NOTES

DISCRIMINATION BLOCKING: A NEW COMPELLING INTEREST FOR AFFIRMATIVE ACTION

In 1951, a promising young student submitted his application to the School of Theology at Boston University.[1] His application was compelling but contained a Graduate Record Exam (GRE) verbal score that was well below average.[2] The test score surely did not reflect the student's actual aptitude; the student, who was Black, grew up in a country with an education system designed to disadvantage him.[3] But those who looked to the GRE as a measure of ability would have been shocked to know that the student behind that below-average verbal score would become one of America's greatest orators. Dr. Martin Luther King Jr.'s verbal aptitude was not the problem. The problem was that admissions officers could not ascertain Dr. King's verbal aptitude without considering all the disadvantages he faced.

That problem continues to bedevil admissions offices today. Universities cannot accurately determine applicant potential without considering the many ways in which race disadvantages minority applicants. But the Supreme Court allows universities to justify race-conscious admissions policies only in the interest of promoting diversity — a worthy aim,[4] but one that has led to institutional insincerity[5] and doctrinal morass.[6]

This Note argues that the Court should recognize a new compelling interest for university affirmative action. Call this interest "discrimination blocking."[7] Discrimination blocking recognizes that universities must take account of applicants' race to accurately ascertain applicants' potential. It is an application of Aristotle's commonsensical observation that an archer must account for wind to hit a target. And it is a

---

[1] *Boston University*, MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., https://kinginstitute.stanford.edu/encyclopedia/boston-university [https://perma.cc/3VVQ-XN8T].

[2] *Graduate Record Examination Scores for Martin Luther King, Jr.*, MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., https://kinginstitute.stanford.edu/king-papers/documents/graduate-record-examination-scores-martin-luther-king-jr [https://perma.cc/UPW9-JT5B].

[3] Black children in the 1940s and '50s attended segregated and severely underfunded schools. *See* Vanessa Siddle Walker, *African American Teaching in the South: 1940–1960*, 38 AM. EDUC. RSCH. J. 751, 755–56 (2001). Even the newly created standardized tests were designed with racial subordination in mind. *See* John Rosales & Tim Walker, *The Racist Beginnings of Standardized Testing*, NAT'L EDUC. ASS'N (Mar. 20, 2021), https://www.nea.org/advocating-for-change/new-from-nea/racist-beginnings-standardized-testing [https://perma.cc/X3JU-FRPM] (highlighting the racist origins of standardized testing).

[4] *See infra* pp. 692–94.

[5] *See infra* section II.C.3–4, pp. 703–04.

[6] *See infra* pp. 695–96.

[7] Though discrimination blocking may well justify identity-conscious policies in a wide range of contexts, this Note cabins its focus on "affirmative action" to race-based admissions policies in higher education.

justification for affirmative action that the Court has written of approvingly — but has yet to consider as a compelling interest.

This Note provides a defense of discrimination blocking as a compelling interest. Part I summarizes the doctrinal framework of affirmative action, highlighting some of its inconsistencies. Part II argues that a new compelling interest may untangle the doctrine. It argues that discrimination blocking is compelling, that it can be narrowly tailored, and that it is good doctrine and policy. Part III defends discrimination blocking from various criticisms. With diversity-based affirmative action under unprecedented pressure, discrimination blocking offers a solid foundation for affirmative action.

I. AFFIRMATIVE ACTION'S DOCTRINAL FRAMEWORK

The Court has long subjected affirmative action to strict scrutiny, requiring that race-conscious programs be narrowly tailored to further compelling government interests.[8] This Note argues that discrimination blocking can justify affirmative action within the strict scrutiny framework. But first it is worth highlighting affirmative action's doctrinal context: the other compelling interests the Court has considered and the narrow tailoring commands it has provided.

A. Compelling Interest

Proponents of affirmative action have offered many compelling interests to justify race-conscious programs. This section examines the two interests to which the Court has paid most attention: remedying past societal discrimination and promoting diversity.[9]

1. Rejecting the Compensatory Interest. — The original purpose of affirmative action was to remedy past societal discrimination.[10] The basis for this compensatory interest is an intuitive type of rough justice: a person who has suffered from wrongdoing is entitled to compensation from the wrongdoer.[11] As Justice Marshall observed, the American story "is not merely the history of slavery alone but also that a whole people were marked as inferior by the law."[12] This history of racial subordination made "it difficult for [him] to accept that [Black people]

---

[8] *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

[9] The Court has also considered providing role models as a compelling interest, though it dismissed the idea. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275–76 (1986).

[10] PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1130 & n.95 (7th ed. 2018).

[11] The first articulation of the compensatory justification for affirmative action was in Professor Judith Jarvis Thomson's 1973 article, *Preferential Hiring*. Judith Jarvis Thomson, *Preferential Hiring*, 2 PHIL. & PUB. AFFS. 364, 380 (1973). For more accounts applying compensatory justice to affirmative action, see ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION 137–41 (2010); and Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CALIF. L. REV. 683, 707–10 (2004).

[12] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 400 (1978) (opinion of Marshall, J.).

cannot be afforded greater protection under the Fourteenth Amendment where it is necessary to remedy the effects of past discrimination."[13] Proponents of the compensatory interest argue it has straightforward moral force: if America has a history of racial subordination[14] and if justice requires righting wrongs, racial preferencing should be — if not obligatory — permissible.

But the compensatory interest never gained traction. In the earliest days of affirmative action litigation, Justice Powell's pivotal *Regents of the University of California v. Bakke*[15] opinion deemed past societal discrimination "an amorphous concept of injury that may be ageless in its reach into the past."[16] The Court confirmed its disavowal of the compensatory interest in subsequent cases, rejecting "a generalized assertion that there has been past discrimination" for its lack of legislative limits and guidance.[17] The compensatory interest, with its backward-looking focus, never gained acceptance from the Court.

2. Accepting the Diversity Interest. — Forward-looking interests, specifically those related to diversity, have fared better. "[T]he attainment of a diverse student body . . . clearly is a constitutionally permissible goal," Justice Powell established in *Bakke*.[18] Subsequent and bipartisan criticism of the diversity interest notwithstanding,[19] the Court has made

---

[13] *Id.* at 401. For a similar argument, see *id.* at 362 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part) ("[R]acially neutral remedies for past discrimination [are] inadequate where consequences of past discriminatory acts influence or control present decisions.").

[14] *See* Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. by Any Means Necessary, 572 U.S. 291, 337–38 (2014) (Sotomayor, J., dissenting) ("[T]o know the history of our Nation is to understand its long and lamentable record of stymieing the right of racial minorities to participate in the political process.").

[15] 438 U.S. 265 (1978).

[16] *Id.* at 307 (opinion of Powell, J.).

[17] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1989).

[18] *Bakke*, 438 U.S. at 311–12 (opinion of Powell, J.).

