RACE-BASED ADMISSIONS ARE MERITOCRATIC ADMISSIONS

André J. Washington

RACE-BASED ADMISSIONS ARE MERITOCRATIC ADMISSIONS

André J. Washington[*]

INTRODUCTION

Since their inception, following the passage of the 1964 Civil Rights Act, race-based affirmative action programs have been extremely unpopular among the American public. Once championed as a tool to create a level playing field for Blacks who were disadvantaged by centuries of government-sanctioned oppression and pervasive race-based societal discrimination,[1] these programs have sustained constant attack and as a result have failed to live up to original expectations.

In the context of university admissions, the ahistorical constitutional framework for affirmative action effectively hamstrings any governmental attempt to remediate racial discrimination in college admissions by limiting college admissions officers' ability to consider race merely as "a factor of a factor of a factor" in pursuit of "diversity."[2] Unsurprisingly, racial disparities in college admissions outcomes persist due to the enduring effects of the baked-in racism in college admissions criteria. Not only is the "diversity" rationale ineffective, it has unleashed a host of problematic social consequences as well.

There is a better way. When it endorsed "diversity" as a compelling interest, the Court left the door open to make additional compelling arguments for the use of race in college admissions and it also provided a framework for doing so. Following this framework, this Essay proposes that the pursuit of "meritocracy" is at least as compelling as diversity. However, since the ways in which universities have

---

[1] Lyndon B. Johnson, 36th U.S. President, Commencement Address at Howard University: To Fulfill These Rights (June 4, 1965) ("You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others' and still justly believe that you have been completely fair.").

[2] Grutter v. Bollinger, 539 U.S. 306, 333 (2003).

---

traditionally measured merit have consistently also measured an applicant's race and applying a penalty therefor, then in order to improve the reliability of these merit measuring criteria and to protect the integrity of merit as a measure of deservingness, universities must consider race at the level of each merit criterion to realign meritocracy with actual deservingness and ability.

This Essay will proceed first by describing the existing constitutional framework, its context and the drawbacks to the "diversity" rationale. Second, using the Court's framework outlined in *Grutter*, the Essay will show how "meritocracy" is a compelling interest. Third, this Essay will describe how each component of merit also measures race and how race can be operationalized in the review process to reverse the race penalty and restore the integrity of meritocracy. Lastly, this Essay will discuss the inefficacy of alternative non-racial approaches to affirmative action further ungirding the argument in favor of this race-based meritocratic approach.

I.   EXISTING CONSTITUTIONAL FRAMEWORK

[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.[3]

The Court has interpreted the Equal Protection Clause as prohibiting the use of race in any law or government action. Any use of race, no matter its purpose, is considered "suspect" and will thus attract "strict scrutiny" review and the judicial inquiry of the justices. Under strict scrutiny, the law or government action cannot be sustained unless there is a compelling government interest being pursued that is related to its governmental mission,[4] and that the use of race is necessary to promote that interest.[5] Once the government has articulated a compelling interest that necessitates the use of race, the Court will demand that the program be narrowly tailored to meet that interest.[6] The Court has explicitly found two reasons to compel the use of race in government action. The first is to remedy past instances of intentional discrimination.[7] The second is in the context of a public college or

---

[3] U.S. CONST. amend. XIV.

[4] Regents of the University of California v. Bakke, 438 U.S. 265, 309 (1978).

[5] *Id.* at 315.

[6] *Id.* at 299.

[7] Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 725 (2007).

university seeking to obtain the "educational benefits that flow from a diverse student body."[8]

According to the Court, "diversity" is a compelling interest for public colleges and universities because the educational benefits are "substantial and real."[9] In *Grutter v. Bollinger*,[10] Justice O'Connor enumerates five benefits that flow from a diverse student body. These are (1) "cross-racial understanding," (2) "livelier class discussions," (3) adequately preparing students for business, (4) the promotion of "national security" interests and (5) "the legitimacy of public leadership."[11] Being convinced that these utilitarian benefits render diversity compelling, the Court declares that the use of race is permitted in so far as it is necessary to promote that interest.[12] *Sans* much explanation, the Court concedes that racial ethnicity is an element of diversity and approves of its use in this context,[13] so long as the government has made a "serious good-faith consideration of workable race-neutral alternatives."[14]

Under this regime, universities may not use race as an admissions factor and then simply assert an interest in diversity as a post-hoc justification. The university must first have an actual stated-interest in diversity, and then design an admissions program that is narrowly tailored to accomplish that purpose.[15] Second, the definition of diversity must not be limited to race or ethnicity, instead it must be broad enough to allow "flexibility for the consideration of all pertinent elements of diversity from a [non-ethnic-minority] candidate."[16] Essentially, white applicants must be able to convince admissions officers that they have something to contribute to the diverse and robust exchange of ideas.

This stubborn, ahistorical, and misguided interpretation of the Equal Protection Clause, which does not recognize the use of race to remedy societal discrimination

---

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

[9] *Id.* at 330.

[10] *Id.* at 330–33.

[11] *Id.*

[12] Regents of the University of California v. Bakke, 438 U.S. 265, 315 (1978).

[13] *Grutter*, 539 U.S. at 326.

[14] *Id.* at 339.

[15] *Id.* at 333.

[16] *Id.*

as permissible, betrays the court's adoption of a color-blind world view of discrimination. While seemingly well-meaning, this perspective insists that racism is rooted in a conscious awareness of race which leads to the attribution of characteristics to people based on skin color and it is that attribution of characteristics (which is assumed to be grounded in ignorance) that leads to prejudice and obscures neutrality.[17] The problem with such a perspective is that it creates the fiction of race neutrality and permits the belief that racism is the practice of race consciousness rather than a social construct of power based on race.[18] The end result is a system that ignores the unique obstacles overcome by Black applicants whose lived experience is built on the cumulative detrimental effects of centuries of white supremacy—in fact, under this world view, white supremacy cannot exist in a color-blind society.

