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Pandemic Possibilities: Rethinking Measures of Merit

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ABSTRACT

The impact of the spread of the novel coronavirus in the United States beginning in winter 2020 has simultaneously laid bare vast chasms of inequality in education and created a crisis in which radical reforms have become possible almost overnight. Schools, colleges and universities have dramatically changed how they admit, assess, and support their students; for example, the University of California abandoned a longstanding and controversial requirement that applicants for admission submit scores on one of two standardized tests, the SAT or the ACT. This Essay analyzes the circumstances that made this change in policy possible and identifies the profound implications of such a move by a public institution of higher learning to consider inequality of conditions among students when making admissions decisions. The decision to drop the tests reflects empathy with students confronting obstacles previously accepted as inevitable and challenges the University's previous conceptions of merit. The move by the University also demonstrates that the selection of admissions criteria is a political choice; there is nothing sacred about the status quo ante. And suspending criteria makes clear the need to think about what future criteria should be. The Essay suggests ways to think about a more equitable process for determining which applicants a selective institution should admit.

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TABLE OF CONTENTS

INTRODUCTION.....	50
I. WHEN THE REGENTS CHOSE TO END THE TEST REQUIREMENT	55
A. Health and Equity	58
B. Merit and Equity	61
II. RATIONALES FOR CONSIDERATION OF SAT AND ACT TEST SCORES AND QUESTIONS OF	
INSTITUTIONAL MISSION	66
A. Decisions To Be Made	67
B. The Malleability of Merit	69
III. IMPLICATIONS OF THE SUSPENSION OF THE TEST REQUIREMENT	72
CONCLUSION	77

INTRODUCTION

In response to the global coronavirus pandemic that raged through 2020 and into 2021, schools, colleges, and universities made drastic and rapid changes in how they admit, assess, and support their students. Large school districts modified assessment regimes to reduce the likelihood of failing grades as students struggled with remote learning.¹ At least one school board voted to cease inclusion of nonacademic factors in grades, aiming to address concerns that disparities in grades along lines of race might reflect bias.² Another decided to promote all students to the next grade regardless of academic performance.³ Colleges, universities, and law schools modified their grading policies, shifting away from the traditional A–F scale to a pass/fail model.⁴ Schools, colleges, and universities swiftly moved to provide expanded technological support to students to enable all

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1. See, e.g., N.Y.C. DEP'T OF EDUC., HIGH SCHOOL ACADEMIC POLICY GUIDE 69 (Fall 2020 ed.), <https://infohub.nyced.org/docs/default-source/default-document-library/AcPolicy-HighSchoolAcademicPolicyGuide> [<https://perma.cc/F5LK-QUBS>] (“For example, students in grades 9–12 in the 2019–20 school year were not to receive failing marks from March 2020 to August 2020 . . .”).
 2. SAN DIEGO UNIFIED SCH. DIST., AGENDA ITEM AR 5121: GRADES/EVALUATION OF STUDENT ACHIEVEMENT, (Oct. 13, 2020), [https://go.boarddocs.com/ca/sandi/Board.nsf/files/BU8VCU802554/\\$file/AR%205121%20Grades-Evaluation%20of%20Student%20Achievement%20-%20Redline.pdf](https://go.boarddocs.com/ca/sandi/Board.nsf/files/BU8VCU802554/$file/AR%205121%20Grades-Evaluation%20of%20Student%20Achievement%20-%20Redline.pdf) [<https://perma.cc/3RTR-J42Y>]. In making the change, the Board implemented a resolution from earlier in the year aimed at “[i]nterrupting discriminatory practices related to grading. . . .” SAN DIEGO UNIFIED SCH. DIST., RESOLUTION (June 23, 2020), [https://go.boarddocs.com/ca/sandi/Board.nsf/files/BU8U767A9F56/\\$file/Board%20Adopted%20Resolution-Summer%20of%20Freedom_6.23.2020.pdf](https://go.boarddocs.com/ca/sandi/Board.nsf/files/BU8U767A9F56/$file/Board%20Adopted%20Resolution-Summer%20of%20Freedom_6.23.2020.pdf) [<https://perma.cc/M475-JGWM>].
 3. Nader Issa, *CPS to Promote All Elementary Students This Year, Nix Standardized Tests for Competitive High School Admissions*, CHI. SUN-TIMES (Apr. 15, 2021, 7:57 PM), <https://chicago.suntimes.com/education/2021/4/15/22386206/cps-high-school-admissions-selective-enrollment-promotion-grades-nwea-map> [<https://perma.cc/QR27-ZEH5>].
 4. See, e.g., Anemona Hartocollis, *With Coronavirus Disrupting College, Should Every Student Pass?*, N.Y. TIMES (Mar. 28, 2020), <https://www.nytimes.com/2020/03/28/us/coronavirus-college-pass-fail.html> [<https://perma.cc/8YA8-P2H6>] (describing moves at many colleges and universities to shift to pass/fail grading); Sara Cardine, *Newport-Mesa Unified Relaxes Grad Requirements, Eliminates Failing Grades During COVID-19 Pandemic*, L.A. TIMES: DAILY PILOT (Apr. 29, 2020, 4:39 PM), <https://www.latimes.com/socal/daily-pilot/news/story/2020-04-29/newport-mesa-unified-relaxes-grad-requirements-eliminates-failing-grades-during-covid-19-pandemic> [<https://perma.cc/6CSU-4DNE>] (reporting on an elementary and secondary public school district suspending failing grades); Karen Sloan, *A Little Less Pressure With Law School Final Exams Amid COVID-19*, RECORDER (Apr. 29, 2020), <https://www.law.com/2020/04/29/a-little-less-pressure-with-law-school-final-exams-amid-covid-19/?slreturn=20200401122406> [<https://perma.cc/6ENT-RH5D>] (law schools).

to access educational offerings remotely,⁵ and provided augmented mental health support to help students cope with the anxiety and stress of pandemic learning.⁶ States suspended the bar examination for would-be lawyers⁷ and the Association of American Medical Colleges canceled administrations of the Medical College Admission Test.⁸ The entities that administer the SAT⁹ and ACT¹⁰ postponed the tests. And in May 2020, the Regents of the University of California (the Regents) voted to end the era of the SAT and ACT in undergraduate admissions,¹¹ essentially making permanent a temporary suspension of the testing requirement

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5. See, e.g., Howard Blume, *L.A. School District Confronts \$200 Million in Coronavirus Costs and a Grim Budget Future*, L.A. TIMES (Apr. 20, 2020, 1:13 PM), <https://www.latimes.com/california/story/2020-04-20/lausd-faced-with-200-million-in-underfunded-expenses-due-to-coronavirus-outbreak> [<https://perma.cc/TSH2-RZCZ>] (reporting that the school district had computers for all students as well as food for needy families).
 6. See, e.g., *Mental Health Support Resources for Students*, COLO. STATE UNIV., <https://health.colostate.edu/mental-health-resources> [<https://perma.cc/5EXA-SNUK>] (announcing the “50+ COVID-19 related resources to help students adapt to an ever-changing world while social distancing and learning online”).
 7. *July 2020 Bar Exam: Jurisdiction Information*, NAT’L CONF. OF BAR EXAM’RS, <http://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information> [<https://perma.cc/SC3D-NEFS>].
 8. Roni Caryn Rabin, *Want to Be a Doctor? Take Your Chances in a Closed Room With Strangers*, N.Y. TIMES (Aug. 7, 2020) <https://www.nytimes.com/2020/08/07/health/coronavirus-exams-mcat.html?searchResultPosition=1> [<https://perma.cc/G8TN-QB9C>] (“The college canceled testing in mid-March, when much of the country was under lockdown. . .”).
 9. Press Release, College Board, *College Board Cancels May SAT in Response to the Coronavirus* (Mar. 16, 2020), <https://newsroom.collegeboard.org/college-board-cancels-may-sat-response-coronavirus> [<https://perma.cc/ZPH6-K33P>].
 10. *ACT Reschedules April 2020 National ACT Test Date to June* ACT: NEWSROOM & BLOG (Mar. 16, 2020), <https://leadershipblog.act.org/2020/03/act-reschedules-april-2020-national-act.html> [<https://perma.cc/H4EE-2GFA>]; see also *ACT Reschedules April 2020 International ACT Test Date to June*, ACT: NEWSROOM & BLOG (Mar. 19, 2020), <https://leadershipblog.act.org/2020/03/act-reschedules-april-2020.html> [<https://perma.cc/XFU9-XKA6>].
 11. BD. OF REGENTS OF THE UNIV. OF CAL., APPROVED ACTIONS 3–4 (May 22, 2020), <https://regents.universityofcalifornia.edu/aar/mayb.pdf> [<https://perma.cc/Y979-8BAJ>] [hereinafter MAY 22 APPROVED ACTIONS] (approving recommendation of the president that the University “suspend the current standardized test (ACT/SAT) requirement for undergraduate admissions until 2024”). The plan approved by the Regents did not technically end use of the tests but made consideration of the scores optional for campuses in the UC system if applicants choose to submit them in the fall 2020–21 and 2021–22 admission cycles. *Id.* Scores on the SAT and ACT would not be considered at all starting in fall 2023. *Id.* Since then, settlement of litigation against the University of California over admissions practices led to an agreement to abandon use of the test scores completely. Settlement Agreement and Release of All Claims, *Smith v. Regents of the Univ. of Cal.*, No. RG19046222 (Cal. Super. Ct., May 11, 2021), <http://www.publiccounsel.org/tools/assets/files/1588.pdf> [<https://perma.cc/7L76-2NAP>].

implemented several weeks earlier,¹² and joining the growing ranks of selective institutions that have dropped the tests.¹³ This move by the University of California (the University) provides the case study for this Essay.