[19] The Court's reliance on diversity has drawn fire from an array of critics that is itself impressively ideologically diverse. *See, e.g.*, Melissa Murray, Opinion, *That Affirmative Action Ruling Was Good. Its Rationale, Terrible.*, N.Y. TIMES (Oct. 2, 2019), https://www.nytimes.com/2019/10/02/opinion/harvard-affirmative-action.html [https://perma.cc/LE3W-F2F8] (lamenting that the diversity rationale "is far removed from the remedial rationales that first animated affirmative action policies"); Guido Calabresi, Bakke *as Pseudo-Tragedy*, 28 CATH. U. L. REV. 427, 431–32 (1979) (criticizing Justice Powell's reliance on diversity as "a compromise that undermines candor and honesty," *id.* at 432); George F. Will, Opinion, *The Unintended Consequences of Racial Preferences*, WASH. POST (Nov. 30, 2011), https://www.washingtonpost.com/opinions/the-unintended-consequences-of-racial-preferences/2011/11/29/gIQAbuoPEO_story.html [https://perma.cc/DJ2H-FJFN] ("[D]iversity bureaucracies . . . treat[minorities] as ingredients that supposedly enrich the academic experience of others."); Grutter v. Bollinger, 539 U.S. 306, 350 (2003) (Thomas, J., concurring in part and dissenting in part) (branding diversity "a faddish slogan of the cognoscenti"). For further survey of the diversity rationale's critics, see Adam Chilton, Justin Driver, Jonathan S. Masur & Kyle Rozema, *Assessing Affirmative Action's Diversity Rationale*, 122 COLUM. L. REV. 331, 349–56 (2022). Evaluating the diversity rationale is not the objective of this Note. Suffice to say, however, that diversity also has defenders, a group that includes — for now — the Supreme Court.

clear that student-body diversity is compelling for both expression- and civic-based reasons.

Because, noted Justice Powell, a diverse student body contributes "to the 'robust exchange of ideas,' [it] invokes a countervailing constitutional interest, that of the First Amendment."[20] Twenty-five years later, the University of Michigan Law School defended its affirmative action policy along similar lines, arguing that "diversity . . . has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts."[21] Justice O'Connor agreed: diversity "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"[22] These benefits, she concluded, make classrooms "livelier, more spirited, and simply more enlightening and interesting."[23] As a result, universities may admit a "critical mass"[24] of minority students, such that students glean the "educational benefits that diversity is designed to produce."[25]

But, according to Justice O'Connor, diversity is not merely pedagogical. Civic legitimacy, she noted, requires "the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[26] Because universities train the nation's leaders,[27] higher education diversity is necessary "to cultivate a set of leaders with legitimacy in the eyes of the citizenry."[28] This civic-based conception of diversity[29]

---

[20] *Bakke*, 438 U.S. at 313 (opinion of Powell, J.).

[21] *Grutter*, 539 U.S. at 315 (quoting the Michigan policy).

[22] *Id.* at 330 (alteration in original).

[23] *Id.* Whether diversity does bring such benefits, as an empirical question, has been a subject of debate. See Chilton, Driver, Masur & Rozema, *supra* note 19, at 356–61, for a survey of the relevant literature. Some scholars, both defenders and critics of affirmative action, have noted the lack of empirical foundation for the benefits of diversity. *See, e.g.*, RANDALL KENNEDY, FOR DISCRIMINATION 103 (2013) ("I remain doubtful about social scientific 'proof' of diversity's value; much of that [research] seems exaggerated and pre-determined with litigation in mind."); Abigail Thernstrom, *Questioning the Rationale for Affirmative Action*, 16 AM. MED. ASS'N J. ETHICS 495, 495 (2014) ("[T]he entire edifice of race-conscious admissions is built on a purely speculative promise that 'diversity' will bring educational benefits."). In *Fisher v. University of Texas at Austin* (*Fisher II*), 136 S. Ct. 2198 (2016), Justice Alito also expressed frustration at a failure to "identify any metric that would allow a court to determine" whether diversity brings about the benefits it seeks. *Id.* at 390. But recently, scholars have begun to fill this empirical gap. In 2022, for example, a study of student-run law reviews found that implementing editor-selection diversity policies led to a significant increase in the median impact of the published articles. Chilton, Driver, Masur & Rozema, *supra* note 19, at 397. The study found, in short: "Diverse law reviews do better work." *Id.* at 401.

[24] *Grutter*, 539 U.S. at 318–19.

[25] *Id.* at 330.

[26] *Id.* at 332.

[27] *Id.*

[28] *Id.*

[29] Professor Robert Post explores the diversity rationale's civic-based turn in Robert C. Post, *The Supreme Court, 2002 Term — Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 60–64 (2003). *See also* Lani Guinier, *The Supreme Court, 2002 Term — Comment: Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 175–76 (2003) ("[D]iversity is pedagogical and dialogic; it helps

might have had far-reaching implications. It could have been interpreted to weaken *Bakke*'s categorical prohibition on compensatory interests[30] or to allow ambitious integration projects.[31] But since *Grutter v. Bollinger*,[32] the Court has remained largely silent on Justice O'Connor's civic theory of diversity.

Indeed, many commentators expect today's conservative Court to reject the diversity interest altogether.[33] Just two months ago, the Court heard the first challenge to university affirmative action since *Fisher v. University of Texas at Austin*[34] (*Fisher II*) in 2016. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*[35] challenges Harvard College's affirmative action program[36] and takes direct aim at diversity as a compelling interest.[37] According to petitioner, the "diversity rationale is not only uncompelling; it flouts basic equal-protection principles."[38] Despite forty-four years of diversity as an accepted compelling interest, the Court may agree.[39] It is more important than ever to consider different foundations for affirmative action.

B. Narrow Tailoring

It is not enough for affirmative action policies to serve a compelling state interest. They must also be narrowly tailored to achieve that

---

challenge stereotypes; and it helps legitimate the democratic mission of higher education. Justice Powell's opinion in *Bakke* really endorsed only the first of these three benefits as a compelling interest . . . . Justice O'Connor's opinion in *Grutter*, by contrast, included encomiums to them all . . . ." *Id.* at 176 (footnotes omitted).).

30 Justice O'Connor's formulation of legitimacy — legitimacy *in the eyes of the citizenry* — ties the concept of legitimacy to civic perception. Thus, if citizens believe that institutions should be more diverse in order to compensate for a history of racial subordination, Justice O'Connor's conception of civic-based diversity would be inextricable from the compensatory interest.

31 Professor Elizabeth Anderson has argued:

> Elites, to be legitimate, must serve a representative function: they must be capable of and dedicated to representing the concerns of people from all walks of life, so that the policies they forge are responsive to these concerns. An elite drawn only from segments of society that live in isolation from other segments will be ignorant of the circumstances and concerns of those who occupy other walks of life.

Elizabeth S. Anderson, *Racial Integration as a Compelling Interest*, 21 CONST. COMMENT. 15, 22 (2004).

32 539 U.S. 306 (2003).

33 *See, e.g.*, Nicholas Lemann, *The Supreme Court Appears Ready, Finally, to Defeat Affirmative Action*, NEW YORKER (Jan. 27, 2022), https://www.newyorker.com/news/daily-comment/the-supreme-court-appears-ready-finally-to-defeat-affirmative-action [https://perma.cc/HYG5-YV4E]; Ian Millhiser, *The Supreme Court Will Hear Two Cases that Are Likely to End Affirmative Action*, VOX (Jan. 24, 2022, 9:32 AM), https://www.vox.com/2022/1/24/22526151/supreme-court-affirmative-action-harvard [https://perma.cc/B2WU-QT8U].

34 136 S. Ct. 2198 (2016).

35 142 S. Ct. 895 (2022) (mem.) (granting certiorari).

36 This is the same program Justice Powell singled out for praise in *Bakke*. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 316–19 (1978) (opinion of Powell, J.).