Justifying affirmative action on the utilitarian benefits of a diluted definition of diversity has two legal consequences. First, race is reduced to a "factor of a factor of a factor,"[19] and cast aside as illegitimate grounds upon which to categorically give competitive assistance to an oppressed people.[20] Second, affirmative action itself is stripped of its potency and handicapped from accomplishing the purpose for which it was originally intended.[21] While advocates have repeatedly attempted to ground race-based affirmative action in reality by linking it to historical and contemporary "societal discrimination," the Court has remained unsympathetic to these arguments.[22]

---

[17] *See generally* Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758–847 (1990).

[18] *Id.*

[19] *Id.*

[20] *See* Khiara M. Bridges, *Class-Based Affirmative Action, or the Lies That We Tell about the Insignificance of Race*, 96 B.U. L. REV. 55 (2016) (discussing how contemporary affirmative action programs have gone astray and the consequences of the detour).

[21] *See* Lyndon B. Johnson, *supra* note 1.

[22] *See* Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 731 (2007) ("[R]emedying past societal discrimination does not justify race-conscious government action."); Shaw v. Hunt, 517 US 899, 909–10 (1996) ("[A]n effort to alleviate the effects of societal discrimination is not a compelling interest[.]"); Richmond v. JA Croson Co., 488 U.S. 469, 498–99 (1989); Wygant v. Jackson Board of Education, 476 U.S. 267, 320 (1986) (plurality opinion) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy[.]"); *id.* at 288 (O'Connor, J., concurring) ("[A] governmental agency's interest in remedying 'societal' discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster.").

It is no surprise that the constitutionality of raced-based affirmative action is justified by its utility to a majority white society rather than its capacity to remedy any past or ongoing harm. As the late Derrick Bell keenly observed, the enduring principle explaining the progress of civil rights in America was not justice for the oppressed, but the convergence of interests between whites and Blacks.[23] While this interest convergence creates the opportunity for progress, such a one-sided motivation necessarily blinds interested policymakers and advocates from viewing the problem from the perspective of the oppressed and inevitably results in negative consequences for the intended beneficiary group.[24] Bell articulated several examples in the case of school desegregation, and an astute analysis reveals similar shortcomings in the "diversity" rational for affirmative action.

While "diversity" has opened the door to the constitutional use of race in our existing color-blind framework, it has also produced adverse consequences that threaten to undo any good it has promised to accomplish. Diversity by definition implies difference and, in practice, difference is defined with oppositional reference to whiteness. The consequence of defining difference in opposition to whiteness is to impart negative associations to the thing that is different by implying abnormality. Whiteness is therefore reinforced as not only the status quo, but also the superior identity. Professor Osamudia James refers to this phenomenon as "white identity formation."[25] By reinforcing white identity as superior in this manner, diversity creates a social atmosphere that appears to be good but brings with it the tools of reinforcing the system we are trying to break down.

In addition to reinforcing the structures of white supremacy, the diversity rationale creates a marketplace for identity where value is assigned to identity based on the preferences of those in power.[26] This allows the powerful to control what it means to belong to a certain "diverse" group and forces the subordinated people to

---

[23] Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

[24] Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE. L.J. 470 (1976).

[25] *See generally* Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425 (2015) (arguing that the diversity justification (a) reaffirms notions of racial superiority among whites by perpetuating a story about black and brown bodies being used for white purposes (i.e., admitting black students to promote the utilitarian goals of white society) (b) stunts the development of antiracist white identity be reinforcing "innocence" and emphasizing "hyper-individualism" and (c) distracts whites from addressing the ways in which their own presence at elite institutions is genuinely undermined).

[26] Nancy Leong, *Identity Entrepreneurs*, 104 CAL. L. REV. 1333–99 (2016).

play along in shaping their own identity to conform to prevailing ideas held by the powerful, or to forego any related benefits by resisting essentializing identity in this manner.[27] In short, "diversity" corrupts self-determination in a society that shapes identity in this way.

Finally, "diversity" is simply ineffective. The evidence of its ineffectiveness is the ongoing under-enrollment of minority students at institutions of higher education that continues to trail behind the rate for white students without any actual evidence of academic inferiority and performance.[28] Ineffective and socially problematic, diversity is clearly undesirable as a legal justification for race-based affirmative action. Nevertheless, reluctant to attract the searching scrutiny of the Court, universities are not exploring more inventive strategies of using race in admissions for any purpose other than to obtain the educational benefits that flow from having a "diverse" student body. As a result, the status quo remains invincible.

Fortunately, the law does not foreclose the opportunity for universities to go beyond "diversity" to rationalize the use of race. Nowhere in Supreme Court jurisprudence is the diversity rationale declared as the exclusive justification for affirmative action. Indeed, the only limitation is that the rationale must qualify as a compelling interest. Based on policy reasons put forth by Justice Powell in *Regents v. Bakke*,[29] and the utilitarian justifications articulated by Justice O'Connor in *Grutter*, diversity is merely the best rationale that the Court has accepted so far. Besides the political firewall that is building to forestall any racial progress whatsoever, there is no legal reason to believe that diversity is the only justification the Court will ever be compelled to accept. It is only a matter of convincing the Court that there are other reasons for universities to use race that are related to its educational mission.