The public health justification of the sudden and swift changes in higher education policy, many of which implicate strongly held ideas of what constitutes academic merit, is obvious: The virus that has sickened millions, as of this writing killed more than five hundred thousand in the United States alone, and shut down broad swaths of the nation's, indeed the world's, economy.¹⁴ To compel students to gather in proximity, forcing them to risk infecting each other with the potentially fatal COVID-19 virus, under conditions provoking exceptional stress and anxiety, must have struck the Regents as unfair and relaxing the requirement, a necessary modification.

But the move also recognized inequality among students. The shift in policy by the University sought to “ensure prospective students aiming for UC get a full and fair shot—no matter their current challenges,” the president of the University, Janet Napolitano, said in a statement accompanying the announcement of the temporary suspension of the test requirement.¹⁵ To maintain the testing requirement¹⁶ would have both penalized some students whose failure to comply would reflect not a personal lack of merit but instead the disparate impacts of a national disaster, and threatened the health of other students—and their families—who might attempt to take the test when they should have stayed safe at home. In light of the lack of student culpability and in

12. UC Office of the President, *UC Temporarily Adjusts Admissions Requirements to Help Students, Families in Wake of COVID-19*, U.C.: PRESS ROOM (Apr. 1, 2020), <https://www.universityofcalifornia.edu/press-room/uc-eases-admissions-requirements-help-students-families-wake-covid-19> [<https://perma.cc/85PT-R7AX>] [hereinafter *Press Release*].

13. Neil Vigdor & Johnny Diaz, *More Colleges Are Waiving SAT and ACT Requirements*, N.Y. TIMES (May 21, 2020), <https://www.nytimes.com/article/sat-act-test-optional-colleges-coronavirus.html?searchResultPosition=1> [<https://perma.cc/8WJR-8L6A>].

14. See, e.g., Denise Lu, *How Covid Upended a Century of Patterns in U.S. Deaths*, N.Y. TIMES (Apr. 23, 2021) <https://www.nytimes.com/interactive/2021/04/23/us/covid-19-death-toll.html> [<https://perma.cc/9Q39-KJY7>] (“Covid-19 [sic] has now claimed more than half a million lives in the United States”); Jim Tankersley, *The U.S. Shut Down Its Economy. Here’s What Needs to Happen in Order to Restart*, N.Y. TIMES (Mar. 22, 2020), <https://www.nytimes.com/2020/03/22/us/politics/coronavirus-economy-shutdown.html> [<https://perma.cc/AD8G-TE7V>] (describing the scale and impact of the shut down United States economy); see also Peter S. Goodman, *Why the Global Recession Could Last a Long Time*, N.Y. TIMES (Apr. 1, 2020), <https://www.nytimes.com/2020/04/01/business/economy/coronavirus-recession.html> [<https://perma.cc/U749-4SR3>] (describing global impact of shutdown of national economies worldwide).

15. Press Release, *supra* note 12.

16. Other admissions requirements were also modified or eliminated in response to the pandemic. *Id.* For example, the University suspended the requirement that undergraduate applicants receive letter grades in courses mandated by the University and eliminated a penalty for undergraduates whose transcripts were submitted late. *Id.*

response to a public health emergency, the suspension of an admissions requirement that otherwise would be used to help determine who would be admitted to the University caused hardly any controversy.

Yet at a deeper level, the move to abandon the tests also constituted a remarkable and remarkably swift shift in institutional attitude toward previously untouchable, unyielding rituals of higher education admissions. Virtually overnight, institutions previously hostile to reforms intended to promote equity in access, despite widely recognized disparities in opportunity, began openly prioritizing fairness for students more severely affected by the pandemic and ensuing economic shutdown.

Because of the deeply held conviction that admissions decisions reflect assessment of individual applicants relative to each other, college and university officials have not necessarily wanted to discuss a policy to respond to the inequality among applicants. In this view, the admissions process properly glorifies inequality by admitting applicants who are by some measure, such as test scores, more able and prepared. In normal circumstances, compensating for inequality among applicants would run counter to this meritocratic ideal. University officials were forced to confront these inequalities in response to the pandemic—some applicants had already taken the tests, others had not and now could not; some had resources enabling academic progress while isolated at home, others did not, to name just a few dimensions. The health emergency forced university officials to act and gave them the opportunity to create a more equitable system, demonstrating that equity can be the guide in university admissions, and that the choice to keep or change admissions policies is a political one.¹⁷

This Essay explores the reasons for and the implications of suspension and abandonment of the standardized test requirement. The shift in policy highlights the contingent nature of merit and opens the door to deeper rethinking of what selective public institutions of higher learning do and should value. The pandemic destabilized a widely used and accepted tool that maintained hierarchies of students and the institutions they attended because the impact of the coronavirus introduced a new variable to the calculation of merit: However, to maintain a

17. JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON* 10 (2005) (describing the establishment of public commitments by elite universities to an ideology prizing equality of opportunity, not results, and the “search for ‘talent’”); see also Lani Guinier, Comment, *Admission Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 115 (2003) (“Admissions decisions affect the individuals who apply, the institutional environments that greet those who enroll, and the stability and legitimacy of our democracy.”).

hierarchy, “you need to measure everyone on a single scale; the moment one begins to introduce more than one criteri[on] (refinement, rationality, money, grace, etc.) into the Great Chain of Being, the whole thing falls apart.”¹⁸ The new consideration—unequal effects of the impact of the pandemic—undermines the credibility of any others.

The University of California offers a compelling case study. In April 2020, at the beginning of the pandemic, the faculty government mounted a staunch defense of the role of the SAT and ACT in the University’s undergraduate admissions.¹⁹ Less than a month later, the UC Regents rejected this position, deciding to remove the SAT and ACT from the admissions process. The health threat reordered priorities, showed that longstanding notions of merit were neither absolute nor inviolable, and created an opportunity to prioritize fairness. The decision by the Regents shows that selection of criteria for determining whom to admit is, as Lani Guinier argued more than fifteen years ago, a *political* decision.²⁰ That means that policymakers, like the Regents, can choose to emphasize equity for students.

Selective college and university admissions decisions do not rest solely on objective measures of academic excellence, however defined. Nor have they in the past, either.²¹ Test scores, like grades, extracurricular activities, athletic ability, socioeconomic status, volunteer work, and other applicant activities and characteristics, all play a role in admissions decisions to varying degrees for different applicants, because they are regarded as indicators of actual and potential excellence and as evidence of likely contributions to a university. Consequently, selective institutions value these metrics for the information they may contain, not because they have independent and intrinsic meaning.²² The question of how

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18. DAVID GRAEBER, *Manners, Deference, and Private Property: Or, Elements for a General Theory of Hierarchy*, in *POSSIBILITIES: ESSAYS ON HIERARCHY, REBELLION, AND DESIRE* 13, 48 (2007).
 19. Letter from Kum-Kum Bhavnani, Chair of the Assembly of the Acad. Senate, Univ of Cal., to Janet Napolitano, President, Univ. of Cal. (Apr. 18, 2020), https://senate.universityofcalifornia.edu/_files/reports/kkb-jn-standardized-testing.pdf [<https://perma.cc/Y7LB-8BA8>] (hereinafter “Bhavnani Letter”).
 20. Guinier, *supra* note 17, at 124 (“[U]niversities need to seek a new approach to admissions that is flexible enough to meet their own internal needs, as well as the external needs of the communities they serve . . . [to] promote the widely held view of education as a means of upward mobility, legitimate the values of democracy, and use race as both a trigger and a continuous source of information for thinking about these complex issues.”).
 21. KARABEL, *supra* note 17, at 4–5 (summarizing changes in the definition of “merit” implemented in elite university admissions processes).
 22. Notably absent from this list is race—historically the most controversial factor in admissions decisions. In California, voters have prohibited the consideration of race in admissions decisions. CAL. CONST. art. I, § 31 (“The State shall not discriminate against, or grant

much weight to give to any admissions criterion must be resolved by recourse to some external set of values, valorizing academic excellence, or diversity, or procedural legitimacy—or, as actually happens, an opaque, muddled, and inarticulate mixture of these and other goals.

This Essay aims to untangle these objectives by identifying the implications of recognizing the new concern about protecting public health. The analysis that follows, which is intended to facilitate a more precise public debate on admissions practices proceeds in three Parts. Part I briefly provides context for the move by the Regents, describing the University’s response to the disparate effects of the global health emergency, then contrasting that response to years of little or no action to address enrollment disparities along lines of race and class. Part II undertakes the task of disentanglement, identifying the different goals pursued through the admissions process of the University and addressing the perception that goals like equity, diversity, and academic excellence inevitably conflict. Part III contends that once goals other than admission of high-scoring students are accepted, the normative justification for assigning any weight to standardized test scores collapses. Part III further argues that in light of historical disparities in higher education access and the role that test scores have played in justifying those disparities, the force of arguments for pursuit of values like inclusion, representation, and democratic legitimacy, increases. The pandemic has created an opportunity to reconsider and redesign admissions, with a goal of realizing a vision of equitable excellence.