37 Brief for Petitioner at 49–71, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 20-1199 (May 2, 2022).

38 *Id.* at 52.

39 *See supra* note 33 and accompanying text.

interest. The requirements of narrow tailoring are varied. But through these varied commands, a consistent thread has emerged: admissions determinations must remain *individualized*. From *Bakke*,[40] to *Grutter*,[41] to *Fisher v. University of Texas at Austin*[42] (*Fisher I*), to *Parents Involved in Community Schools v. Seattle School District No. 1*,[43] the Court has consistently demanded that affirmative action programs prioritize individual-level determination over racial group membership.[44]

Though the individualization principle is simple enough, the Court's additional narrow tailoring commands constitute a hodgepodge of requirements. Because universities may not engage in "outright racial balancing,"[45] they may not utilize quotas.[46] Because universities may not institute policies that operate mechanically,[47] they may not assign "*every* underrepresented minority applicant the same, *automatic* 20-point bonus."[48] Universities must engage in a "serious, good faith consideration of workable race-neutral alternatives,"[49] must use race as no more than a "plus" factor,[50] and must ensure race does not become "determinative"[51] or "defining"[52] for any applicant.

Put together, the Court's compelling interest and narrow tailoring commands create some tension. To justify affirmative action programs,

---

[40] *See Bakke*, 438 U.S. at 318 n.52 (opinion of Powell, J.) ("The denial to respondent of this right to individualized consideration without regard to his race is the principal evil of petitioner's special admissions program.").

[41] *See* Grutter v. Bollinger, 539 U.S. 306, 337 (2003) ("The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.").

[42] 570 U.S. 297 (2013); *see id.* at 311–12 ("[I]t remains at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine, that admissions processes 'ensure that each applicant is evaluated as an individual . . . .'" (quoting *Grutter*, 539 U.S. at 337)).

[43] 551 U.S. 701 (2007); *see id.* at 722 ("The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group.").

[44] Some scholars — including Professor Cristina Rodríguez, a defender of affirmative action — have criticized individualized consideration, arguing it "does not restrain [admissions officers'] race-based judgments — it unleashes them." Cristina M. Rodríguez, *Against Individualized Consideration*, 83 IND. L.J. 1405, 1409 (2008). For Rodríguez, individualized consideration "encourage[s] the development of semi-official definitions of the category — the very sorts of definitions that produce stereotypical thinking and deny that the experience of race or ethnicity differs from individual to individual." *Id.* at 1411. It also "demands that people perform their ethnicity for admissions officers," *id.*, and "move[s] away from an honest approach to . . . combating discrimination," *id.* at 1420.

[45] *Grutter*, 539 U.S. at 330; *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989) (finding a requirement that thirty percent of municipal subcontracts go to minority-owned businesses to be impermissible racial balancing).

[46] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978) (opinion of Powell, J.); *Grutter*, 539 U.S. at 334 ("[A] race-conscious admissions program cannot use a quota system . . . .").

[47] Gratz v. Bollinger, 539 U.S. 244, 280 (2003) (O'Connor, J., concurring).

[48] *Id.* at 276.

[49] *Grutter*, 539 U.S. at 339.

[50] *See, e.g.*, *Bakke*, 438 U.S. at 317 (opinion of Powell, J.).

[51] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 723 (2007).

[52] *Grutter*, 539 U.S. at 337.

universities must seek to admit a "critical mass" of minority students.[53] Universities cannot numerically define "critical mass"; that would be outright racial balancing. Instead, "critical mass" is the number of minority students necessary to achieve "the educational benefits that diversity is designed to produce."[54] Taking these definitions at face value, diversity is defined by critical mass, and critical mass is defined by achieving the benefits of diversity. Perhaps a nuanced issue calls for a nuanced doctrine.[55] But even at best, these conflicting definitions make the narrow tailoring inquiry difficult. Recognizing a different compelling interest — discrimination blocking — would resolve this tension.

II. DISCRIMINATION BLOCKING AS A COMPELLING INTEREST

Discrimination blocking is neither a backward-looking attempt to compensate for past racial subordination[56] nor a forward-looking attempt to cultivate diversity.[57] It is rather a present-centered effort to accurately ascertain applicant potential and thus glean the societal benefits produced by a high-quality higher education system. Discrimination blocking is an acknowledgement of Aristotle's simple point that an archer must account for wind to hit a target.[58]

A. Discrimination Blocking Is a Compelling Interest

1. Discrimination-Blocking Background. — The discrimination-blocking rationale is founded on a simple realization: despite a web of antidiscrimination law, discriminatory outcomes persist.[59] Administrative agencies charged with enforcing antidiscrimination laws have long recognized that eliminating discriminatory outcomes requires more than antidiscrimination law; it requires affirmative action.[60] And though the Court has not considered discrimination blocking as a compelling interest, the idea that university affirmative action could be justified as a *countermeasure* to slanted admissions metrics has origins in the earliest

---

[53] *See supra* p. 693.

[54] *Grutter*, 539 U.S. at 330.

[55] Proponents of the diversity model may point out that a flexible definition of critical mass allows universities to balance their diversity goals against the cost — the amount of racial preference — of achieving them. A hard, numerical definition of critical mass would lack this flexibility.

[56] *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 310 (1978) (opinion of Powell, J.) (rejecting the remedial interest).

[57] *Grutter*, 539 U.S. at 329–30 (accepting the diversity interest).

[58] *See* ARISTOTLE, NICOMACHEAN ETHICS bk. I, ch. 2, § 2, at 2 (Terence Irwin trans., Hackett Publishing Co. 2d ed. 1999) (c. 384 B.C.E.); ANDERSON, *supra* note 11, at 148.

[59] *See* Shelby County v. Holder, 570 U.S. 529, 536 (2013) ("[V]oting discrimination still exists; no one doubts that."); *Grutter*, 539 U.S. at 345 (Ginsburg, J., concurring) ("It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land . . . .").

[60] *See* ANDERSON, *supra* note 11, at 145–46.

affirmative action cases.[61] In *Bakke*'s footnote forty-three, Justice Powell acknowledged that "[r]acial classifications in admissions conceivably could serve [another] purpose, one which petitioner does not articulate: fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures."[62] For Justice Powell, using race to "cur[e] established inaccuracies in predicting academic performance . . . is no 'preference' at all."[63]

Professor Devon Carbado has contended that accepting Justice Powell's argument entails rejecting the application of strict scrutiny to affirmative action.[64] In a recent *Students for Fair Admissions* amicus brief, Professors Jonathan Feingold and Vinay Harpalani echo this argument.[65] They further assert that affirmative action is necessary not only to counter minority-applicant disadvantage but also to counter certain admissions processes that *favor* White applicants.[66] These are astute points. But endorsing these more ambitious arguments is not necessary to accept that countermeasures may justify a new compelling interest. The remainder of this Note sketches that interest, arguing that *within* the strict scrutiny regime, affirmative action as a countermeasure — that is, using affirmative action to block discrimination — is a compelling interest that can be narrowly tailored.