The way to employ race as more than "a factor of a factor of a factor" in university admissions starts with the policy justifications of *Regents* and *Grutter*.

---

[27] *See generally* NANCY LEONG, IDENTITY CAPITALISTS: THE POWERFUL INSIDERS WHO EXPLOIT DIVERSITY TO MAINTAIN INEQUALITY (Stanford University Press 2021).

[28] *Percentage of 18- to 24-year-olds Enrolled in Degree-Granting Postsecondary Institutions, by Level of Institution and Sex and Race/Ethnicity of Student: 1970 through 2015*, NAT'L CENTER FOR EDUC. STAT., https://nces.ed.gov/programs/digest/d16/tables/dt16_302.60.asp [https://perma.cc/B8ZX-E3RM].

[29] Regents of the University of California v. Bakke, 438 U.S. 265, 311–12 (1978) (quoting Sweezy v. New Hampshire, 354 U.S. 254, 263 (1967)) (explaining the "four essential freedoms" inherent in academic liberty borrowed from Justice Frankfurter).

This Essay proposes that one such compelling interest is meritocratic admissions.[30] Since universities play such a critical and unique role in connecting young citizens to economic opportunity and grooming future leaders in society, the integrity of merit-based admissions must be protected in order to sustain the legitimacy of admissions decisions.

II. PUBLIC UNIVERSITIES HAVE A COMPELLING INTEREST IN MERITOCRATIC ADMISSIONS

It is nearly universally accepted that the distribution of social goods, like admission to an elite college or university, should be the result of the application of a neutral selection criteria. Instead of a society where goods are distributed arbitrarily or pursuant to the whims of the powerful, social peace and acceptance of distributive outcomes depend on the public's belief in the validity of the neutral criteria. The appearance of neutrality enables the powerful to divert attention from themselves as a determinant in producing the outcomes and to declare that the awardees have "merited" their rewards through hard work, talent, or some combination of the two. Thus, it can be believed that the power brokers are merely assessing universally agreed-upon criteria and measuring competitors against that measuring stick.

Meritocracy is so universally accepted that the Supreme Court has never called it into question and is likely to uphold any law or government action grounded in the pursuit thereof. Indeed, much of our legal system is implicitly grounded in meritocratic terms.[31] Where college admissions are concerned, existing Supreme Court precedent provides a useful framework for analyzing how an argument for meritocracy might be received.

First, it must be restated that "[i]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevails *'the four essential freedoms' of a university—to determine for itself on academic grounds* who may teach, what may be taught,

---

[30] *See id.* (quoting *Sweezy*, 354 U.S. at 263) ("It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail *'the four essential freedoms' of a university—to determine for itself on academic grounds* who may teach, what may be taught, how it shall be taught, and *who may be admitted to study*.") (emphasis added).

[31] Consider, for example, unemployment security which distributes goods based on worthy. Such worthiness is determined to be those that are actively seeking re-employment. Benefits are not afforded to those who are not.

how it shall be taught, and *who may be admitted to study*."[32] For this reason, a university has a wide range of "freedom" to develop a system of admissions in order to support its educational mission. Because meritocratic admissions are a way of choosing "who may be admitted to study," a university has the freedom to employ such a system. To justify meritocracy as the pathway to incorporating race in admissions decisions, meritocratic admissions must be at least as compelling as "diversity" in order to constitutionally justify the use of race in pursuit of that interest.[33]

Diversity is compelling because of (1) "cross-racial understanding," (2) "livelier class discussions," (3) adequately preparing students for business, (4) the promotion of "national security" interests and (5) "the legitimacy of public leadership."[34] Many of these benefits are also present when employing a meritocratic admissions process.

Justice O'Connor believes that a diverse student body promotes cross-racial understanding.[35] This conclusion is obtained only when students from different racial groups seek to understand one another when confronted with each other.[36] This conclusion, however, is untenable when considered in conjunction with more recent psychological research which suggests that students will remain isolated within their own racial groups and not seek to understand those who are not a part of it.[37] A more apt assertion would be that a group of diverse *and curious* students promotes cross-racial understanding. That Justice O'Connor's assumption is misguided at best should not preclude applying her reasoning to meritocratic admissions. In fact, since a meritocracy ostensibly selects the best students, and by many measures the "best" students are curious students, a meritocracy equally promotes cross-racial understanding because the curious students will engage in cross-racial inquiry and discovery.

---

[32] *Regents of the University of California*, 438 U.S. at 312 (quoting *Sweezy*, 354 U.S. at 263) (emphasis added).

[33] Grutter v. Bollinger, 539 U.S. 306, 333 (2003).

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Study Finds Our Desire for 'Like-Minded Others' is Hard-Wired*, U. KAN. RSCH. CTR. (Feb. 23, 2016), https://news.ku.edu/2016/02/19/new-study-finds-our-desire-minded-others-hard-wired-controls-friend-and-partner [https://perma.cc/EE5G-BAYY].

Class discussions are also livelier when students are admitted under a meritocratic system.[38] The smartest students will think creatively about class material and share unique ideas because they are smart and thoughtful, not only because they are different from one another.

Justice O'Connor also argued that a diverse student body promotes national security interests.[39] This is for the same reason that diversity prepares students for business and government service. The crux of the argument is the fundamental belief that students at universities might end up in the military, and because the military is growing increasingly diverse, the students recruited from universities need to be diverse as well to ensure that the members can work well together.