I. WHEN THE REGENTS CHOSE TO END THE TEST REQUIREMENT

The University of California has grappled with the role of the SAT and ACT in admissions decisions for decades; really, the story could begin with the decision

preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”). But disparities in representation of different racial and ethnic groups on University of California (UC) campuses—especially the flagship campuses at Berkeley and Los Angeles—loom large in discussions of admissions policies here. See Teresa Watanabe, *Drop the SAT and ACT as a Requirement for Admission, Top UC Officials Say*, L.A. TIMES (Nov. 23, 2019, 6:00 AM), <https://www.latimes.com/california/story/2019-11-23/uc-officials-recommend-dropping-sat-admission-requirement> [<https://perma.cc/RD82-D247>] (reporting on statements by UC Berkeley Chancellor Carol T. Christ and UC Provost Michael Brown to the effect that “performance on the SAT and ACT was so strongly influenced by family income, parents’ education and race that using them for high-stakes admissions decisions was simply wrong”).

to require the SAT in the fall of 1968.²³ For purposes of this Essay, the sensible starting point is the more recent effort, beginning with the appointment in January 2019 of a task force charged with, among other things, evaluating whether the use of scores “fairly promote[d] diversity.”²⁴ After a year of deliberation, the task force recommended continuing to require the SAT or ACT.²⁵ The Regents decided nonetheless to suspend the requirement shortly thereafter.²⁶ This Part briefly explores each of these moments.

The University had taken on the difficult question of how to use standardized test scores in deciding whom to admit more than a year before the pandemic and the Regents’ decision. The Academic Senate, a faculty body, had appointed a faculty task force in January 2019 to develop draft recommendations for its review and submission to the office of the president. Questions about whether the SAT and ACT contributed to the underrepresentation of Black and Latinx undergraduate students in the University overall and especially on its most prestigious campuses were not new: a committee of the Academic Senate had conducted reviews and produced reports in 2002 and 2010. The 2019 task force spent months behind closed doors conducting interviews, reviewing research, and analyzing data.

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23. BOARD OF ADMISSIONS AND RELATIONS WITH SCHOOLS, THE USE OF ADMISSIONS TESTS BY THE UNIVERSITY OF CALIFORNIA 6 (2002), https://senate.universityofcalifornia.edu/_files/committees/boards/admissionstests.pdf [<https://perma.cc/3DYP-JUGH>] [hereinafter UC USE OF ADMISSIONS TESTS]. According to this report, the goal was to reduce the pool of eligible students. *Id.*
 24. Letter From Robert C. May, Chair of the Assembly of the Acad. Senate, Univ. of Cal., to the Acad. Council Standardized Testing Task Force, Univ. of Cal. (Jan. 30, 2019), https://www.google.com/url?client=internal-element-cse&cx=010755004631799523841:b-22oiviztw&q=https://senate.universityofcalifornia.edu/_files/committees/sttf/standardized-testing-tf-charge.pdf&sa=U&ved=2ahUKEwiD2PzY_OPpAhV3HjQIHa0dBC4QFjAAegQIAxAC&usg=AOvVaw2_Em77zuRMzbH-2HH4-I8z [<https://perma.cc/5ZDC-44V6>].
 25. Procedurally, the task force recommendation went to the Academic Council—the executive committee of the full Academic Assembly—which in turn consists of representatives of each of the campuses of the UC system. See UNIV. OF CAL. ACAD. SENATE, SHARED GOVERNANCE, https://senate.universityofcalifornia.edu/_files/resources/shared-gov-org-of-senate-review-process.pdf [<https://perma.cc/Z6YJ-562X>] (graphical representation of the Academic Senate’s governance structure). After considering comments on the report from various University committees, the full Academic Assembly transmitted its own recommendation on the task force report to the president of the University, who in turn was to offer her own recommendation to the Regents of the University. Bhavnani Letter, *supra* note 19.
 26. UC Office of the President, *University of California Board of Regents Unanimously Approved Changes to Standardized Testing Requirement for Undergraduates*, U. C.: PRESS ROOM (May 21, 2020), <https://www.universityofcalifornia.edu/press-room/university-california-board-regents-approves-changes-standardized-testing-requirement> [<https://perma.cc/VY57-Z4WT>].

While the task force proceeded, a group of students filed a lawsuit demanding that the tests be dropped from the admissions process because they constituted an unfair barrier to access for Black and Latinx high school students applying to the University.²⁷ But current and prospective students did not play a direct, major role in the task force's analysis and discussion: it had only one undergraduate student member. Nor were students invited to address the task force as witnesses with expertise on the admissions process from the user's perspective or on the undergraduate experience. Nor were students invited to comment on how they viewed the criteria considered by the University admissions office. In retrospect, the absence of student voices is striking, because students have strong views on the subject of merit.²⁸

Various senior officials in the University and a few of the Regents also weighed in on the issue the task force was to address, arguing that the University should abandon the tests.²⁹ The task force was closely monitored by the news media, which reported that a decision by the University to stop using the tests would reverberate throughout higher education because the University of California is enormous and because its campuses are considered bellwethers in academia.

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27. Complaint, *Smith v. Regents of the Univ. of Cal.*, No. RG19046222 (Cal. Super. Ct., Dec. 10, 2019), <http://www.publiccounsel.org/tools/assets/files/1250.pdf> [<https://perma.cc/D7DL-GA69>] [hereinafter Complaint].
 28. Student newspapers around the University of California system ran editorials revealing such strong views. See, e.g., *A New UC Test Would Fail as SAT, ACT Have*, DAILY CALIFORNIAN (May 28, 2020), <https://www.dailycal.org/2020/05/28/a-new-uc-test-would-fail-as-sat-act-have> [<https://perma.cc/Y7QB-TNTA>] (arguing that the University should “[b]ecom[e] test-blind . . . [to] help the UC system abandon admissions criteria that further inhibit diversity”); see also Elaine Chen, Opinion, *UC Must be Mindful to not Perpetuate Inequity With Replacement Admissions Exam*, DAILY BRUIN (May 28, 2020, 5:35 PM), <https://dailybruin.com/2020/05/28/uc-must-be-mindful-to-not-perpetuate-inequity-with-replacement-admissions-exam> [<https://perma.cc/7SBK-S5GX>] (calling on the University to “dedicate the proper resources, time and oversight to ensure its test is ready by 2025 and doesn’t further accentuate existing socioeconomic cleavages”); see also Ean Kimura, *UC Needs to Consider These Alternates for the SAT, ACT*, CAL. AGGIE (Oct. 28, 2020), <https://theaggie.org/2020/10/28/uc-needs-to-consider-these-alternates-for-the-sat-act/> [<https://perma.cc/GP4C-UULM>] (proposing that the University require other arbitrary tests, such as measuring prior sexual experience and the ability to endure tests of the national emergency broadcast system).
 29. Watanabe, *supra* note 22 (reporting that the “chancellors of UC Berkeley and UC Santa Cruz, along with the University of California’s chief academic officer, sa[id] they support dropping the SAT and ACT as an admission requirement” and that “[s]ome of the UC system’s 26 voting regents have expressed deep skepticism or outright opposition to the continued use of the SAT and ACT, including Chairman John A. Pérez, Vice Chairwoman Cecilia Estolano and Regent Eloy Ortiz Oakley”).

The task force produced a draft report (the Report) for the Academic Senate in January 2020.³⁰ The Report called for creation of a new set of assessments to take the place of the SAT and ACT—a development project that the Report predicted would require nearly a decade—and for continued use of the SAT and ACT until new assessments were created.³¹ The recommendation to continue use of the tests in the meantime, which deeply divided the task force, was met with consternation by civil rights advocates concerned over equity in access to higher education.³² By way of disclosure, I note that I was a member of the faculty task force, and one of six members who signed an additional statement calling for abandonment of consideration of standardized test scores in admissions more quickly than the full report contemplated.³³

In April 2020, the Academic Assembly, the representative body of the faculty of the University, voted unanimously³⁴ to endorse the recommendations of the task force, though with reservations about the possibility of designing a new test.³⁵ The Assembly also discussed the additional statement “at length, but did not arrive at a final decision.”³⁶ Less than a month later, the Regents rejected the recommendation and voted to suspend use of the SAT and the ACT in admissions. This Part identifies challenges the pandemic posed for retaining prior measures of merit: the disparate effects of requiring differently situated students to take standardized tests during the pandemic and the disparate effects of requiring differently situated students to take standardized tests at all.

30. UNIV. OF CAL. ACAD. SENATE, REPORT OF THE UC ACADEMIC COUNCIL STANDARDIZED TESTING TASK FORCE (STTF) (2020), https://senate.universityofcalifornia.edu/_files/underreview/sttf-report.pdf [<https://perma.cc/YB6K-CFTV>] [hereinafter REPORT].

31. *Id.* at 109–16.

32. Larry Gordon & Michael Burke, *Critics Will Fight on Despite Faculty Report Urging University of California to Keep SAT and ACT in Admissions*, EDSOURCE (Feb. 4, 2020), <https://edsources.org/2020/uc-report-upholds-test-scores-in-admissions-while-critics-pledge-to-fight-on/623299> [<https://perma.cc/JM8Y-QC78>].

33. Letter From Eddie Comeaux & Henry Sánchez, Standardized Testing Task Force Co-Chairs, Univ. of Cal., to Kum-Kum Bhavnani, Chair, Acad. Council (Jan. 27, 2020), https://senate.universityofcalifornia.edu/_files/underreview/additional-statement-sttf-report-feb20.pdf [<https://perma.cc/GJ48-VW3U>].