2. Ascertaining Applicant Potential Is a Compelling Interest. — Though strict scrutiny "ranks among the most important doctrinal elements in constitutional law,"[67] the Court has never answered a question central to its formula: what is a compelling interest?[68] One scholar called the Court's compelling interest approach "astonishingly casual"[69]; another likened it to Justice Stewart's "I know it when I see it."[70] The opacity of compelling interests notwithstanding, the Court has established a bevy of them. They include: preventing the appearance of

---

[61] *Bakke*, 438 U.S. at 306 n.43 (opinion of Powell, J.); *see also* Devon W. Carbado, Essay, *Footnote 43: Recovering Justice Powell's Anti-preference Framing of Affirmative Action*, 53 U.C. DAVIS L. REV. 1117, 1120 (2019); Jonathan P. Feingold, *Equal Protection Design Defects*, 91 TEMP. L. REV. 513, 548–49 (2019).

[62] *Bakke*, 438 U.S. at 306 n.43 (opinion of Powell, J.).

[63] *Id.*

[64] Carbado, *supra* note 61, at 1123.

[65] Brief for Legal Scholars Defending Race-Conscious Admissions as Amici Curiae in Support of Respondents at 30–31, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 20-1199 (Aug. 1, 2022) ("[O]nce one recognizes how [race-conscious admissions policies] ensure a more racially neutral, individualized and 'meritocratic' admissions process, it calls into question this Court's conclusion that strict scrutiny is appropriate for all 'racial classifications.'" *Id.* at 30.).

[66] *Id.* at 18. These admissions practices include preferences for children of alumni, recruited athletes, applicants shortlisted by the Dean of Admissions, and children of staff or faculty. *Id.*

[67] *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268 (2007).

[68] *See id.* at 1271.

[69] *Id.* at 1321.

[70] Stephen E. Gottlieb, *Tears for Tiers on the Rehnquist Court*, 4 U. PA. J. CONST. L. 350, 367 (2002) (quoting Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

corruption,[71] teaching students appropriate behavior,[72] preserving favorable public perception of state judiciaries,[73] shielding children from pornography,[74] and promoting diversity in higher education,[75] among others. In an effort to impose some order on the doctrine, courts and commentators have tried to group these interests in various categories. This Note highlights two: interests derived from constitutional text and interests that preserve some core value. Ascertaining applicant potential fits well in each category.

Deriving compelling interests from constitutional text makes intuitive sense, and *Bakke* presents a foremost instance of doing so. For Justice Powell, student body diversity was compelling because it invoked First Amendment freedom of expression.[76] In a similar vein, the Court asserted in *Roberts v. United States Jaycees*[77] that eradicating private discrimination was compelling due to the Equal Protection Clause, which abhors treating individuals in a manner that "bear[s] no relationship to their actual abilities."[78]

These constitutional provisions support discrimination blocking too. The mission statement of the University of California (UC) demonstrates the expression-based importance of accurately ascertaining applicant ability: "UC provides a unique environment in which leading scholars and *promising students* strive together to expand fundamental knowledge of human nature, society, and the natural world."[79] Promising students are an essential component of UC's mission. They create an "enlightening" academic environment — an environment the Court has already acknowledged is compelling.[80] *Jaycees*'s equal protection formulation similarly supports accurately ascertaining applicant potential as compelling. The entire point of discrimination blocking is to ensure that admissions determinations *do* "bear [a] relationship to [students'] actual abilities."[81]

Another group of compelling interests preserves certain social or civic values. These interests are many and varied; this Note highlights three: In *Williams-Yulee v. Florida Bar*,[82] the Court found that

---

[71] *See* Austin v. Mich. Chamber of Com., 494 U.S. 652, 658–59 (1990).

[72] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (finding "society's countervailing interest in teaching students the boundaries of socially appropriate behavior" outweighed students' expressive right to use profanity).

[73] *See* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 447 (2015).

[74] *See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 755 (1996).

[75] *See* Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

[76] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978) (opinion of Powell, J.).

[77] 468 U.S. 609 (1984).

[78] *Id.* at 625; *see* Fallon, *supra* note 67, at 1321.

[79] *UC's Mission*, UNIV. OF CAL.: OFF. OF THE PRESIDENT (emphasis added), https://www.ucop.edu/uc-mission [https://perma.cc/9Y5N-WFSD].

[80] *Grutter*, 539 U.S. at 330.

[81] *Jaycees*, 468 U.S. at 625.

[82] 575 U.S. 433 (2015).

preserving favorable public perception of state judiciaries was compelling.[83] In *Burson v. Freeman*,[84] a plurality found that preserving electoral fairness was "obviously" compelling.[85] And in *Bethel School District No. 403 v. Fraser*,[86] the Court found that suppressing lewd student speech in order to teach "socially appropriate behavior" was compelling.[87]

The contours of this group are admittedly vague and may be defined more accurately by what they are not: tethered to constitutional text. That said, if promoting social or civic values is important in establishing a compelling interest, discrimination blocking is well positioned. As UC makes clear, admitting promising students does more than promote an expressively "enlightening" classroom. These students "keep[] the California economy competitive" and "contribute to the needs of a changing society."[88] UC's programs net the state "billions of tax dollars, economic growth . . . , agricultural productivity, advances in health care, [and] improvements in quality of life."[89] In short, these students make "substantial economic and social contributions."[90]

If the state has an interest in preserving favorable public perception of state judiciaries,[91] it should have an interest in maintaining public faith in universities, the training grounds for the nation's leaders.[92] If the state "obviously" has an interest in preserving the reliability of elections,[93] it may well have an interest in preserving the reliability of admissions judgments. If the state has an interest in suppressing lewd student speech to teach manners,[94] it surely has an interest in admitting students who will best serve society. The problem — and the reason this interest justifies affirmative action — is that universities cannot tell which applicants are best equipped to serve society[95] without considering an applicant's race.[96]

B. Discrimination Blocking Can Be Narrowly Tailored

Discrimination-blocking programs can be narrowly tailored because research has demonstrated that race, independent of other factors like wealth or parental education, creates disadvantages that result in the

---

[83] *Id.* at 447–48.
[84] 504 U.S. 191 (1992).
[85] *Id.* at 198–99 (plurality opinion).
[86] 478 U.S. 675 (1986).
[87] *Id.* at 681; *see also id.* at 678.
[88] *UC's Mission*, *supra* note 79.
[89] *Id.*
[90] *Id.*
[91] Williams-Yulee v. Fla. Bar, 575 U.S. 433, 447–48 (2015).
[92] Grutter v. Bollinger, 539 U.S. 306, 332 (2003).
[93] Burson v. Freeman, 504 U.S. 191, 198–99 (1992).
[94] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 678, 681 (1986).
[95] Serving the interests of society seems to be UC's institutional aim — though it is not the only institutional aim that can justify discrimination-blocking affirmative action. *See infra* pp. 708–09.
[96] *See infra* section II.B, pp. 699–702.

underestimation of minority applicants' potential. For example, researchers have found that a phenomenon called stereotype threat[97] — anxiety that performance in a stigmatized context will confirm the stigma — can depress test scores. A Stanford study found strong evidence of stereotype threat in Black students' test performance.[98] In the study, two groups of students were given the same verbal GRE. One group was told the exam was simply a lab exercise, while the other was told the exam tested intellectual ability.[99] The Black participants performed as well as the White participants on the lab exercise but "greatly underperformed White participants in the diagnostic condition."[100] The external manifestation of what Justice Sotomayor deemed "that most crippling of thoughts,"[101] stereotype threat makes standardized tests defective measures of applicant ability.