The legitimacy of public leadership depends on ensuring that all segments of American society have access to becoming national leaders. This is a paramount government interest according to Justice O'Connor, and therefore supports the use of race to promote a diverse student population.[40] Most of the nation's leaders come from the top universities, and so if certain populations are locked out of those universities, they are locked out of national leadership opportunities. A meritocracy is also necessary to promote the legitimacy of government. Martin Luther King's dream is of an America where people are judged for who they are and what they can do rather than the color of their skin. Meritocratic admissions would do just that, and therefore, the pipeline to national leadership roles will be open to all those that work hard and merit the opportunity to true neutral principals of merit. Further, a truly legitimate meritocracy would better ensure that those who are best prepared are selected for leadership.

Because of the unique role that universities play in selecting and training the next generation of leaders in the country, the admissions processes they employ are important to protect because they bear on the legitimacy of the path to public leadership. This argument is consistent with Justice O'Connor's rationale defending "diversity" as a compelling interest. Since the Court should agree with its own reasoning on that point (the important role universities play in selecting future leaders), protecting the legitimacy of the process by which universities make that selection should also be a compelling interest.

---

[38] *Grutter*, 539 U.S. at 333.

[39] *Id.*

[40] *Id.*

In addition to protecting the process by which universities select future public leaders, the Court has made declarations that suggest a university may go further in its efforts to undo racism in the admissions selection process. In *City of Richmond v. J.A. Croson Co.*, the Court struck down a minority set-aside program that gave minority-owned businesses preferences for city contracts.[41] It reasoned that remedying societal discrimination was not a compelling interest. However, the Court maintained that the City could still remedy discrimination where there is evidence of a third party (not itself) systematically discriminating against a minority group.[42] Applying this rationale to the context of university admissions, when presented with evidence of a third-party test administrator who is systematically discriminating against minority test takers, a university should be able to act to end that discriminatory treatment.

III. THE CURRENT SYSTEM OF MERITOCRATIC ADMISSIONS MEASURES RACE IN ADDITION TO MERIT

The criteria used by universities to determine whether an applicant is fit for admission is imperfect. Instead of measuring only the aptitude and experience of the student, these criteria have a baked-in measure that accounts for race. The basic merit-based criteria used by universities to measure merit include standardized tests, GPA, a resume of extra-curriculars, and personal statements. There is substantial expert research on certain of these criteria revealing that these measurements consistently bake-in an unmeritocratic disadvantage for racial minorities. The research also reveals the extent of that additional disadvantage. These mis-measuring criteria are standardized tests, GPAs, and the resume of extra-curriculars. Because of the additional racial penalty that is baked into the merit-measuring criteria, the admissions outcomes are inherently unmeritocratic.

A. *Standardized Tests Are Not Accurate Measurements for Merit*

Jay Rosner is the executive director of the Princeton Review Foundation.[43] Mr. Rosner has over thirty years of experience coaching various standardized tests

---

[41] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989) ("If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion.").

[42] *Id.*

[43] Jay Rosner, *Disparate Outcomes by Design: University Admissions Tests*, 12 BERKLEY LA RAZA L.J. 377, 385 (2001).

and researching the types of questions that appear on each exam each year.[44] Mr. Rosner has testified as an expert witness in many affirmative action cases including *Grutter v. Bollinger*.[45] Mr. Rosner concludes in his research that standardized tests, including the SAT and LSAT have disparate outcomes by design.[46]

The outcomes have a fixed disparate impact because of test construction methods which control how the test designer selects test questions and limits the pool of questions from which test makers may draw.[47] First, the test question selection procedure called "differential item functioning" removes questions that favor African Americans by significant margins, and keeps questions that favor whites by slim margins.[48] Mr. Rosner discusses the example of a question where African Americans were 8% more likely to choose the right answer than whites.[49] Because of this large difference, test-makers will remove such a question.[50] However, other questions that favor whites at a rate of 1–2% are not removed. The cumulative impact of this process contributes to the racial score gap.

Second, questions are chosen to produce a particular consistent statistical outcome with respect to the number of test takers who will choose the right answer, and the demographic of those test takers.[51] So, if a new question results in a population of test-takers choosing the correct answer that would not normally select the correct answer, the test-takers would see the question as deviating from its predictable nature.[52] The path-dependent nature of selecting questions prevents test makers from leveling the playing field.[53] The result is a test that produces that same disparate measurement year after year.[54]

---

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 381.

[49] *Id.* at 385.

[50] *Id.*

[51] *Id.* at 379.

[52] *Id.*

[53] *Id.*

[54] *Id.*

In addition to standardized questions that produce statistically different outcomes from different races, other research also shows how there are questions on these exams that are actually biased. These questions are intended to deliberately effect the performance of African Americans and other non-white minorities. David M. White is one of these researchers who summarizes his findings in *The Requirement of Race-Conscious Evaluation of LSAT Score for Equitable Law School Admissions*.[55] These reports of biased testing items affect the concentration of African American test takers because they are culturally wrong and offensive, or the question requires the test takers to assume a premise that is culturally at odds with their own world view.[56]

Mr. White also cites a study commissioned by the National Conference of Black Lawyers which shows that the LSAT score gap cannot be accounted for by prior academic achievement. The study looked at applicant pools for twelve law schools. The study compared white and Black graduates of the same university that had the same GPA. Black students with the same GPA as their white counterparts score on average 10 points lower on the LSAT.[57] The study was repeated twenty years later for Boalt Hall, and produced similar results when comparing students from the campuses of Harvard, Yale, Stanford, UCLA, and Berkeley.[58] Based on this information, one could conclude that a Black applicant who scores a 160 on the LSAT will likely (on average) perform in law school just as well as a white applicant with a 170.

While the research which compares LSAT scores to GPA is compelling, other research also demonstrates that GPAs are not a reliable comparison point because those measurements also bake-in a factor of racism.

