition among them).

upend it. And to be sure, pondering the proper measure of student merit does not necessarily compel a reassessment of the institutional variety; rethinking what institutions ought to strive and be rewarded for calls for a broader focus, extending well beyond students. That is the intent of this section, because reconsidering institutional goals may resolve the access problem created by current definitions of applicant merit.

The often unstated rationale for selective admissions at elite institutions is the scarcity of educational experiences of the caliber they offer. Yet scarcity is an artificial constraint, in that greater public investment in higher education could expand the availability of comparable educational experiences, with their small class sizes and other, generous support. This has happened at various points in our national history in the past, both at the federal and the state level. The scarcity justification is not the result of reasoning about the ideal, desired role of higher education in a democratic society, for example; it is not normative, but pragmatic. Were there more colleges and universities offering elite-level experiences, then admissions could be more about matching of schools and applicants than about weeding out applicants deemed too weak. This approach would be consistent with a proficiency model of assessment as identified above. If the admissions process were guided by the question of which students would benefit most from the experience on offer, this would not simply translate into acceptance of those who were the most disadvantaged previously, although students who had encountered hardship in primary and secondary schooling would likely be better represented. Some of the same factors currently considered in admissions would still play a role. For example, students who had demonstrated the ability to take advantage of educational opportunities in the past would likely be able to take advantage of opportunities in the future. But students who attended weaker secondary schools might be better represented in an admitted class because the admissions process would be looking for evidence of ability to benefit, rather than just evidence of past achievement. Some students with strong academic backgrounds would also benefit from the education on offer, but again, not precisely because of what they had done but because of what their achievements indicated they would do next. Put another way, this focus in admissions would run counter to the notion that access to elite higher education is "earned" and "deserved" by those who do well enough in high school. Doing well in postsecondary schooling might indicate an ability to benefit, but might not be dispositive in admissions decisions.

The difference could lie in student ambition, for example, and evidence of students' attempting to stretch and strengthen their learning in more challenging areas. The difference could also lie in assessing the opportunities a student might have, were a particular selective institution *not* to admit that student. Thus, an applicant from a more privileged background, who would be expected to thrive at whatever institution attended and experience a positive outcome after graduating from whatever institution attended, would enjoy less of an advantage in the admissions process. This is a slightly different use of the kind of information considered in the alternative admissions regime developed by the University of Colorado and discussed above, which sought to calculate the likelihood of a given degree of academic success by a disadvantaged student who has overachieved in the past, and also to calculate the probability that a potentially more advantaged student would overachieve in the future. This could involve comparing the general likelihood of success by the applicant, based on demographic characteristics, to the specific likelihood of success at the institution considering the applicant for admission. Thinking about applicants this way would reflect a choice to prioritize "humane justice" in allocating of educational resources, to put more emphasis on what an institution could give a student.[162]

This would be a radical shift in admissions criteria, redefining merit. The best institutions would be those that produce the best results, however defined, with more disadvantaged students. Another virtue of such an approach is the ease of explaining it: it can be transparent, as admissions decisions should be, because the college or university could inform students that decisions were made based on who could benefit the most from the education provided. Some students might not be admitted because they would not benefit as much, and they might benefit less because they had already achieved and were already on a trajectory to achieve more. Such a conclusion creates no stigma. In contrast, college and university officials currently have an incentive to keep admissions decisions opaque, given the state of Supreme Court doctrine and the risk that the anger of rejected applicants could lead to litigation.[163] Because the admissions decision reflects an

[162] See Christopher Jencks, *Whom Must We Treat Equally for Educational Opportunity to be Equal?*, 98 ETHICS 518, 521-22 (1988).

[163] Grutter v. Bollinger, 539 U.S. 306, 394 (2003) (Kennedy, J., dissenting) (lamenting that the if opinion gives "universities . . . the latitude to administer programs that are tantamount to quotas, they will have few incentives to make the existing minority admissions schemes transparent and protective of individual review").

assessment of past achievement, rejection is experienced by the applicant as belittling.

No doubt there are skills essential to enable success in college. And success need not mean excelling, of course; poor performance does not necessarily indicate an error in the admissions process. If essential, prerequisite skills could be verified, that would be a logical first step in an admissions process at a highly selective institution, to ensure that a student could handle fundamental tasks, such as basic math, reading, analysis, and writing. With the establishment of proficiency, the focus would properly shift to the applicant and the applicant's social and educational context, including race, socioeconomic status, gender. This analysis could extend to consider the type of institution the applicant might otherwise attend, based on the typical trajectories of students like the applicant. The process should aim to uncover evidence of, or proxies for, determination and resilience, rather than some quantum of knowledge; the goal would be to gauge the potential of students to appreciate and benefit from their higher education. The institution ought also to consider its track record in serving students like the applicant but not in order to decide whether to admit but to identify areas where the education needs refinement. And admissions officers should continue to reassess their matriculating classes with attention to whether their process is reproducing the socioeconomic, racialized hierarchies of the outside world.