Universities also consider applicants' grades and recommendations, but these metrics suffer from further problems. For decades, studies have indicated that teachers both perceive and treat White students more favorably than Black students.[102] This injustice is compounded by the fact that teachers' perceptions influence Black students' performance three times more than White students'.[103] And many researchers have isolated race as the specific factor causing the unequal treatment.[104] But an admissions office shifting from external assessments — like tests, grades, and recommendations — to internal assessments — like interviews — does not solve the problem either. Interviews are particularly subject to implicit racial bias,[105] and they do nothing to ameliorate other disadvantages like stereotype threat.

Crucially, researchers have begun to separate the impact of race from other factors. A regression analysis of UC applicants, for example, has

---

97 *See Stereotype Threat*, NAT'L INSTS. OF HEALTH (June 30, 2017), https://diversity.nih.gov/sociocultural-factors/stereotype-threat [https://perma.cc/9JRX-YPX7].

98 Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCH. 613, 620 (1997).

99 *Id.*

100 *Id.*

101 Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. by Any Means Necessary, 572 U.S. 291, 381 (2014) (Sotomayor, J., dissenting).

102 *See, e.g.*, Seth Gershenson, Stephen B. Holt & Nicholas W. Papageorge, *Who Believes in Me? The Effect of Student-Teacher Demographic Match on Teacher Expectations*, 52 ECON. EDUC. REV. 209, 222 (2016); Ronald F. Ferguson, *Teachers' Perceptions and Expectations and the Black-White Test Score Gap*, *in* THE BLACK-WHITE TEST SCORE GAP 273, 273–313 (Christopher Jencks & Meredith Phillips eds., 1998).

103 Ferguson, *supra* note 102, at 286.

104 *See, e.g.*, Jason A. Grissom & Christopher Redding, *Discretion and Disproportionality: Explaining the Underrepresentation of High-Achieving Students of Color in Gifted Programs*, 2 AERA OPEN 1, 1 (2016) ("Even after conditioning on test scores and other factors, Black students indeed are referred to gifted programs, particularly in reading, at significantly lower rates when taught by non-Black teachers, a concerning result given the relatively low incidence of assignment to own-race teachers among Black students.").

105 Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1094–96 (2006).

shown that "race has a large, independent, and growing statistical effect on students' SAT/ACT scores *after controlling for other factors*."[106] Additionally, researchers have begun to measure the disadvantage with a numerical specificity that makes narrow tailoring easier. Another study found that "Black students were predicted to score *104 points* lower than Whites" while controlling for other variables.[107] Precise social science allows for precise narrow tailoring. If a university can demonstrate that race independently disadvantages Black students by 104 SAT points, the university should be able to view Black applicants' SAT scores 104 points more favorably.[108] At the very least, preventing the university from considering this disadvantage alongside other considerations is sure to result in assessments that are less accurate. Acknowledging racial disadvantage is not racial preferencing; it is merely removing bias from slanted data.

Implicit bias research has further established that race disadvantages minority applicants *within* the walls of admissions offices. As a college admissions association addressed its members bluntly: "You're [b]iased."[109] A study of medical school admissions officers demonstrated "significant levels of implicit white preference."[110] And though Harvard denied in federal court that its admissions officers were "uniquely" biased, the implication was that all people, and thus all admissions officers, are implicitly biased.[111] Judge Burroughs agreed, charging that Harvard's admissions program "would likely benefit from conducting implicit bias trainings for admissions officers."[112] In addition to discrimination *outside* the admissions office, implicit bias "provides an independent and compelling case for [affirmative] action" from *within* the admissions office itself.[113]

---

106 Saul Geiser, *Norm-Referenced Tests and Race-Blind Admissions*, *in* THE SCANDAL OF STANDARDIZED TESTS 11, 14–15 (Joseph A. Soares ed., 2020) (emphasis added).

107 NICHOLAS P. TRIPLETT & JAMES E. FORD, CTR. FOR RACIAL EQUITY IN EDUC., E(RACE)ING INEQUITIES: THE STATE OF RACIAL EQUITY IN NORTH CAROLINA PUBLIC SCHOOLS 64 (2019) (emphasis added).

108 The obvious objection to this type of policy is that it fails to treat applicants as individuals, a reasonable concern that this Note addresses *infra* section III.B.3, pp. 707–08.

109 Jim Paterson, *You're Biased*, NAT'L ASS'N COLL. ADMISSION COUNSELING (2022), https://www.nacacnet.org/news--publications/journal-of-college-admission/youre-biased [https://perma.cc/M6UJ-VCCW].

110 Quinn Capers IV, Daniel Clinchot, Leon McDougle & Anthony G. Greenwald, *Implicit Racial Bias in Medical School Admissions*, 92 ACAD. MED. 365, 366 (2017).

111 Harvard's Response to SFFA's Proposed Findings of Fact & Conclusions of Law at 3, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 14-cv-14176), *aff'd*, 980 F.3d 157 (1st Cir. 2020); *see id.* at 2–3.

112 *Students for Fair Admissions*, 397 F. Supp. 3d at 204.

113 Kang & Banaji, *supra* note 105, at 1066.

Whether researchers can determine *how much* racial implicit bias *independently* disadvantages minority applicants is another matter.[114] If they can, universities will be able to narrowly tailor affirmative action programs to account for racial disadvantage within the admissions office, as well as the already-quantified racial disadvantage outside of it.

C. Discrimination Blocking Is Good Doctrine and Policy

1. Responding to Societal Change. — Courts have long encountered difficulties in crafting affirmative action doctrine that would respond to social change. In *Grutter*, for example, Justice O'Connor took stock of the social progress that affirmative action had encouraged and predicted that affirmative action programs would be needed for twenty-five more years — and only twenty-five more years.[115] The twenty-five-year "self-destruct mechanism" garnered instant criticism as mechanical, arbitrary, and doctrinally incoherent.[116] Discrimination blocking does not require, nor would it support, any such time limit. Flexibility is built into the model itself. As Professors Jerry Kang and Mahzarin Banaji have noted, scientific data provides the terminus for discrimination-blocking affirmative action: "[R]ace- or gender-conscious [measures] will become presumptively unnecessary when the nation's . . . bias against those social categories goes to zero . . . ."[117] This makes intuitive sense. If social science were to indicate that race provides no independent disadvantage, there would be no discrimination to block.

But discrimination-blocking flexibility extends beyond a sunset timeline. Discrimination blocking allows universities to narrowly tailor affirmative action policies to any social change at any level of specificity. Perhaps an adjustment of testing methods removes race as an independent disadvantage in standardized tests, but a change in the teacher pool increases race as a disadvantage in high school grades. As long as the empirical evidence can demonstrate such outcomes, discrimination blocking allows universities to account for them. This flexibility *increases* the level of individualization with which universities may consider applicants, satisfying the Court's most consistent and longstanding narrow tailoring command.[118]

---

[114] Implicit bias experts acknowledge that current implicit bias research methods have low predictive value for behavior. *See* German Lopez, *For Years, This Popular Test Measured Anyone's Racial Bias. But It Might Not Work After All.*, VOX (Mar. 7, 2017, 7:30 AM), https://www.vox.com/identities/2017/3/7/14637626/implicit-association-test-racism [https://perma.cc/B986-XFFD]. This could, of course, change as research methods improve and evolve.

[115] Grutter v. Bollinger, 539 U.S. 306, 343 (2003). Twenty-five years after *Grutter* is 2028 — five years from now.

[116] *Id.* at 394 (Kennedy, J., dissenting); *see id.* at 394–95; *id.* at 375–76 (Thomas, J., concurring in part and dissenting in part); Kang & Banaji, *supra* note 105, at 1116.