B. The GPA is Infected With Race Discrimination

A high school GPA is a cumulative measure of how a student is graded by teachers over the course of four years. Unlike standardized examinations, high school grades are not blind but incorporate the personal biases of the teachers.

---

[55] David M. White, *The Requirement of Race-Conscious Evaluation of LSAT Score for Equitable Law School Admissions*, 12 BERKELEY LA RAZA L.J. 399 (2015).

[56] *Id.* at 408–09.

[57] *Id.* at 405 (quoting Joseph Gannon, *College Grades and LSAT Scores: An Opportunity to Examine the "Real Differences" in Minority-Nonminority Performance*, *in* TOWARDS A DIVERSIFIED LEGAL PROFESSION 276 (David M. White ed., 1981)).

[58] *Id.* at 406 (stating Blacks with the same GPA as white classmates scored 9.3 points lower on the LSAT).

Research shows that every human is infected with implicit bias, regardless of race.[59] These implicit biases effect how we judge one another, including how teachers judge students. Since a GPA is the reflection of a teacher judging a student, this research shows that a GPA cannot be relied upon to accurately measure exactly how well a Black student has performed academically while in high school. These inaccurate measurements will result in a pool of Black college applicants with lower GPAs, but who do not actually have a diminished academic aptitude. This subsection explains that research.

In their paper, *A Behavioral Realist Revision of 'Affirmative Action,'* Professors Jerry Kang and Mahzarin Banaji argue that implicit cognitive processes (aka implicit biases) influence the way in which perceivers of information judge others.[60] The argument proceeds as follows: first, perceivers are affected by ubiquitous and chronically accessible stereotypes.[61] These stereotypes are unconscious.[62] When using subjective measures of merit, the perceiver will evaluate what she sees in the evaluated student through the lens of her subjective biases.[63] In situations where perceivers are judging ambiguous behavior or performance, implicit bias will cause the perceiver to interpret that behavior to comport with their biased expectations.[64] For example, a Black student, whose classroom performance is average, will be perceived by their teacher as performing below average because of the pervasive stereotype that Black students perform below average. The same effect would harm the evaluation of a Black student who is performing above average. Their teacher's evaluation will be that they are only performing at an average level. Consequently, every grade that a Black student receives in high school has a subjectively biased component which devalued the quality of the work the student actually produced. When an admissions officer relies on the GPA as a marker of the student's past academic achievement, they are not relying on an accurate measurement of that students work but is likely looking at a measure which is below what the student is actually capable of producing.

---

[59] Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063, 1085 (2006).

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* at 1085.

This phenomenon has been measured and studied in other practical areas. Arin Reeves conducted a study which looked at how law firm partners perceived the work of law firm associates based on race.[65] Reeves gave firm partners identical memos, one from a Black associate and one from a white associate. The study found that supervising lawyers are more likely to perceive the work product of Black associates as subpar to their white counterparts.[66] The study gave sixty-three law firm partners the exact same memo.[67] Half of the partners were told that the author was white, the other half were told that the author was Black.[68] On average, where the partners believed the author of the memo to be white, the memo received a rating of 4.1 out of 5. Conversely, where the author of the same memo was believed to be Black, the memo was rated 3.2 out of 5.[69]

The conclusions that can be drawn from the implicit bias research performed by Professors Kang and Banaji and colleagues are only as strong as the research itself. Recently, the debate surrounding the reliability of implicit bias research has resulted in increased scrutiny of Banaji and colleagues' research methods.[70] In a journalistic summary of implicit bias research flaws, Olivia Goldhill identifies three reasons why we should be skeptical. First, the test-retest reliability score is low.[71] With a median and mean score of .50, the implicit associations test is deemed to be "unacceptably low" by psychological test standards.[72] However, Goldhill's misperceives the range of acceptability for the test-retest cut-off. A score of .50 put the test into the "poor reliability" range; however, .50 is only the mean, some studies have shown that the test-retest score can be as high as .69, which approaches the

---

[65] Arin D. Reeves, *Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills* (N.C. Assoc. Defense Attorneys, Yellow Paper Series, No. 2014-0404), https://www.ncada .org/resources/CLE/WW17/Materials/Wegner%20_%20Wilson-- Confirmation%20Bias%20in%20Writing.pdf [https://perma.cc/6UKJ-YBLX].

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] Olivia Goldhill, *The World is Relying on a Flawed Psychological Test to Fight Racism*, QUARTZ (July 24, 2020), https://qz.com/1144504/the-world-is-relying-on-a-flawed-psychological-test-to-fight- racism/ [https://perma.cc/6QJD-XUD7] (detailing the countervailing research which calls into question implicit bias research).

[71] *Id.*

[72] *Id.*

acceptability range of .70.[73] Further on this point, the results of a person's score on the implicit association test is known to be "improved" after the second administration of the test because the test-taker has practice, and they are aware they should avoid associating "blackness" with "badness" at least for the exam.

Goldhill's second challenge, is based on the "validity" of the test as measured by the test's predictive power—its ability to predict related behaviors. According to four meta analyses that she cites, the Implicit Associations Test ("IAT") does not predict discriminatory behavior.[74] Nonetheless, there are still several individual studies which show that the IAT is indeed predictive.[75] These competing results merely support what Goldhill admits toward the end of her critique of IAT: "[e]xisting evidence neither definitely proves nor disproves current theories on the subject."[76] Finally, where IAT is able to predict discriminatory behavior, it is not exclusive of people holding biased or discriminatory opinions about Black people, whether or not those opinions are implicit or explicit.