To be sure, this approach could lead to a perverse incentive: some selective colleges and universities might reduce their support of students from historically excluded groups to make the education less accessible and so contend that students who are more disadvantaged would get less out of it. The admissions office of such a strategically unsupportive institution might in good faith only admit students who have had the most privileged prior educational experiences because only they would have the training to cope with the lack of student-friendly services devoted to, for example, development of academic and social skills expected by faculty. It is likely that some institutions would pursue this route. Adopting an attitude of deliberate indifference to the needs of many students would likely worsen the negative experiences of students from historically excluded groups, who already report feeling alienation on campus.[164] Difficulties encountered by students from less privileged backgrounds when they

[164] Adrienne Green, *The Cost of Balancing Academia and Racism*, ATLANTIC (Jan. 21, 2016), https://www.theatlantic.com/education/archive/2016/01/balancing-academia-racism/424887/.

step onto elite college campuses are well documented,[165] and different campuses have expended more or less effort to promote student diversity.[166]

An alternative, equity-centric admissions regime would not be judged by how reliably it measured individual ability but instead would be judged by its results. This approach would follow necessarily from recognizing that there is no set baseline for assessment: a fair and reliable admissions selection process should reward what quality of an applicant? Or should be judged by what outcome for a matriculant? The current selective admissions process, as discussed above, rewards privilege and is judged by success in obtaining (or preserving) privilege for graduates. But there are alternatives. An assessment tool that aims to promote diversity among the student body is easily judged, because equity of results — the racial, ethnic, socioeconomic diversity of the assembled class — can be observed. Put another way, setting a goal enables working backwards to develop a process that meets the goal.

If admitted students and graduates of elite colleges and universities should reflect the increasing diversity of the wider population, then the correct approach in admissions would be recognizable because it would achieve this goal. Setting this as a goal presumes an even distribution of ability to benefit — and ability overall — across different racial and ethnic groups. This is a claim that is both positive and normative, in that it reflects a conviction about reality and a belief

[165] *See, e.g.*, Joan M. Ostrove & Susan M. Long, *Social Class and Belonging: Implications for College Adjustment*, 30 REV. HIGHER EDUC. 363, 366 (2007) (describing alienation experienced by students on elite college campuses where they do not feel that they "belong"); Jeremy Bauer-Wolf, *Access Woes Persist for Students of Lesser Means*, INSIDE HIGHER EDUC. (July 12, 2018), https://www.insidehighered.com/news/2018/07/12/enrollment-completion-troubles-students-lower-socioeconomic-classes; JENNIFER ENGLE & VINCENT TINTO, MOVING BEYOND ACCESS: COLLEGE SUCCESS FOR LOW-INCOME, FIRST-GENERATION STUDENTS 9 (2008), http://files.eric.ed.gov/fulltext/ED504448.pdf (identifying web of risk factors confronting first generation students on college campuses). There is also ample scholarship on the obstacles such students face. *See, e.g.*, DOROTHY EVENSEN & CARLA D. PRATT, THE END OF THE PIPELINE: A JOURNEY OF RECOGNITION FOR AFRICAN AMERICANS ENTERING THE LEGAL PROFESSION (2011) (describing experiences of Black students who succeed in law school). The data collected by the Education Department illustrates the results: gaps in completion rates along lines of race and ethnicity. *Table 326.10*, *supra* note 5.

[166] Some campuses have far more students whose families are poor, while some overwhelmingly cater to the wealthiest. *Top Colleges Doing the Most for the American Dream*, N.Y. TIMES (May 25, 2017), https://www.nytimes.com/interactive/2017/05/25/sunday-review/opinion-pell-table.html.

that assessment methods that yield results that disproportionately favor one racial or ethnic group are inherently suspect.

Redefining the mission of higher education as an opportunity to be bestowed where it may do the most good may sound utterly unrealistic. Yet for reasons completely incompatible with this Essay's reasoning, it may be a vision that can be realized. Independent of concern over the degree to which elite higher education reflects the diversity of the contemporary United States, critics of the cost of college have suggested assessing the quality of higher education by calculating the value that it adds.[167] The idea is to predict a student's trajectory based on pre-matriculation characteristics and then compare that to the student's actual trajectory post-graduation. The better the postgraduate actual outcome relative to what was predicted, the more "value" the college or university provided to the student.[168] One way that an institution can improve its performance on a test of its value-added is to try to improve outcomes. Another is to admit more students whose predicted outcomes in the absence of obtaining the institution's educational experience are worse. No doubt there are myriad ways to manipulate any quality assessment; this Essay does not argue for a policy of measuring value-added. Any such assessment is difficult even in the absence of strategic behavior. Rather, the goal here is to suggest that receptiveness to considering institutions' value-added as an indicator of quality is evidence of openness to other indicators of quality that focus on institutions rather than their students.