[117] Kang & Banaji, *supra* note 105, at 1116.

[118] *See supra* p. 695.

2. Reducing Racial Resentment. — Discrimination blocking may increase the legal legitimacy of affirmative action for another reason. Because discrimination-blocking policies aim to accurately ascertain applicant potential, these policies generally do not override meritocratic criteria.[119] And studies have shown that people are more likely to view affirmative action programs as fair when "merit criteria predominate in decision making."[120] Discrimination blocking cuts off the principal popular objection to affirmative action — that it circumvents merit[121] — at the pass. The whole point of discrimination blocking is to *accurately* measure applicant merit.[122] As a result, discrimination blocking may incur less racial resentment from dispreferred White applicants.[123]

3. Fitting Real-World Practice. — Discrimination blocking better fits the real-world practice of affirmative action. The *Students for Fair Admissions* litigation revealed that Harvard specifically trains admissions officers on how racial disadvantages impact minority applicants: "Admissions officers also were told that '[r]egardless of economic background, Black students' experiences are impacted by racial bias, both explicit and implicit.'"[124] Such trainings are not unique to Harvard; they "are commonly broached in admissions offices across the country."[125]

It is true that legal doctrine need not — and often should not — model itself after real-world practice. But it is also true that legal legitimacy, to some extent at least, requires compliance.[126] Admissions officers are *trained* to view minority applicants differently due to the racial disadvantage that minority applicants experience. Current doctrine turns a blind eye to this practice, allowing universities to justify race-conscious policies for the sake of diversity only. Surely, the universities *do* value diversity, but diversity is apparently not the *only* reason admissions officers consider applicant race. Recognizing discrimination

---

119 *See* ANDERSON, *supra* note 11, at 147.

120 Michael J. Yelnosky, *The Prevention Justification for Affirmative Action*, 64 OHIO ST. L.J. 1385, 1396 (2003).

121 *See* Kang & Banaji, *supra* note 105, at 1081.

122 That is, accurately measure which applicants have those (meritorious) attributes that will best advance a university's institutional mission. *See infra* notes 163–66 and accompanying text.

123 "Basic arithmetic" dictates that affirmative action policies do not substantially decrease the admission chances of any given White applicant. *See* Goodwin Liu, *The Causation Fallacy:* Bakke *and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1049 (2002). Nonetheless, diversity-based affirmative action policies continue to provoke resentment that is far disproportionate to their impact on any individual applicant's chances of admission.

124 Michael E. Xie, *Harvard Admissions Officers Specifically Trained on "Use of Race*," HARV. CRIMSON (June 23, 2018) (quoting Declaration of Michael Connolly in Support of Plaintiff's Motion for Summary Judgment attach. 77, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 261 F. Supp. 3d 99 (D. Mass. 2017) (No. 14-cv-14176), *aff'd*, 980 F.3d 157 (1st Cir. 2020)), https://www.thecrimson.com/article/2018/6/23/admissions-officers-trained-on-race [https://perma.cc/43C4-UZ8P].

125 *Id.*

126 Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 20 PSYCH. PUB. POL'Y & L. 78, 78 (2014).

blocking as a compelling interest would acknowledge an admissions reality that universities have been forced, and allowed, to obscure. Many scholars have argued that doctrinal honesty is a virtue in itself.[127] In this regard, so is discrimination blocking.

4. Allowing for Candor. — A central problem with the diversity framework is that it requires universities to aim for a critical mass of minority students but also to obscure precisely what the critical-mass number is, lest they be accused of racial balancing.[128] Conservative Justices have often highlighted this flaw. In *Fisher II*, for example, Justice Alito noted that "UT has claimed that its plan is needed to achieve a 'critical mass' of African-American and Hispanic students, but it has never explained what this term means."[129] Scholars, including liberals, have similarly lamented the lack of candor in affirmative action jurisprudence. Judge Calabresi, for example, acknowledged that diversity-based affirmative action "shad[es] honesty" rather than "facing the issues squarely."[130]

Discrimination blocking avoids these problems. Discrimination-blocking universities may forthrightly admit their aim to reduce the racial disadvantage in admissions to zero, and they may clarify what this requires numerically.[131] A doctrine that allows for such candor is good not only for honesty's sake but also for making the narrow tailoring inquiry clear cut. It can be difficult to determine precisely how much preference is necessary to achieve the appropriate critical mass.[132] Discrimination blocking allows universities to pinpoint their level of preference with numerical specificity, making narrow tailoring easy.

III. DEFENDING DISCRIMINATION BLOCKING

Like other affirmative action justifications, discrimination blocking faces challenges. This final Part defends discrimination blocking against compelling interest, narrow tailoring, and policy objections in turn.

A. Compelling Interest Objections

1. The Lack-of-Discrimination Challenge. — Critics of discrimination blocking will point out that the Constitution prohibits only discrimination made "because of, not merely in spite of, its adverse effects upon

---

127 *See, e.g.*, Calabresi, *supra* note 19, at 432.

128 *See supra* pp. 695–96.

129 *Fisher II*, 136 S. Ct. 2198, 2216 (2016) (Alito, J., dissenting).

130 Guido Calabresi, Bakke*: Lost Candor*, N.Y. TIMES, July 6, 1978, at A19.

131 If, for example, race disadvantages minority applicant test scores by 104 points, universities should be allowed to view minorities' scores 104 points more favorably. *See supra* p. 701.

132 Consider, for example, the dueling experts in *Students for Fair Admissions*. *See* Eric Hoover, *Dueling Economists: Rival Analyses of Harvard's Admissions Process Emerge at Trial*, CHRON. HIGHER EDUC. (Oct. 30, 2018), https://www.chronicle.com/article/dueling-economists-rival-analyses-of-harvards-admissions-process-emerge-at-trial [https://perma.cc/64D8-4CV8].

an identifiable group."[133] Many of the above examples of racial disadvantage[134] do not meet this standard and are better characterized as disparate impact, to which the Court has not extended Fourteenth Amendment protection.[135] Discrimination blocking, critics argue, cannot be a compelling interest because there is no constitutionally recognized discrimination to block.

The challenge fails for a simple reason: compelling interests need not remedy constitutional violations. Reducing the appearance of corruption is a compelling interest,[136] but the appearance of corruption is not a constitutional violation.[137] Teaching students socially appropriate behavior is a compelling interest,[138] but failing to teaching students socially appropriate behavior is not a constitutional violation. A school that decides not to restrict its students' vulgarity would be well within constitutional bounds. In fact, schools are constitutionally *prohibited* from policing certain off-campus vulgarity.[139]

It thus matters little whether the racial disadvantage in university applications results from intentional discrimination or disparate impact. Accurately ascertaining an applicant's abilities is a compelling interest, full stop. If race happens to be a factor that artificially depresses the scores, grades, and recommendations of minority students, universities have a compelling interest in correcting that bias.

2. The Elite School Challenge. — In *Grutter*, Justice Thomas argued that universities have no compelling interest in admissions standards that maintain academic selectivity.[140] Indeed, Justice Thomas believed that states have no compelling interest in maintaining "elite" institutions at all.[141] If universities want to maintain a diverse student body, Justice Thomas argued, they should adopt "different admissions methods, such as accepting all students who meet minimum qualifications."[142]

---

133 Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (internal quotation marks omitted).

134 *See, e.g.*, *supra* p. 700.