Goldhill's final objection relies on the suggestion that because the research surrounding the reliability of IAT is, in her opinion, questionable, then IAT must be serving some other unworthy purpose.[77] That purpose is the recasting of explicit prejudice as implicit prejudice. In her opinion, explicit prejudice is the real problem. She suspects that because it is no longer ok to publicly espouse racist views, people with conscious racist opinions do not admit them out loud but still behave in a racist manner (i.e., hiring the white candidate over the Black candidate).[78] For her, the implicit bias phenomenon gives the people with explicit prejudices an excuse to continue behaving badly.[79] While her suspicion that implicit bias gives individuals

---

[73] Kristin A. Lane et al., *Understanding and Using the Implicit Association Test: IV: What we know (so far)*, *in* IMPLICIT MEASURES OF ATTITUDES: PROCEDURES AND CONTROVERSIES 59, 70 (BERND WITTENBRINK & NORBERT SCHWARZ eds., 2007), https://faculty.washington.edu/agg/pdf/Lane%20et% 20al.UUIAT4.OCR.2007.pdf [https://perma.cc/4YAT-6WQ5] (reporting on the peer reviewed methods of retesting the implicit association test).

[74] Goldhill, *supra* note 70.

[75] Jeremy D. Heider & John J. Skowronski, *Improving the Predictive Validity of the Implicit Association Test*, 9 N. AM. J. PSYCH. 53, 73–74 (2007), https://www.niu.edu/jskowronski/publications/ HeiderSkowronski2007.pdf [https://perma.cc/2SFM-KGX7] (finding that IAT predicted friendliness of nonverbal behaviors directed toward caucasian confederates relatives to African American Confederates).

[76] Goldhill, *supra* note 70.

[77] *Id.*

[78] *Id.*

[79] *Id.*

with explicit bias an acceptable "excuse" for their behavior, it does not erase the existence of the behavior in the first instance.

Ultimately, Goldhill and the research that she cites undermines the credibility of the IAT, but does not refute or undermine the abundance of evidence related to discriminatory treatment against Blacks. Goldhill herself argues that the instances of racially discriminatory treatment are more likely due to explicit, rather than implicit, bias.[80] Thus, the example discussed earlier concerning the negative impact that implicit bias has on the grades of Black students remains logically correct. A teacher who holds explicit, but disguised, biases that Black students perform below average would still evaluate a Black student's work below its actual value thus harming that student's GPA.

C. *Resumes Are Infected with Racial Bias*

Universities rely on student resumes to look for signs of overachievement. One resume indication of over-achievement is having a job while in school or a fancy internship. Many students might hold a part-time job at the local McDonald's while balancing a course load full of AP credits, but few students have an opportunity to intern at a company where they might gain useful insights into a particular career. Interning for a local company can be an advantage for a high school applicant to college. However, even these signals of overachievement are infected with racial bias.

Two professors from the Booth School of Business researched the effect of having a white or Black name on a resume on the applicant's prospects for being invited to interview for the job. Bertrand and Mullainathan found that "applicants with White names need to send about 10 resumes to get one callback whereas applicants with African American names need to send about 15 resumes."[81] Essentially, white high school students are 50% more likely to receive an interview for an internship, and are much more likely to actually obtain the internship which might make a difference in a college application.[82]

The implicit biases that seep into the resume may be categorized as societal discrimination. On their own, they might not present a compelling interest for the university to act upon. However, it is the effect of the implicit bias on the resume

---

[80] *Id.*

[81] *See* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004), https://www.aeaweb.org/articles?id=10.1257/0002828042002561 [https://perma.cc/K53H-WF76].

[82] *Id.*

that delegitimizes the meritocratic admissions processes which creates an opportunity to protect that process without butting up against the proscription against remedying societal discrimination.

IV. RACE-BLIND ALTERNATIVES FOR LEGITIMIZING MERITOCRATIC ADMISSIONS

Race-based meritocratic admissions are necessary because non-race-based alternatives fail to adequately address racial penalties associated with existing meritocratic criteria. This Section discusses existing race-blind proposals and argues that these proposals are incapable of addressing the problems previously identified.

One proposal that has increased in popularity over the years is affirmative action based on socio-economic background. In the article *Class-Based Affirmative Action*, Richard Kahlenberg argues for a class-based affirmative action program to assist people at "meritocratic crisis points" relatively early in life.[83] This is to help those who have been disadvantaged by poverty with opportunities to prove themselves and earn future employment and promotions. These points are college admissions, entry-level employment, and federal contracting. In determining who among applicants should receive the preferential treatment at these stages, he offers three possible ways that a government institution could define socioeconomic status ("SES") in order to make judgments. The first, "simple definition," incorporates only the income of the applicant.[84] The second, "moderately sophisticated definition," considers income, parental education, and occupation.[85] The third, and also the definition he supports most strongly, is the "sophisticated definition" which considers net worth, quality of primary and secondary education, neighborhood influences, and family structure in addition to the factors in the moderately sophisticated definition.[86]

While Professor Kahlenberg never proposed a way to weigh the various factors for determining the student's socio-economic status, the idea has not died. As recently as 2019, the College Board publicly explored adopting Professor Kahlenberg's ideas by creating an "adversity score" linked to each student who takes

---

[83] Richard Kahlenberg, *Class-Based Affirmative Action*, 84 CAL. L. REV. 1037 (1996).

[84] *Id.* at 1074.

[85] *Id.* at 1075.