34. With one abstention. See Bhavnani Letter, *supra* note 19.

35. *Id.* Members of the Assembly expressed concern about the UC’s “capacity to develop the assessment, its expense, its utility beyond UC, and the related concern that a new test could burden students who would need to take both a UC-specific test and the SAT/ACT for admission to other institutions.” *Id.*

36. *Id.*

A. Health and Equity

On the advice of medical experts who had studied how the virus was transmitted, in March 2020 much of the United States shut down and cities, counties, and states—including California—issued “stay home” orders requiring residents to remain inside.³⁷ California’s K–12 schools closed,³⁸ while colleges and universities in the state switched almost overnight and mid-term to offering classes online, closed their campuses, and sent most of their residential students home.³⁹ The goal of these drastic steps, akin to those taken almost exactly a century earlier when the nation confronted a flu pandemic,⁴⁰ was to reduce rates of transmission or “bend the curve”⁴¹ by reducing how often students were in close proximity to each other. Not surprisingly, the University took these steps despite their potential adverse impact on the ability to achieve other goals like protecting the quality of education of students, or preserving standards for admission to the University.⁴²

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37. See, e.g., EXECUTIVE DEPARTMENT, STATE OF CALIFORNIA, EXECUTIVE ORDER N-33-20 (Mar. 19, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf> [<https://perma.cc/GE4U-UXPA>] (ordering “all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors”) [hereinafter EXECUTIVE ORDER].
38. Howard Blume, Sonali Kohli, Ruben Vives, Alex Wigglesworth & Hailey Branson-Potts, *Los Angeles Unified District to Close All Schools*, L.A. TIMES (Mar. 13, 2020, 3:41 PM), <https://www.latimes.com/california/story/2020-03-13/los-angeles-schools-closure-possible-cornavirus> [<https://perma.cc/J49L-SFEW>].
39. Teresa Watanabe, *UC Should Prepare for Online Classes, Limited Dorms Beyond Fall*, *UC Health Chief Says*, L.A. TIMES (Sep. 17, 2020, 6:42 PM), <https://www.latimes.com/california/story/2020-09-17/coronavirus-uc-university-california-online-classes> [<https://perma.cc/GVJ3-XK6D>].
40. Alexandra M. Stern, Martin S. Cetron & Howard Markel, *Closing the Schools: Lessons From the 1918–19 U.S. Influenza Pandemic*, HEALTH AFFS. 1066, 1067 (2009).
41. EXECUTIVE ORDER, *supra* note 37.
42. Or at least, not for weeks. Well into the second month of the lockdown, education experts with increasing frequency expressed concern over the harm caused by school closures to students’ education. See, e.g., Shawn Hubler, Erica L. Green & Dana Goldstein, *Despite Trump’s Nudging, Schools Are Likely to Stay Shut for Months*, N.Y. TIMES (Apr. 30, 2020), <https://www.nytimes.com/2020/04/28/us/coronavirus-schools-reopen.html> [<https://perma.cc/8HEP-H42H>] (“To make up for lost classroom time, schools may need to provide remedial instruction, additional special-education services and counseling. . .”). College student groups filed lawsuits alleging that the move to remote learning had severely impacted the quality of the education they received. See Teresa Watanabe, *Students Sue UC, Cal State, Demanding Coronavirus-Related Refunds of Campus Fees*, L.A. TIMES (Apr. 28, 2020, 5:34 PM), <https://www.latimes.com/world-nation/story/2020-04-28/lawsuit-california-universities-owe-virus-related-refunds> [<https://perma.cc/8SEM-J89L>] (reporting on lawsuit against California schools as well as against colleges and universities in other states). Those focused on inequality in K–12 education worried that continued and consistent access to public

This Subpart examines how the COVID-19 pandemic forced a new receptiveness to changes to admission criteria.

In this context, requiring students to take the typical admissions tests, would have constituted a serious risk to the health of test-takers and anyone who might come into contact with test-takers. After all, the typical test administration practice through winter 2020 involved students assembling in close proximity in rooms at test sites and sharing the same airspace: a practice that could result in students potentially passing the virus on to each other. Under the plan approved by the Regents in May 2020, the University would consider SAT and ACT scores in making admissions decisions if applicants provided them in the fall 2021 and fall 2022 admissions cycles and would not consider them at all in admissions thereafter.⁴³ The University would adopt a new test for applicants by fall 2025 or use no test at all.⁴⁴

The University of California was not alone in taking this step, but the system is one of the largest users of these standardized tests, and the Regents' decision drew considerable public attention. A growing number of selective colleges and universities issued announcements over the course of March and April 2020 that they would not require applicants for admission to submit test scores.⁴⁵ And suspending the test requirement was not the only change in policy that the University announced: the University also suspended specific course requirements for admission, as well as minimum grade requirements in those classes.⁴⁶

Concerns beyond the immediate risk of contributing to the spread of disease seem to have motivated the University to make these changes, however. For example, there was the worry that students who had taken the test before the nation's shutdown would enjoy an unfair advantage over those who had planned

education was more available to students whose families already had greater financial resources. See Editorial Board, Opinion, *Locked Out of the Virtual Classroom*, N.Y. TIMES (Mar. 27, 2020), <https://www.nytimes.com/2020/03/27/opinion/coronavirus-internet-schools-learning.html> [<https://perma.cc/2GWE-NAXD>] (“America came face to face with the festering problem of digital inequality when most of the country responded to the coronavirus pandemic by shutting elementary and high schools . . .”).

43. MAY 22 APPROVED ACTIONS, *supra* note 11, at 3–4. Test scores could still be considered for purposes of awarding scholarships, placement in classes, and determination of whether an applicant was eligible for the state's admission guarantee. Memorandum From Office of the President, Univ. of Cal., for the Meeting of May 21, 2020, to the Bd. of Regents (May 21, 2020), <https://regents.universityofcalifornia.edu/regmeet/may20/b4.pdf> [<https://perma.cc/GG8G-34ED>].

44. MAY 22 APPROVED ACTIONS, *supra* note 11, at 3–4.

45. Vigdor & Diaz, *supra* note 13.

46. Press Release, *supra* note 12.

to take it on dates now unavailable. And outside advocates for greater equity in admissions cited a third concern: the fear that requiring the tests under such extraordinary and difficult circumstances could exacerbate preexisting inequality among the applicant pool.⁴⁷

The concerns other than health were not entirely new; relative privilege and the benefits advantaged students enjoy in admissions are widely recognized. But the receptiveness to these concerns was new. The temptation may be great to dismiss suspension of testing requirements as a case of interest convergence, as analyzed by the late Derrick A. Bell, Jr.: relatively powerful groups will support policies that aid Black people only if doing so also advances the interests of the powerful.⁴⁸ However, the plan to eliminate the testing requirement represented a recognition of the opportunity that the University had to try to ameliorate the effects of longstanding inequality that the pandemic made more visible.⁴⁹ The pandemic helped make possible what more abstract arguments about equity had long failed to achieve.⁵⁰

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47. See Teresa Watanabe & Nina Agrawal, *UC to Ease Admission Requirements: No SAT, no Letter Grades Due to Coronavirus*, L.A. TIMES (Apr. 1, 2020, 5:46 PM), <https://www.latimes.com/california/story/2020-04-01/uc-to-suspend-admission-requirements-for-sat-minimum-gpas-to-help-students-during-coronavirus-crisis> [<https://perma.cc/9PCY-2L96>] (describing concerns of advocacy groups focused on equity in admissions that the “coronavirus crisis has exacerbated inequities in education as students struggle with access to computers, the internet, counseling and guidance”).
 48. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (famously postulating that the “interest of blacks [sic] in achieving racial equality will be accommodated only when it converges with the interests of whites . . . [but that] the fourteenth amendment [sic], standing alone, will not authorize a judicial remedy providing effective racial equality for blacks [sic] where the remedy sought threatens the superior societal status of middle and upper class whites”). Certainly, at the time of the announcement of the initial suspension of the test requirement in May 2020, both University faculty and the president of the University emphasized that the move was temporary. Press Release, BD. OF REGENTS OF THE UNIV. OF CAL., *supra* note 12.
 49. There is another consideration, rarely explored openly, that may have played a role in making the decision. Consider: Perhaps the requirement that applicants submit scores on the SAT or ACT functioned as a barrier in general to aspiring University students. At a time of great uncertainty about application and enrollment volume, any hurdle to enrolling sufficient students, and obtaining the corresponding revenue from them, must have appeared most unwelcome.
 50. The pandemic also bolstered the arguments made by plaintiffs who had sued the University over its use of standardized tests. A trial court judge issued an injunction enjoining use of the tests because of the disparate effects on applicants with disabilities under the interim “test optional” regime adopted by the Regents. *Smith v. Regents of the Univ. of Cal.*, No. RG19046222, (Cal. Super. Ct., Aug. 31, 2020), (order granting preliminary injunction), <http://www.publiccounsel.org/tools/assets/files/1489.pdf> [<https://perma.cc/5UNY-DFHZ>].

B. Merit and Equity

The University's Academic Senate had at various times in the past investigated the role and effect of using standardized test scores in undergraduate admissions, recognizing the disturbing patterns in admission and enrollment: Black and Latinx students are underrepresented systemwide and are particularly underrepresented at the flagship campuses of the University of California, Berkeley and the University of California, Los Angeles.⁵¹ This was so even when the University was permitted to take race into account in making admissions decisions, though the loss of that ability made achieving diversity even more difficult.⁵² This Subpart explains that because test scores have been accepted as indicia of merit, longstanding disparities in enrollment have fed into a narrative of tension between diversity and excellence.