135 *See Feeney*, 442 U.S. at 259, 279.

136 Buckley v. Valeo, 424 U.S. 1, 45 (1976).

137 Stock trading by members of Congress, for example, is not unconstitutional, despite the obvious appearance of corruption and the fact that a significant majority of Americans believe that most politicians are corrupt. *See* Richard Wike et al., *Many in U.S., Western Europe Say Their Political System Needs Major Reform*, PEW RSCH. CTR. (Mar. 31, 2021), https://www.pewresearch.org/global/2021/03/31/many-in-us-western-europe-say-their-political-system-needs-major-reform [https://perma.cc/T7TD-HCQ8]; *cf.* Richard W. Painter, Opinion, *Biden's Ongoing Struggle with the Utter Hypocrisy of Stock Trading in Congress*, MSNBC (Aug. 8, 2022, 7:27 AM), https://www.msnbc.com/opinion/msnbc-opinion/biden-needs-stop-stock-trading-congress-n1297760 [https://perma.cc/UP47-J5BA].

138 *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

139 *See* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2043, 2048 (2021) (finding a First Amendment violation when a school suspended a student from the cheerleading squad for posting "Fuck school fuck softball fuck cheer fuck everything" on social media, *id.* at 2043).

140 Grutter v. Bollinger, 539 U.S. 306, 360–61 (2003) (Thomas, J., concurring in part and dissenting in part).

141 *Id.* at 358.

142 *Id.* at 361.

Whatever force Justice Thomas's elite-school critique has for the diversity interest, it has little for discrimination blocking. Even if universities adopted minimum qualification standards, they would still need to determine which applicants meet the minimum qualifications and which do not. Doing so requires an accurate measure of applicant ability. The elite-school critique would challenge discrimination blocking only if universities abandoned *all* admissions standards. And while some scholars have suggested universities should adopt a broadly inclusive lottery system, even these proposals — like Justice Thomas's —would require applicants to satisfy *some* standard of academic capability.[143] Wherever there are standards, determining which applicants meet those standards requires accounting for racial disadvantage.

B. Narrow Tailoring Objections

1. The Mechanical Quota Challenge. — Mechanical quotas have been constitutional nonstarters from the earliest affirmative action cases.[144] In *Bakke*, the Court declared that universities may not reserve specific numbers of seats for certain racial groups.[145] In *Grutter*, the Court extended this logic, precluding universities from insulating some applicants from competition with others.[146] But discrimination-blocking policies do not seek to admit a fixed number of applicants. The same flexibility that allows discrimination-blocking policies to respond to social change allows these policies to fluctuate naturally with the quality and quantity of an applicant pool. Nor do discrimination-blocking policies foreclose "comparison with all other candidates"[147] — quite the opposite. The whole purpose of discrimination blocking is to enable comparison between candidates on equal footing.[148]

2. The Quantification Challenge. — Critics of discrimination blocking may further argue that narrow tailoring requires universities to quantify precisely how much race disadvantages minority applicants. This Note provides two responses. First, this criticism may be unfair. Though dissenting Justices have long criticized universities for obfuscating the numerical meaning of "critical mass,"[149] the Court has not required such specificity for other compelling interests. Preventing the appearance of corruption is a conceivably measurable compelling

---

143 *See, e.g.*, MICHAEL J. SANDEL, THE TYRANNY OF MERIT 184–85 (2020).

144 *See Grutter*, 539 U.S. at 334 ("To be narrowly tailored, a race-conscious admissions program cannot use a quota system . . . .").

145 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315–16 (1978) (opinion of Powell, J.).

146 *Grutter*, 539 U.S. at 334.

147 *Bakke*, 438 U.S. at 317 (opinion of Powell, J.).

148 *Cf. id.* at 306 n.43 (opinion of Powell, J.) ("Racial classifications in admissions conceivably could serve [another] purpose, one which petitioner does not articulate: fair appraisal of each individual's academic promise . . . .").

149 *See, e.g.*, *Fisher II*, 136 S. Ct. 2198, 2216 (2016) (Alito, J., dissenting) ("UT has claimed that its plan is needed to achieve a 'critical mass' of African-American and Hispanic students, but it has never explained what this term means.").

interest. The Court could require a state to demonstrate *how much* public perception of the judiciary would be improved by banning state judges from personally soliciting campaign funds.[150] Public perception is undoubtedly measurable[151] — much more easily measurable than the impact of race on college admissions. But the Court does not require the numerical specificity that critics of affirmative action seek.

Second, as noted above,[152] researchers have begun to quantify how much[153] race independently[154] disadvantages applicants. Even if the Court holds discrimination blocking to a narrow tailoring standard that it does not require for other compelling interests, discrimination blocking satisfies that standard.

3. The Causation Fallacy. — Still, critics may point out that — even with data demonstrating numerically specific, race-independent disadvantage — discrimination blocking is a group-level solution imposed upon individuals. Not every member of a disadvantaged racial group incurs the same racial disadvantage. Because, the criticism goes, discrimination blocking allows group characteristics to affect the treatment of the individual, discrimination blocking fails the Court's command to consider applicants as individuals.

The best response to this objection is to accept it. Defenders of discrimination blocking *should* accept that the best discrimination-blocking policy would account for racial disadvantage at the individual level. Unfortunately, that data does not yet exist. But the lack of individualized data about racial disadvantage should not preclude universities from accounting for *known* racial group disadvantage. The perfect need not be the enemy of the good.[155] Even if only a proxy, group disadvantage is the *best* proxy to account for individual disadvantage. Universities should be allowed to account for racial disadvantage at whatever level of granularity empirical evidence can justify.

Even so, critics may note that *McCleskey v. Kemp*[156] stands for the proposition that evidence of group-level disparate treatment cannot support claims of individual-level discrimination.[157] In the realm of race,

---

150 *Cf.* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 446 (2015).

151 *See, e.g.*, Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx [https://perma.cc/F4KY-W2GW].

152 *See, e.g.*, *supra* p. 701.

153 *See* TRIPLETT & FORD, *supra* note 107, at 64.

154 *See* Geiser, *supra* note 106, at 14–15.

155 This is particularly the case when many metrics to which discrimination-blocking policies would be applied are themselves highly imprecise. *See* Jonathan Feingold, *Racing Towards Color-blindness: Stereotype Threat and the Myth of Meritocracy*, 3 GEO. J.L. & MOD. CRITICAL RACE PERSPS. 231, 261 (2011) ("Standardized test makers refute the notion that individual scores accurately measure student talent. . . . Thus understood, the LSAT results in broad, grotesque chunking.").

156 481 U.S. 279 (1987).

157 *See id.* at 292–97.

the criticism goes, the perfect *is* the enemy of the good; group-level evidence is not good enough.

But defenders of discrimination blocking need not dispute whether *McCleskey* was rightly decided[158] or whether *McCleskey* does indeed prohibit the use of group-level disparate treatment in proving discrimination.[159] Defenders of discrimination blocking may merely point out that the relevant question in *McCleskey* — whether statistics can prove constitutionally prohibited discrimination — is irrelevant when narrowly tailoring a policy that admittedly discriminates based on race.[160] Discrimination-blocking proponents do not argue that the Constitution *requires* universities to account for race in admissions, lest universities unconstitutionally discriminate against minority applicants. Such an argument would certainly fail *McCleskey*. Discrimination-blocking proponents merely argue the constitution *allows* universities to utilize group-level statistics to narrowly tailor race-conscious policies to a compelling interest. And it bears repeating that the Court generally does not require *any* numerical specificity to satisfy the narrow tailoring inquiry,[161] much less numerical specificity at the level of individuals.