[86] *Id.*

the SAT.[87] The adversity score *supposedly* measures the effect of a student's socioeconomic background by considering the student's neighborhood environment, family environment, and high school environment to develop what is called an "Adversity Index." It was intended to help the school identify strengths in students that the test cannot measure. The idea was quickly abandoned following swift and harsh public criticism.[88]

Prior to this new proposal by the College Board, the University of Colorado at Boulder established a highly-sophisticated system of disadvantage and overachievement indices.[89] In general, the disadvantage index identifies the amount of disadvantage an applicant suffers.[90] The overachievement index is a formula which calculates the applicant's performances on standardized tests and high school grades in comparison to the expected performance for an applicant with a similar disadvantage index.[91] The students with the greatest overachievement/disadvantage index difference get the highest boosts in application consideration.[92]

UCLA established a primary index and a combine index system of class-based affirmative action.[93] The primary index ("PI") refers to applicant qualifications without any boosts.[94] All applicants receive a PI.[95] Applicants were also evaluated for socioeconomic disadvantage. Any student who received a boost for any of the

---

[87] Douglas Belkin, *SAT to Give Students 'Adversity Score' to Capture Social and Economic Background*, WALL ST. J. (May 16, 2019, 11:51 PM), https://www.wsj.com/articles/sat-to-give-students-adversity-score-to-capture-social-and-economic-background-11557999000 [https://perma.cc/343G-F4EB].

[88] Anemona Hartocollis, *SAT 'Adversity Score' is Abandoned in Wake of Criticism*, N.Y. TIMES (Aug. 27, 2019), https://www.nytimes.com/2019/08/27/us/sat-adversity-score-college-board.html [https://perma.cc/L5DM-ZXZM].

[89] Matthew N. Gaertner & Melissa Hart, *Considering Class: College Access and Diversity*, 7 HARV. L. & POL'Y REV. 367, 388 (2013) (explaining the development, implementation, and evaluation of the class-based affirmative action program developed by the University of Colorado at Boulder in anticipation of the potential amendment to outlaw race-conscious admissions policies).

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472 (1997) (discussing the class-based system that he helped develop and that was put into place at UCLA Law).

[94] *Id.*

[95] *Id.*

SES factors were given a second holistic review as long as they met a minimum PI standard.[96]

However, all of these class-based affirmative action proposals are weak alternatives to a system that corrects racial mis-measurements by appropriately considering race. Scholars have already articulated the reasons why it should not be employed in place of a race-conscious system. First, class-based affirmative action does not actually achieve the stated diversity goals inherent to their proposals. Second, a system of class-based affirmative action is tangential to the real problem, and harmful to the process of finding a proper solution by ignoring the importance of race—if race is the source of the penalty, then race must be the source of the solution to neutralize the penalty.

First, proponents of class-based affirmative action admit that such a program would impose greater costs on institutions of higher education because accepting a class of poorer students would require the school to offer more financial aid if the students are to be able to attend. This alone is not the reason to oppose the proposals. A school should seek to increase the wealth diversity of its students. However, increasing wealth diversity is a distinct goal from increasing racial diversity and as noted earlier, correcting wealth disadvantages will not properly correct the mis-measuring of race in merit.

Second, three other scholars have articulated well developed and unique critiques of class-based affirmative action. Professor Deborah Malamud attacks class-based affirmative action mostly on its own terms. Professor Malamud identifies that class-based affirmative action programs will essentially pit the strongest of the poor against the weakest of the wealthy while the upper middle-class remains immune to the "close swap."[97] Professor Richard Sander responds to this critique by pointing to the dramatic difference in median income between the students accepted to UCLA with an SES boost and those not accepted without the boost.[98] Additionally, Professor Malamud also details the various ways that SES measurements miscalculate the Black middle-class experience.[99] For example, a

---

[96] *Id.*

[97] The "close swap" is the phenomenon that the students on the edge of the bubble are just switching places.

[98] *Id.*

[99] Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939 (1997) ("[T]he diversity rationale for race-based affirmative action is highly problematic. Most persuasive when coupled with the view that past and present race-based economic inequality is the reason

class-based proposal does not account for family wealth, only income. A proposal based on income would therefore fail to address the disadvantages that flow from having less wealth. Such disadvantages include fewer available economic resources and less social and cultural capital.[100]

Professor Khiara Bridges argues that class-based affirmative action "ignores the importance of race."[101] Her argument is relevant to explaining why the most recent proposal by the College Board is inadequate. Currently, in the United States, it is unthinkable to measure "adversity" without including race. While poverty, crime rates, and underperforming public schools effect everyone, explicit and implicit bias discrimination based on race only effect racial minorities of color. It has never been reported that a young white male was pulled over by the police for "Driving While Living in a High Vacancy Rate Neighborhood."[102] Neither has it been reported that the child of a poor white mother was denied a job because of her race or denied an apartment because of the race of the family. The psychological and emotional impact of enduring these racially discriminatory acts cannot be said to have no adverse effect. To ignore this reality would continue to overlook the struggles of students who, because of race, have to overcome so much more.

Another race-blind alternative for increasing diversity in universities is to get rid of standardized exams. The problem with this solution is two-fold. First, without the exam, the university will have to rely even more on other measures that are filled with racial bias, like teacher recommendations, GPAs, and padded resumes. Second, the standardized exam still measures merit concomitantly with race. Within a racial or socioeconomic group, higher test scores still predict better performance in law school and college as compared to other test takers in the same group. The problem is that standardized exams measure merit as well as race. The solution is to continue administering exams, but account for race when exams for two test takers of different races are being compared.

---

we cannot achieve meaningful levels of integration. The minority middle-class suffers race-based economic inequality.").