The task force concluded that scores on the SAT and ACT are “better predictors of first-year GPA than high school grade point average (HSGPA), and about as good at predicting first-year retention, [university grade point average], and graduation.”⁵³ If the University were to abandon consideration of these test scores in admissions, the Report asserted, several undesirable results would follow, including lower grades earned by the average undergraduate student in the first year, weakened ability of the University to support students who need academic assistance, higher costs of educating students as more students would take longer to graduate, and an uncertain effect on diversity.⁵⁴ The conclusion, not so explicitly stated, was that changing admissions factors would cause more harm than would keeping the factors then in use. The basis of this normative conclusion goes unspecified in the Report itself. Like prior faculty reports on the impact of

51. The University maintains an interactive website that allows observation of aggregate and campus-specific statistics on the diversity of the applicant pool and enrolled student body. See *Undergraduate Admissions Summary*, U.C., <https://www.universityofcalifornia.edu/infocenter/admissions-residency-and-ethnicity> [https://perma.cc/RQR5-3UB8].

52. The Regents of the University of California banned consideration of race in admissions in 1995 and the people of California banned the practice both in the context of admissions and financial aid by referendum the following year. WILLIAM C. KIDDER & PATRICIA GÁNDARA, TWO DECADES AFTER THE AFFIRMATIVE ACTION BAN: EVALUATING THE UNIVERSITY OF CALIFORNIA'S RACE NEUTRAL EFFORTS 1 (Oct. 2015), https://www.ets.org/Media/Research/pdf/kidder_paper.pdf [https://perma.cc/5J8M-YSF5]. Kidder and Gándara found that the University “has never come close to a student body representing the state's population.” *Id.* at i.

53. REPORT, *supra* note 30 at 3.

54. *Id.* at 85.

standardized testing,⁵⁵ the Report did not specify how “useful”⁵⁶ a test had to be as a predictor of success in the University.

The recommendation that the role of the SAT and ACT be maintained encountered fierce criticism from scholars who study the impact of standardized tests on access to higher education and from advocacy groups pursuing equity in admissions. One critic argued that the methodology used to assess whether the SAT and ACT predicted academic performance in the University failed to consider student demographics, including family income and level of parental education.⁵⁷ These demographic characteristics correlated with test scores and with performance in college, Saul Geiser wrote, and “when researchers fail to control for income in their prediction models, the predictive value of the tests is artificially inflated and appears much greater than is actually the case.”⁵⁸ Geiser argued that high school grades were better predictors of performance in the University once other variables are considered,⁵⁹ and noted that prior studies of correlates of academic performance had reached the same conclusion.⁶⁰ Jesse Rothstein, in a separate critique, made the point succinctly: “[T]he SAT appears to be a strong predictor of student success because students from disadvantaged backgrounds are less prepared to succeed, and the SAT is a very effective measure of student advantage.”⁶¹ The implication was that the SAT and ACT scores were

55. In addition to the 2002 and 2009 reports on the use of standardized tests in admissions generally, the Academic Senate’s Board of Admissions and Relations with Schools also evaluated particular aspects of the tests, addressing revisions to the SAT examination, for example. Letter From George Johnson, Chair, Bd. of Admissions and Relations With Schs., to William Jacob, Chair, Acad. Council (July 8, 2014), https://senate.universityofcalifornia.edu/_files/committees/boars/SAT_Redesign.pdf [<https://perma.cc/FDM8-YGU9>] (approving adoption of the then-revised SAT for use in University of California admissions).

56. UC USE OF ADMISSIONS TESTS, *supra* note 23, at 15–16 (specifying principles for use of standardized tests in University of California admissions including the difficult-to-dispute but difficult-to-define requirement that any admissions “test should be useful in a way that justifies its social and monetary costs”).

57. Saul Geiser, *SAT/ACT Scores, High School GPA, and the Problem of Omitted Variable Bias: Why the UC Taskforce’s Findings Are Spurious 2* (Berkeley Ctr. for Stud. in Higher Educ. Rsch. & Occasional Paper Series CSHE 1.2020, Mar. 2020), https://cshe.berkeley.edu/sites/default/files/publications/2.rops.cshe.1.2020.geisersatactommitted_variables.3.18.2020.pdf [<https://perma.cc/3AUQ-8735>].

58. *Id.*

59. *Id.*

60. *Id.* at 1.

61. Jesse Rothstein, *Comments on the Standardized Testing Task Force Report’s Treatment of Predictive Validity and the Use of SATs in Current University of California Admissions*, in UC REGENTS SHOULD CONSIDER ALL EVIDENCE AND OPTIONS IN DECISION ON ADMISSIONS POLICY 20, 22 (2020), https://edpolicyinca.org/sites/default/files/2020-04/uc_regents_admissions_analysis.pdf [<https://perma.cc/HR9J-SNXW>].

not necessary to make admissions decisions if the goal was to identify students more likely to do well—wealth would do just as good a job. That is an uncomfortable finding for institutions that claim their goal is to enroll the best and brightest, rather than the wealthiest.

Analyses of enrollment patterns identify various causes, but the usual suspect blamed for enrollment disparities is the relative ability of public K–12 schools in different neighborhoods, with different levels of resources, to prepare students comparably to gain admission. Schools in California, and in many places nationwide, are highly segregated along lines of race,⁶² and better-resourced schools tend to enroll students who are white, who are of Asian descent, or whose families have higher earnings or greater wealth.⁶³ It is seductive to tell a story of unequal funding of public education that has the unfortunate result of producing students who have poor scores on the ACT and SAT. The tests, in this view, are the thermometer measuring the extent of the problem, and should not be blamed themselves.⁶⁴ This perspective requires acceptance of the idea that scores on the ACT and SAT reflect academic readiness as opposed to family wealth and privilege—with which scores also correlate—and that students who earn lower scores are unready and should not be admitted by highly selective colleges and universities.⁶⁵ College admission becomes a zero-sum game in which pursuit of

62. GARY ORFIELD, ERICA FRANKENBERG, JONGYEON EE & JOHN KUSCERA, *BROWN AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE* 20, 25 (May 15, 2014), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf> [<https://perma.cc/T4JH-H84W>] (showing the degree of racial isolation of Black students and Latinx students, respectively).

63. *EDBUILD*, \$23 BILLION, at 4, (Feb. 2019), <https://edbuild.org/content/23-billion/full-report.pdf> [<https://perma.cc/X9BN-MHW3>] (describing spending per student in predominantly white school districts relative to predominantly nonwhite districts); see also Sean F. Reardon & Ann Owens, *60 Years After Brown: Trends and Consequences of School Segregation*, 40 *ANN. REV. SOCIO.* 199, 204 (2014).

64. This is the analogy used by the chief executive of ACT. Teresa Watanabe, *UC Violates Civil Rights of Disadvantaged Students by Requiring SAT for Admission*, *Lawsuits Say*, *L.A. TIMES* (Dec. 10, 2019, 4:35 PM), <https://www.latimes.com/california/story/2019-12-10/uc-violates-civilrights-of-disadvantaged-students-by-requiring-sat-for-admission-lawsuit-alleges> [<https://perma.cc/8QH5-4XH4>].

65. As the Report notes, the pattern in scores of admitted students does not suggest that the University's admissions offices have a specific, cutoff score in mind—a score indicating that a student is certainly not ready. Rather, the higher a student's score, the more likely that the student will be admitted, suggesting that admissions offices use scores to rank students relative to each other rather than to assess absolute level of preparation. *REPORT*, *supra* note 30, at 67–68 (“Because test scores have predictive power among students within particular disadvantaged groups (e.g. URM, first-generation, low family income, low parental education

one goal (academic excellence) precludes achievement of another (equity in access).

Language in the legal complaint filed against the University over use of the SAT did not directly contest this tradeoff but argued that any incremental increase in excellence achieved by using the standardized test scores in admissions did not justify the adverse effects on particular applicants⁶⁶ and violated state law.⁶⁷ According to the complaint, the Regents had improperly “determined that the minimal added value of SAT and ACT scores in predicting first-year GPA outweigh[ed] their harms to underrepresented minority students, students with disabilities, and students with less wealth.”⁶⁸

Continuing to require the SAT and ACT could have worsened disparities, given changes in test administration methods responding to the impact of the pandemic on test administrations. Both ACT and the College Board—the companies that administer the ACT and SAT, respectively—announced plans to make the tests available remotely, online, enabling students to take them from home.⁶⁹ At-home testing could well exacerbate the effects of inequality, because some students would be able to complete the examination in peace and quiet, with the benefit of reliable internet access, perhaps with the benefit of a large computer monitor, while other students might have none of these things.⁷⁰ These advantages would reinforce others that relatively privileged students already enjoy, such as access to preparatory courses and private tutoring. Even some of the advocates of preserving a role for these test scores in the admissions process called for changes to make test-taking fairer.⁷¹

level), they are used effectively to select among students within each group who are less likely to succeed and to admit students who are more likely to succeed.”).

66. Complaint, *supra* note 27, at ¶¶ 195–200.

67. *Id.* ¶¶ 205–48.

68. *Id.* ¶ 9.