It is critical that the right outcome measure be used. To the extent that a study of institutional value-added only takes into account the income earned by graduates, for example, it will not necessarily encourage colleges and universities to focus on admitting students from more diverse backgrounds. Thus, harnessing the impulse to measure institutional value-added demands great care: to ask what additional value a particular institution confers on its students is not to ask who would benefit the most from that institution's program of education. The former question would be consistent with a pro-market mindset, the view that Justice Powell expressed in a confidential memorandum before he joined the Court.[169] Powell

[167] *See, e.g.*, JONATHAN ROTHWELL & SIDDHARTH KULKARNI, BEYOND COLLEGE RANKINGS: A VALUE-ADDED APPROACH TO ASSESSING TWO- AND FOUR-YEAR SCHOOLS (2015), https://www.brookings.edu/wp-content/uploads/2015/04/BMPP_CollegeValueAdded.pdf (assessing the economic outcomes experienced by students at different institutions of higher education).

[168] *Id.* at 4.

[169] This pro-market mindset is more fully examined in Moran, *supra* note 39.

warned that the "American economic system is under broad attack,"[170] and called for a broad effort by the private sector to shape what college students are taught, to ensure that they absorb the message that free markets are good. To the extent that students make decisions about higher education based on the financial impact that the experience may have, then that message has hit home. To the extent that institutions and students recognize that education is more than a means to an economic end, though, there is a path toward promoting greater equity in access. Surveys of first-year college students suggest that they believe that college offers both greater economic prosperity and an opportunity to gain a "general education and appreciation of ideas."[171] The latter goal has grown in importance over the past fifty years.[172]

Hopefully, the impulse to focus less on students' past achievements and more on what colleges and universities offer them could be directed to promote rethinking institutional mission. This change in perspective, without expanded public support, would not solve the scarcity problem, but would improve equity of allocation. And it has implications beyond traditional admissions criteria, encompassing the allocation of cost of higher education, to reduce the financial disincentive for those who lack resources. If we recognize that the proper question is how higher education opportunity may be allocated equitably, then institutions would be judged not only based on the value that their educations confer, but on whom they confer it.

CONCLUSION

Implicit in the Supreme Court's jurisprudence on consideration of race in admissions processes at selective colleges and universities is a vision of exclusive excellence. Because elite higher education is scarce, it must be allocated, and currently such opportunity is allocated on the basis of demonstrated student achievement, largely measured by performance on high-stakes tests. To the extent that different kinds of students, those historically underrepresented on elite college

[170] Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce 1 (Aug. 23, 1971), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1000&context=powellmemo.

[171] EAGAN ET AL., *supra* note 127, at 8 (describing reasons first year college students say they seek higher education); *see also* Seeta Bhardwa, *Why Do Students Go to University and How Do They Choose Which One?*, WORLD UNIV. RANKINGS (June 6, 2017), https://www.timeshighereducation.com/student/news/why-do-students-go-university-and-how-do-they-choose-which-one#survey-answer.

[172] *Id.*

campuses, disproportionately perform less well on these tests, they will not gain access in the absence of intervention. Consideration of race in admissions has aimed to counter the consequences of reliance on standardized tests.

The discussion above contends that this conception of higher education, which is so well-established and taken for granted by the Supreme Court Justices that only one of them has even glancingly addressed it, must be reconsidered in light of our constantly improving understanding of the effects of current admissions criteria and practices, whom they benefit, and whom they penalize. This Essay has offered a critique of the conception of higher education presumed and unquestioned by the Court and has outlined alternatives, one opening up opportunity to a greater number of students who have already shown that they can succeed academically despite adversity and another more broadly redefining the goal that elite colleges and universities should pursue. This second alternative calls for refocusing selective admissions to identify those students who might benefit the most from the resources elite institutions offer, rather than those students who offer the most to the institution.

While developing a different sense of mission in elite higher education is no small task, the rising cost of college has brought about a moment in which policymakers may be open to different perspectives. If elite higher education truly aims to be an engine of socioeconomic mobility for less privileged students, then these institutions must admit such students neither despite nor because of their prior academic achievements, but in recognition of what elite higher education offers and of what students will do in the future.