[100] *See*, *e.g.*, Latoya Baldwin Clark, *Beyond Bias: Cultural Capital in Anti-Discrimination Law*, 53 HARV. C.R.C.L. L. REV. 381 (2018) (articulating the key role that cultural capital plays in the distribution of education benefits for special needs learners).

[101] Khiara M. Bridges, *Class-Based Affirmative Action, or the Lies that We Tell About the Insignificance of Race*, 96 B.U. L. REV. 55 (2016).

[102] The unfortunate more common retort is "Driving While Black."

V. RACE-BASED ADMISSIONS ARE MERITOCRATIC ADMISSIONS

Ongoing non-meritocratic outcomes resulting from measuring criteria that measure both merit and race, as demonstrated in the preceding sections, pose a threat to an admissions system that makes critical contributions to society and government by delegitimizing its role in selecting future leaders and grooming citizens for participation in democracy. Ignoring the racial penalty of merit-measuring criteria undermines admissions decisions and results in overlooking the most meritorious students and granting admissions to unmeritorious students. A university's constitutionally compelling interest in meritocracy is compromised. In pursuit of such a constitutionally compelling interest, a university must therefore account for the racial penalties baked into the admissions selection criteria in order to more accurately select the most meritorious students.

By using the power of the wealth of "Big Data" available to it, a university can assess each aspect of an application by sculpting out the racial penalty wherever it appears.[103] As Professor Peter Salib describes, statistical analyses based on a wealth of data from the institution itself could help tease out the exact impact of the racial penalty linked to a particular application criterion. For example, where a university penalizes Black applicants for having lower test scores than white applicants, it could look to years of data showing how these different students ultimately perform in college. Where performance is ultimately shown to be equal, universities can automatically adjust how it assesses a certain test score in predicting future performance.

This practice should be constitutionally acceptable because it does not require universities to create an additional application category for race (*i.e.*, extra points for Black applicants merely for being Black)—this was the problem with the admissions procedure at issue in *Gratz v. Bollinger*.[104] In *Gratz*, the office of undergraduate admissions gave an extra twenty points for each applicant belonging to an underrepresented minority group.[105] Instead, every application category remains the same: standardized tests, resume, essays, etc. A burden is not imposed on whites because they can still take the same exams and submit the same resumes, without being excluded from competition in a category for race. By the same token, the

---

[103] Peter N. Salib, *Big Data Affirmative Action*, NW. UNIV. L. REV. (Feb. 3, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4024623 [https://perma.cc/S8LP-KZTY] (forthcoming).

[104] Gratz v. Bollinger, 539 U. S. 244 (2003).

[105] *Id.* at 255.

burden is removed from Blacks by not ignoring the racial penalty that is baked into their application materials. There is an additional benefit to employing "Big Data" in a carefully sculpted affirmative action policy and that is the ability to account for the intersectional impact of social disadvantage borne by individuals belonging to multiple marginalized categories. For example, applicants that are Black and poor face racial disadvantages, but they also face class disadvantages that are foreign to wealthy Blacks. The same goes for Black women applicants at the intersection of race and gender discrimination.[106] By employing "Big Data," universities are not merely boosting Black applicants as has been done in the admissions cases so far but uncovering the true merit value of each applicant by narrowly measuring the impact of the racial penalty and accounting for the varying and specific ways this racial penalty impacts each particular applicant.

The proposal of this Essay also corrects the mistakes made by the intervening defendants in *Gratz* and *Grutter*. Those litigants focused their argument on the impact of racist admissions decisions on the applicants and on delegitimizing the system that created such decisions. Their argument was the disparate impact which results from racially biased standardized tests militates the use of race in university admissions,[107] but failed, "to present any evidence that the discrimination alleged by them, or the continuing effects of such discrimination, was the real justification for the LSAT's race-conscious admissions programs."[108] Taking the same position as the district court, the Supreme Court summarily rejected the intervenors' argument with a footnote.[109]

This Essay instead proposes an argument that focuses on "saving" the system rather than demanding redress for harm done. Grounded in the integrity of meritocracy, rather than the desire to remedy "societal discrimination," there is sufficient historical evidence to support the belief that this argument should be sustained under searching judicial scrutiny. The strength of this argument is that its claim is stated within the existing logical framework of the law and university

---

[106] Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 UNIV. CHI. LEGAL F. 139, 140 (1989).

[107] White, *supra* note 55.

[108] Gratz v. Bollinger, 135 F. Supp. 2d 790, 795 (E.D. Mich. 2001).

[109] *Gratz*, 539 U. S. at 257 n.9.

admissions systems, which makes it more likely to be effective.[110] The existing power structures have an interest in maintaining the system and by highlighting and foregrounding the hypocrisy of existing meritocratic measures by illustrating the ways in which meritocracy does not actually measure merit at all, those in power will have an interest in taking steps to re-establish the appearance of legitimacy.[111] This is the same theory that early critical race scholars used to defend the importance of "rights" rhetoric in critical legal scholarship that was previously focused solely on exposing inconsistency and hypocrisy. Similarly, the fundamental argument here is that meritocracy is a legitimate basis upon which to make admissions decisions and that Blacks, as well as whites, have the right to be judged by a fair criteria—only that, in order for the criteria to be fair, race must be considered to the extent that its effect on the criteria can be neutralized.

This approach does not support affirmative action on the grounds of past discrimination or the intent to discriminate by universities, but instead advocates for the use of race at the precise moment a racial penalty would be applied—in the admission decision. In this context, such race-based decision-making is really merit-based decision-making and should be upheld by the court as a compelling interest in meritocratic admissions.

---

[110] Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1366–69 (1988).

[111] *Id.*