69. Anemona Hartocollis & Dana Goldstein, *Students Might Have to Take College Admissions Tests at Home This Fall*, N.Y. TIMES (Apr. 15, 2020), <https://www.nytimes.com/2020/04/15/us/sat-act-test-coronavirus.html> [<https://perma.cc/VH7V-U7EF>] (“Even the possibility brought stark warnings from critics and testing experts, who said at-home tests could exacerbate inequality, raise privacy issues and make it easier to cheat.”).

70. Anemona Hartocollis, *College Board Scraps Plans for SAT at Home*, N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/2020/06/02/us/at-home-sat-coronavirus.html> [<https://perma.cc/PJ6N-MU3S>].

71. See, e.g., Elizabeth Currid-Halkett, Opinion, *A Pandemic Isn’t a Reason to Abolish the SAT*, N.Y. TIMES (May 1, 2020), <https://www.nytimes.com/2020/05/01/opinion/coronavirus-test-optional-sat.html> [<https://perma.cc/X8DA-3ED2>] (arguing that standardized tests should be retained and that “our top priority should be to figure out a way for lower-income students to prepare for the tests, given that so many will be at home in possibly cramped living environments that are not amenable to studying”). Further, remote administration of the tests

But the zero-sum conceit that the above arguments accept rests on unstated, shaky assumptions. First, colleges and universities do not argue that the goal of admissions is to maximize first-year grades, overall grades, the graduation rate, or any of the results-oriented measures typically cited to justify use of the SAT or ACT in admissions. Second, if colleges and universities blame inequality in K-12 schooling for disparities in admissions along lines of race and class, they must justify their acceptance of such unfairness. Perhaps the mission of higher education institutions should require them to make up for disparities. If colleges and universities are to be complicit in an overall inequitable system of education, there should be a reason. The next Part turns to this question.

II. RATIONALES FOR CONSIDERATION OF SAT AND ACT TEST SCORES AND QUESTIONS OF INSTITUTIONAL MISSION

The California Constitution describes the University of California as a “public trust,” overseen by the Regents.⁷² Two policies of the Regents, 2101 and 2102, define the goals of the undergraduate admissions process:

[T]o admit the largest possible number of qualified students consistent with the maintenance of the quality of instruction,⁷³ and

to enroll, on each of its campuses, a student body that, beyond meeting the University’s eligibility requirements, demonstrates high academic achievement or exceptional personal talent, and that encompasses the broad diversity of cultural, racial, geographic, and socioeconomic backgrounds characteristic of California.⁷⁴

Also affecting admissions decisions is the concrete need for revenue, which can be boosted by the enrollment of more students who are not state residents and

presented obvious security problems. Determined families would almost certainly work to subvert them, and a scandal around college admissions a year earlier illustrated just how far ambitious and wealthy parents will go to get their children into specific colleges and universities. Jennifer Medina, Katie Benner & Kate Taylor, *Actresses, Business Leaders and Other Wealthy Parents Charged in U.S. College Entry Fraud*, N.Y. TIMES (Mar. 12, 2019), <https://www.nytimes.com/2019/03/12/us/college-admissions-cheating-scandal.html> [<https://perma.cc/53NB-GXEW>].

72. CAL. CONST., art. IX, § 9.

73. *Regents Policy 2101: Policy on Admissions*, U.C.: BD. OF REGENTS, <https://regents.universityofcalifornia.edu/governance/policies/2101.html> [<https://perma.cc/9WJB-55P2>].

74. *Policy 2101*, *supra* note 73.

who pay higher tuition to the university.⁷⁵ This can contribute to controversy because it may appear that enrolling more students from elsewhere denies a University of California education to a resident. Some research suggests that nonresident students' payments contribute to institutional quality, which would redound to the benefit of in-state students.⁷⁶

The challenge is how to allocate public higher education opportunity in the state. Screening mechanisms include cost, grades, prerequisite high school course requirements, various measures of individual achievement in extracurricular and other activities, and of course, scores on the SAT or ACT.⁷⁷ But the rationales for requiring such qualifications, like the relationships among them (Do higher high school grades make up for fewer extracurricular activities? How much can athletic ability serve as a substitute for lower test scores?), are rarely addressed. The difficulty lies in identifying any single or overriding goal in making admissions decisions: Preparing future leaders?⁷⁸ Countering historic underrepresentation of students of particular backgrounds?⁷⁹ Rewarding hard work? Ensuring a sufficiently well-trained labor force in the future?⁸⁰ Representing the population of the state, nation, or world—and if so, how precisely? The absence of a single, clearly specified goal of admissions and indeed, the impossibility of achieving the multiple, potentially conflicting goals the University pursues, enormously complicates any effort to evaluate, let alone change, current processes. Any reform benefits some and harms others or is perceived to do so. This Part questions who

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75. *Tuition & Cost of Attendance*, U.C.: ADMISSIONS, <https://admission.universityofcalifornia.edu/tuition-financial-aid/tuition-cost-of-attendance> [<https://perma.cc/UMR3-NJ4V>] (showing different total costs of attendance for resident and nonresident students).
76. Michael J. Rizzo & Ronald G. Ehrenberg, *Resident and Nonresident Tuition and Enrollment at Flagship State Universities*, in *COLLEGE CHOICES: THE ECONOMICS OF WHERE TO GO, WHEN TO GO, AND HOW TO PAY FOR IT* 303, 338–39 (Caroline M. Hoxby ed., 2004), <https://www.nber.org/chapters/c10103.pdf> [<https://perma.cc/D8LV-K9X2>].
77. *Regents Policy 2103: Policy on Undergraduate Admissions Requirements*, UNIV. OF CAL.: BD. OF REGENTS, <https://regents.universityofcalifornia.edu/governance/policies/2103.html> [<https://perma.cc/NDD4-DWGQ>] (describing undergraduate admissions requirements).
78. This is the rationale recognized by the U.S. Supreme Court. *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637, 641 (1950).
79. *Regents Policy 4400: Policy on University of California Diversity Statement*, U. C.: BD. OF REGENTS, <https://regents.universityofcalifornia.edu/governance/policies/4400.html> [<https://perma.cc/SP36-MPJK>] (“The University particularly acknowledges the acute need to remove barriers to the recruitment, retention, and advancement of talented students, faculty, and staff from historically excluded populations who are currently underrepresented.”).
80. HANS JOHNSON, MARISOL CUELLAR MEJIA & SARAH BOHN, *WILL CALIFORNIA RUN OUT OF COLLEGE GRADUATES?* 2 (Oct. 2015), https://www.ppic.org/content/pubs/report/R_1015HJR.pdf [<https://perma.cc/BMZ6-Y8RL>] (“If current trends in the labor market persist, by 2030 California will have a shortage of 1.1 million workers holding a bachelor’s degree.”).

should be making decisions about admissions qualifications, the definition of merit, and the possibilities for the evolution of merit.

A. Decisions To Be Made

A threshold matter is who should be permitted to answer any of these questions, which are inherently bound up in politics, history, and culture. There is no disinterested group: high school students, currently enrolled University students, alumni, parents, politicians, and taxpayers all have strong views. Even faculty members, trained in critical analysis, are conflicted, for they care deeply about institutional excellence, which in turn is reflected in rankings that place a premium on admitted students' scores on the SAT and ACT.⁸¹ Further, the people who become college and university professors, who have been steeped in the established culture of the academy and who are likely to have attended institutions that disproportionately enroll applicants with high test scores, may find it very difficult to accept, let alone adopt, a more nuanced definition of excellence. At the same time, faculty members may "lean left" in their social and political views,⁸² and so may wish to promote mobility and advance equity in the academy.

In recommending that the University continue to use the SAT and ACT in admissions, the faculty task force implicitly endorsed the importance of whatever those tests measure, justifying this position by citing outcomes that correlate with test scores, like first-year grades.⁸³ The Academic Senate adopted the same reasoning when its decisionmaking body voted to endorse the task force report.⁸⁴

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81. For example, the influential U.S. News & World Report rankings take into account test scores of students enrolled. Robert Morse & Eric Brooks, *How U.S. News Calculated the 2021 Best Colleges Rankings*, U.S. NEWS & WORLD REP. (Sept. 13, 2020), <https://www.usnews.com/education/best-colleges/articles/how-us-news-calculated-the-rankings> [<https://perma.cc/U379-YY5E>].
 82. Scott Jaschik, *Professor and Politics: What the Research Says*, INSIDE HIGHER ED (Feb. 27, 2017), <https://www.insidehighered.com/news/2017/02/27/research-confirms-professors-lean-left-questions-assumptions-about-what-means> [<https://perma.cc/QF7V-LJ3>].
 83. There are other correlations as well, but high school grades perform as well or better than SAT and ACT scores for purposes of making predictions. See REPORT, *supra* note 30, at 19–20 (“At present, test scores are a slightly better predictor of freshman grades than high school grades are [and] . . . [b]oth grades and scores are stronger predictors of early outcomes (freshman retention and GPA) than of longer-term outcomes (eventual graduation and graduation GPA)”).
 84. In endorsing the Report, the Academic Senate disregarded the views of the six members of the task force who supported abandoning the tests more quickly. This point matters, insofar as the decision of the president to side with the task force members who signed the additional statement urging faster abandonment of standardized testing means that when she did not adopt the Academic Council’s recommendation, she did not wholesale reject a role for

The president of the University did not adopt the view of the Academic Council or the majority of the task force, effectively siding with the minority view that the consideration of the standardized tests should cease sooner, and the Regents unanimously supported the president's recommendation. The sequence of events suggests that the definition of merit is the product of an exercise of power. While the Regents chose to emphasize equity, making the political decision that was theirs to make, they could also choose or be compelled to pursue different goals in the future.⁸⁵ Battles over who should get in will almost certainly continue—especially as the University takes on the challenge of selecting entering classes without considering test scores.