C. Policy Objections: The Merit Question(s)

Questions of merit have long dogged scholars[162] and admissions officers alike. Resolving various merit debates is not the aim of this Note, but it is necessary to respond to two merit-based challenges to discrimination blocking. Like the works of other scholars,[163] this Note attaches no intrinsic value to "merit." It takes "merit" merely to be an attribute

---

158 Since the moment *McCleskey* was decided, scholars have criticized it as a modern-day *Dred Scott*. *See* Hugo Adam Bedau, *Someday* McCleskey *Will Be Death Penalty's* Dred Scott, L.A. TIMES (May 1, 1987, 12:00 AM), https://www.latimes.com/archives/la-xpm-1987-05-01-me-1592-story.html [https://perma.cc/PCM7-GQGC]; Annika Neklason, *The "Death Penalty's* Dred Scott" *Lives On*, THE ATLANTIC (June 14, 2019), https://www.theatlantic.com/politics/archive/2019/06/legacy-mccleskey-v-kemp/591424 [https://perma.cc/7DFJ-767V]; Cassandra Stubbs, *The* Dred Scott *of Our Time*, ACLU: NEWS & COMMENT. (Apr. 16, 2012), https://www.aclu.org/blog/capital-punishment/racial-disparities-and-death-penalty/dred-scott-our-time [https://perma.cc/8GNF-MQED].

159 Even the *McCleskey* Court acknowledged that it *does* accept group-level statistics as proof of intent to discriminate in certain contexts like jury selection and Title VII violations. *See McCleskey*, 481 U.S. at 293–94. *McCleskey*'s disapproval of group-level statistics is arguably cabined to the death penalty context because, as the Court itself asserted, "the nature of the capital sentencing decision, and the relationship of statistics to that decision, are fundamentally different." *Id.* at 294.

160 It bears reemphasizing that compelling interests need not be narrowly tailored to remedying only constitutional violations. *See supra* p. 705.

161 *See supra* pp. 706–07.

162 *See generally, e.g.*, LANI GUINIER, THE TYRANNY OF THE MERITOCRACY (2015); MICHAEL J. SANDEL, THE TYRANNY OF MERIT (2020); T.M. SCANLON, WHY DOES INEQUALITY MATTER? (2018); *Meritocracy*, STAN. MCCOY FAM. CTR. FOR ETHICS IN SOC'Y https://edeq.stanford.edu/sections/section-2-conceptions-equality-opportunity/meritocracy [https://perma.cc/2D2J-SFWD] (collecting scholarly treatment of meritocracy).

163 *See* Benjamin Eidelson, *Patterned Inequality, Compounding Injustice, and Algorithmic Prediction*, AM. J.L. & EQUAL., Sept. 2021, at 252, 255 n.13.

that universities value as advancing their institutional missions.[164] UCLA, for example, considers creativity and drive[165] to be meritorious attributes that advance the university's goal to provide "long-term societal benefits."[166]

The first merit-based challenge argues that merit is measurable and that the metrics on which college admissions offices rely accurately measure it. Proponents of this challenge accept that race disadvantages minority applicants, but they maintain that this disadvantage results in a real difference of ability between the disadvantaged and advantaged. These proponents would argue that, even if race depressed Dr. King's GRE score, the test nevertheless accurately measured Dr. King's verbal ability at the time.

The problem with this challenge is that it views student ability as static. This runs contrary to the whole point of student learning: to learn, change, and grow.[167] It runs contrary to neuroscientific research, which has found that higher education changes the brain.[168] And it runs contrary to real-world outcomes, in many instances of which minority students — despite the many disadvantages before *and* during college — perform as well as White peers.[169] Discrimination-blocking proponents need argue neither that student ability is wholly plastic (it surely is not), nor that race is the most important factor in determining applicant ability (it surely is not). Proponents must argue merely that race adds an important dimension to a university's assessment of which applicants are best suited to accomplish the university's mission.

The second merit-based challenge is the inverse of the first. It argues that merit is *not* measurable. Grounding affirmative action programs in the idea of accurate merit measurement only encourages the dangerous myth of merit. The response to this objection does not require taking a stance in the merit debate. It merely notes that, whether or not merit is measurable, universities — as well as most institutions —

---

164 The manner in which universities define their institutional missions is important for discrimination blocking. Certain missions are unlikely to be able to justify discrimination-blocking affirmative action. Arguing, for example, that race-conscious programs are necessary to ascertain which students best fulfill the university's aim of compensating for past societal discrimination is unlikely to be successful. But institutional missions not tied to justifications for affirmative action explicitly rejected by the Court will not present such problems.

165 *Undergraduate Admission*, UCLA, https://admission.ucla.edu [https://perma.cc/R2YL-2V7J].

166 *UC's Mission*, *supra* note 79.

167 *See, e.g.*, *Mission, Vision & History*, HARV. COLL., https://college.harvard.edu/about/mission-vision-history [https://perma.cc/Z832-4HR3] ("Beginning in the classroom with exposure to new ideas, new ways of understanding, and new ways of knowing, students embark on a journey of intellectual transformation.").

168 *See* Cheryl Grady & Mellanie Springer, *Brain Imaging Suggests How Higher Education Helps to Buffer Older Adults from Cognitive Declines*, AM. PSYCH. ASS'N (2005), https://www.apa.org/news/press/releases/2005/03/education-aging [https://perma.cc/J7UH-KJD6].

169 *See, e.g.*, Teresa Watanabe, *African American Students Thrive with High Graduation Rates at UC Riverside*, L.A. TIMES (June 14, 2017, 4:00 AM), https://www.latimes.com/local/lanow/la-me-uc-riverside-black-students-20170623-htmlstory.html [https://perma.cc/5KY8-SJT2].

continue to consult metrics they believe speak to applicants' abilities to advance their institutional missions. As long as they do, universities should be allowed to account for factors that slant these metrics, like racial disadvantage.

CONCLUSION

Thankfully for the nation, the Boston University admissions office looked beyond Dr. Martin Luther King Jr.'s subpar GRE scores. Thirteen years later, when he received an award for excellence in the education field, Dr. King highlighted education as "vital" to the fight for social equality.[170] In the past five decades, affirmative action has contributed to a remarkable racial integration of higher education.[171] But affirmative action has never been under more pressure. Discrimination blocking can relieve this pressure: it is compelling, it can be narrowly tailored, and it is good policy and doctrine. The Court has cited discrimination blocking as a worthy idea before.[172] It is time to adopt it as a compelling interest.

---

[170] Valerie Strauss, *MLK's Prescient Thinking on Education Reform*, WASH. POST (Jan. 16, 2012), https://www.washingtonpost.com/blogs/answer-sheet/post/mlks-prescient-thinking-on-education-reform/2012/01/15/gIQAnIV91P_blog.html [https://perma.cc/9RGV-32V4].

[171] *See* Louis Menand, *The Changing Meaning of Affirmative Action*, NEW YORKER (Jan. 13, 2020), https://www.newyorker.com/magazine/2020/01/20/have-we-outgrown-the-need-for-affirmative-action [https://perma.cc/34A3-5TL4].

[172] *See supra* pp. 696–97.