B. The Malleability of Merit

Discussion of the use of standardized tests in higher education admissions often focuses on the question of whether a particular student possesses the requisite indicia of merit to be granted a precious slot in the entering class. Not surprisingly, this question is top of mind for ambitious applicants and their parents, who are both heavily invested in success in the admissions contest.⁸⁶ Yet the question of which individual student should get in is at best the fourth to be asked when evaluating admissions processes; this Essay is motivated by concern that insufficient attention has been paid in current debates to the first three. Those prior questions are:

1. What is merit?
2. What is evidence of merit?

University faculty in setting admissions criteria; she simply agreed with different members of the faculty.

85. For example, as of this writing, lawmakers in Sacramento are debating whether to require the University to reduce the number of out-of-state students enrolled, for example – prioritizing access for in-state residents. Teresa Watanabe, *A Bold Plan for U.C.: Cut Share of Out-of-State Students by Half Amid Huge California Demand*, L.A. TIMES (May 25, 2021, 5:00 AM), <https://www.latimes.com/california/story/2021-05-25/bold-plan-for-uc-admissions-reduce-out-of-state-students>.

86. Again, the readiness of parents to engage in criminal conduct in an effort to get their children admitted to selective institutions illustrates just how deep the degree of investment is. See Medina et al., *supra* note 71 (noting that the criminal “charges also underscored how college admissions have become so cutthroat and competitive that some have sought to break the rules”).

3. To what extent should the designated notion of merit, whatever it is, determine who enjoys access to selective,⁸⁷ public higher education?

The meaning of merit has changed over time, as the work of Joseph F. Kett has demonstrated convincingly.⁸⁸ Greatness that could be demonstrated on the battlefield as a manifestation of heroic character and raw combat ability, both arguably inherent traits, has declined in importance relative to greatness that can be demonstrated by performing well on a test.⁸⁹ There are other attributes that could be assessed and taken into account in admissions decisions, such as the ability to empathize with others, to manage conflict, to engage in critical analysis, or to tolerate difference.⁹⁰ The typical standardized test does not capture the many facets of applicants. Admissions officers at selective colleges and universities know this and try to build a class that includes students with different kinds of abilities. One implication is that no single definition of merit is workable. But there is enormous popular reluctance to question any particular notion of merit, in part because to do so is to challenge an entire complex around admissions, but also because the motives behind any such effort are inevitably suspect: those proposing a particular definition of merit may be dismissed as pursuing their own interest, designing a test upon which they expect to excel.

One appeal of the SAT and ACT has been their reduction of merit to a set of numbers. These numbers get considerable attention; applicants with high numbers

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87. It bears emphasis that most students in the United States do not attend highly selective colleges and universities. Slightly more than one in five undergraduate students attend institutions that reject half or more of applicants; most students attend colleges and universities that accept at least half of their applicants. *Digest of Education Statistics*, INST. OF EDUC. SCIS.: NAT'L CTR. FOR EDUC. STAT., tbl. 305.40, https://nces.ed.gov/programs/digest/d18/tables/dt18_305.40.asp?current=yes (last visited May 2, 2020) [<https://perma.cc/YM82-E7T9>]. But the most selective institutions, such as those in the Ivy League and several in the University of California system, play an outsized role in discussions of selective admissions, face litigation over the admissions practices they use, and loom large in the minds of millions of students and parents. And the degree of underrepresentation of Black and Latinx students is greater at the more selective institutions, including the University of California, Berkeley, for example.
 88. JOSEPH F. KETT, MERIT: THE HISTORY OF A FOUNDING IDEAL FROM THE AMERICAN REVOLUTION TO THE 21ST CENTURY 5–6 (2013) (describing the evolution of concepts of merit in the United States from “essential” merit, demonstrated by great acts, to “institutional” merit, demonstrable on standardized tests).
 89. *Id.*
 90. These are some of the kinds of applicant characteristics that the task force hinted at in the section of the Report describing a hypothetical new admissions assessment that would use simulations and performance tasks. REPORT, *supra* note 30, at 111.

are not happy to be denied admission to selective institutions.⁹¹ Yet when explaining how they do what they do, admissions officers at selective institutions typically emphasize the multiple aspects of applicants they consider,⁹² and some note that though they make individual admissions decisions, the goal is to build a class.⁹³ Different strengths and weaknesses of different kinds of students are relevant to this exercise—different kinds of merit. While such applicant attributes and skills are difficult to reduce to one number and allowing them to play a role in admissions decisions runs the risk that unfair biases may play a role, tests also reflect subjective choices: Why include algebra in a math assessment for purposes of undergraduate admissions,⁹⁴ for example, but not multivariable calculus? After all, just one advanced question could help identify a rare superstar. At some time, a decision was made about what should be tested.

This observation highlights the importance, again, of the three threshold questions on merit. They are interrelated, which makes answering them that much more difficult. A more restrictive definition of merit that would limit greatly who gets in, for example, could be rejected in order to pursue egalitarian goals. A broader definition that results in admission of a group of students broadly representative of the applicant pool might be a reason for its adoption, for the same set of reasons. And some parents and policy makers might see conflict here, worrying that the more broadly distributed merit is—however it is defined—the less valid the definition. Put differently, the search for merit in applicants is part of an effort to distinguish those who have it from those who do not, so some share of students must be identified for exclusion, and the more who do not make it to the end of the process, the more significant that surviving student's achievement. Conversely, parents, students, and university officials may fear that a more open admissions regime would devalue each student's achievement.

91. The complaint in the lawsuit challenging Harvard College's consideration of race in its admissions decisions emphasized the high scores of students who were not admitted, implying that but for consideration of race, they would have and should have been admitted. Complaint at ¶ 20, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 14-cv-14176-DJC (D. Mass. Nov. 17, 2014).

92. The University of California, for example, identifies thirteen applicant characteristics to consider in making admissions decisions. *How Applications Are Reviewed*, U. C.: ADMISSIONS, <https://admission.universityofcalifornia.edu/how-to-apply/applying-as-a-freshman/how-applications-are-reviewed.html> [<https://perma.cc/9BAC-BS4G>].

93. See, e.g., *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, No. 14-cv-14176-ADB, at 25 (D. Mass. Sept. 30, 2019) (describing the admissions office's effort to build the "best freshman class" (emphasis added)).

94. *Heart of Algebra*, COLL. BD., <https://collegereadiness.collegeboard.org/about/alignment/math/heart-of-algebra> [<https://perma.cc/VXL7-8CUW>] ("The SAT Suite of Assessments focuses strongly on algebra and the key concepts that are most essential for success in college and career.").

Overt, explicit racism drops out of this story. Again, poor test scores can be attributed to the lack of resources of schools disproportionately attended by Black and Latinx students and to the socioeconomic advantages disproportionately held by students who are white and who are of Asian descent. But acceptance of the translation of socioeconomic advantage into more merit and, by extension, a higher level of college readiness implies that any assessment tool that does *not* manifest the disparities along lines of race and class that the SAT and ACT currently show, is suspect.

If the lack of financial and other resources is expected to lead to worse test performance, it is impossible to imagine a test that does not reproduce the disparities in the absence of a complete redistribution of resources; poor performance by these test-takers is validation of and essential to race and class hierarchy. Poor performance by Black and Latinx students reinforces a socioeconomic rationale that poverty yields low tests scores at the same time that it reinforces racial subordination. To paraphrase Professor Frank B. Wilderson III, there may be few or no Black people on campus, but, by the same token, there can be no campus without Black people, whose exclusion enables a particular conception of excellence.⁹⁵ Acceptance of parity of performance across lines of race and class—or even significant narrowing of the gap in scores—on an assessment would require, first, acceptance of an understanding of excellence that decouples socioeconomic advantage and merit. Even without acceptance, though, it should be evident that the tolerable extent of disparities caused by using any particular assessment presents not a positive, empirical question but a normative one: We must decide whether any criterion that reinforces societal inequality is acceptable and if so, how much reinforcement is tolerable. This decision should come before and should inform the choice of a definition of merit.

III. IMPLICATIONS OF THE SUSPENSION OF THE TEST REQUIREMENT

On the question of what definition of merit is normatively appropriate, jurisprudence does not offer much guidance. The Supreme Court has not outlawed use of admissions criteria that produce disparities along lines of race and class.⁹⁶ Indeed, the efforts of conservative members of the U.S. Supreme Court to

95. FRANK B. WILDERSON III, *AFROPESSIMISM* 40 (2020).

96. *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2234 (2016) (Alito, J., dissenting) (stating that defense of consideration of race in admissions by the University of Texas at Austin was “more than a little ironic [given] that UT uses the SAT, which has often been

hollow out the equal protection doctrine, undermining efforts to promote equality of opportunity by emphasizing that law provides a remedy only in instances of individual, invidious discrimination based on racial or other prohibited classification rather than in cases involving structural barriers that hinder members of groups long subject to de jure discrimination, is well documented.⁹⁷ That literature is beyond the scope of this Essay.⁹⁸ Rather, this Part draws out the implications of the University's abandonment of consideration of the standardized test scores in admissions. The discussion that follows turns to the question of what should come next, identifying the potential challenges of designing a new assessment tool, and offering guidance on how to prioritize equity in the process: by closely attending to the results.

The suspension of the testing requirement helps to suggest a path forward, because restricting use of test scores in response to a pandemic implies certain limits on admissions criteria. The University recognized that its need for the SAT and ACT scores in order to decide whom to admit existed in a context that could change. In early spring 2020, the context changed as a result of the COVID-19 pandemic: The considerations of health and safety, which the Academic Senate and the Regents had not previously had to consider, suddenly were not only evident but dispositive. And in the interim, as the disparate effects of the University's and the nation's responses to the pandemic became clear, considerations long set aside as insufficient to overcome the University's commitment to a particular notion of merit also emerged in a new light. The disparate, negative effect of using test scores on admission of Black and Latinx students led the Regents to adopt a plan for permanent abandonment of the tests. Both the interim and permanent moves constituted rejection of the consequences of an historical, ongoing, unfair distribution of resources along lines of race. And evidence emerged quickly of the significance of dropping the tests: The number of

accused of reflecting racial and cultural bias" and observing that "[e]ven if the SAT does not reflect such bias . . . SAT scores clearly correlate with wealth.").

97. See Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1787–88 (2012) (describing conservative justices' determination to "clos[e] courthouse doors to evidence showing continued racial hierarchy"); see also Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1144 (1997) (describing the "large body of literature criticizing discriminatory purpose doctrine, advancing proposals to modify, or abolish, the governing doctrinal framework").
98. This literature does help to explain why the lawsuit filed last year over the University's use of SAT and ACT scores rests on the Constitution and laws of the State of California rather than those of the United States.

Black and Latinx applicants to the University increased dramatically,⁹⁹ suggesting that the tests had been a powerful deterrent to many students of color.

Adopting any new assessment raises difficult, pragmatic questions. Should the distribution of scores on a new test be the same across all racial, ethnic, or socioeconomic groups? More specifically, should the test be allowed to produce some disparities, presumably reflecting the superior opportunities available to students who come from families of greater means?¹⁰⁰ Should the test be allowed to produce or reproduce disparities along lines of race, reflecting structural inequality and the toll of endemic discrimination and racial stress?¹⁰¹ It is unlikely that there is consensus on how these questions should be answered, but failure to think clearly about them heightens the risk that the University will adopt another assessment that has the same drawbacks as the old ones. Failure to identify a normative target beforehand may ensure a miss by the University.

It is not obvious where to begin in thinking about what an equitable selection process would look like. The best solution would likely entail eliminating the scarcity of college opportunity in the state, so that there would be no need to admit and enroll only a fraction of applicants. Instead, students could take placement tests upon matriculation to ensure readiness for classes they take, and the stakes would accordingly be low. However, as long as scarcity remains a hallmark of public higher education opportunity, students must somehow be chosen. For a moment, consider equity as a guide, then.

If disparities along lines of race and class do not represent innate differences in ability but are the result of students' opportunities and experiences,¹⁰² then in a

99. UC Office of the President, *All-Time Record-High Number of Applicants Apply to UC, With Chicana/Latina Students Comprising Largest Proportion*, U.C.: PRESS ROOM (Jan. 28, 2021), <https://www.universityofcalifornia.edu/press-room/all-time-record-high-number-applicants-apply-uc-chicanolatino-students-comprising-largest> [https://perma.cc/HJE2-4UJD]. The number of Black applicants increased by more than 20 percent. *Id.*

100. SAT scores typically follow a pattern: Students from families with higher incomes and students whose parents have completed more education receive higher scores. COLL. BD., TOTAL GROUP PROFILE REPORT: 2016 COLLEGE-BOUND SENIORS 4 (2016), <https://secure-media.collegeboard.org/digitalServices/pdf/sat/total-group-2016.pdf> [https://perma.cc/5KQ6-8DNK].

101. See Emma K. Adam et al., *Developmental Histories of Perceived Racial Discrimination and Diurnal Cortisol Profiles in Adulthood: A 20-year Prospective Study*, 62 PSYCHONEUROENDOCRINOLOGY 279, 288–89 (2015) (describing potential physical manifestations, including likelihood of illness, related to exposure to perceptions of race discrimination).

102. Analysts of the human genome have found that race has no biological basis. See, e.g., Elizabeth Kolbert, *There's No Scientific Basis for Race—It's a Made-Up Label*, NAT'L GEOGRAPHIC (Nov. 5, 2020, 6:04 AM) <https://www.nationalgeographic.com/magazine/2018/04/race-genetics-science-africa> (reporting that “all humans are closely related—more closely related than all

perfect world utterly lacking in racial hierarchy and socioeconomic inequality, the same share of students in each group would earn a particular score.¹⁰³ This is not that world, but the University can decide how great a degree of inequality-driven deviation from the ideal to tolerate. If equity is the guide, then a perfect world should be the destination. In that world, use of a properly fair assessment would result in selection of an admitted class consistent in its demographics with those of the applicant population. Thus, if the assessment screens out 90 percent of applicants because only one in ten people have the requisite ability to do well in college, and if 10 percent of applicants belong to a particular racial group, then 1 percent—one-tenth of one-tenth—of the admitted class should consist of members of that racial group. Students from no racial group would be disproportionately over- or underrepresented.

To be sure, as a practical matter, precise percentages might vary from year to year—but the degree of variance to be tolerated is a subject to be decided. This raises another question to be resolved, because for a state’s public university that serves the nation and to a significant degree the world, the reference population could consist of residents of the state, the class of high school seniors, or some other group. Politically, defining the reference population as the class of in-state graduating seniors may be most compelling.¹⁰⁴ This is not a call for quotas, although of course quotas are one way to assure particular degrees of representation. The Supreme Court has definitively condemned that particular

chimps, even though there are many more humans around today”); accord DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* 53 (2011) (noting that there is more diversity within racial groups than across them). The clear implication is that ability should not track race.

103. Some contemporary writers argue that there may well be innate differences in ability along lines of race. See, e.g., David Reich, Opinion, *How Genetics Is Changing Our Understanding of ‘Race,’* N.Y. TIMES (Mar. 23, 2018), <https://www.nytimes.com/2018/03/23/opinion/sunday/genetics-race.html> [<https://perma.cc/VS3N-H4G3>] (“[S]ince all traits influenced by genetics are expected to differ across populations (because the frequencies of genetic variations are rarely exactly the same across populations), the genetic influences on behavior and cognition will differ across populations, too”). These ideas are not new. See generally IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* (2016). Even scholars who recognize that merit is susceptible to different definitions and who view themselves as politically progressive may have a hard time acknowledging the possibility of a world in which achievement manifests in the pattern I describe.
104. Students from overseas complicate the assessment of group representation, but the purpose of this Essay is not to develop a complete admissions model. Rather, it is to show how many levers are subject to adjustment, and to suggest a way to think about recognizing when they are calibrated correctly.

policy tool, at least in the context of higher education admissions.¹⁰⁵ Rather—and at risk of repetition—this discussion suggests a way to evaluate whether a particular selection mechanism is operating fairly when the primary goal is equity. There are various methods to decide who is admitted by the University, after all, including use of a completely random lottery.¹⁰⁶

This outcomes-based approach for evaluating an admissions policy is no doubt controversial. Merit has for years been accepted as susceptible to measurement by test performance, a method favored because of concern that the prior selection process yielded both unprepared students and excluded potential superstars.¹⁰⁷ The universe of such potential superstars until relatively recently did not extend to include many Black, Latinx, or Asian applicants, though; that was beyond the realm of the imagination.¹⁰⁸ Therein lies the problem of adopting criteria without explicitly considering the potential outcome: A result that is disproportionately (or absolutely) exclusive becomes accepted as the result of the use of a neutral tool more properly recognized as a possibly biased instrument producing an anticipated outcome. History warns that adopting an admissions assessment without a goal in mind will lead to an instrument that reproduces preexisting hierarchies. History also shows that selective colleges and universities have never used an assessment that did not produce disparate results. College admissions is not a system from which bias can simply be removed, like an obstruction blocking a drain. The water is tainted and there is no filter in place to clean it.

The global pandemic shined a bright light on such structural inequality.¹⁰⁹ Those without health insurance, for example, are obviously more vulnerable to

105. The Supreme Court has avoided acknowledging the fact that any selection criteria effect social engineering. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978).

106. Guinier, *supra* note 20, at 218, 218 n.403.

107. James Bryant Conant, onetime president of Harvard University, was an early proponent of use of a standardized test in admissions for these reasons. NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* 38 (2000). Conant at the same time oversaw an admissions regime that effectively maintained limits on enrollment of Jewish students, however; the meritocracy operated within limits. KARABEL, *supra* note 17 at 193.

108. *Id.* at 173–74 (observing that in the seventy-year period between 1870 and 1941, roughly 165 Black students matriculated at Harvard—far more than at Yale and Princeton).

109. See, e.g., Claire Cain Miller, *Three Things Lockdowns Have Exposed About Working and Parenting*, N.Y. TIMES: THE UPSHOT (Apr. 27, 2020), <https://www.nytimes.com/2020/04/27/upshot/coronavirus-exposes-workplace-truths.html> [<https://perma.cc/TT2M-H5K3>]; see also Linda Villarosa, ‘A Terrible Price’: *The Deadly Racial Disparities of Covid-19 in America*, N.Y. TIMES MAG. (Nov. 18, 2020), <https://www.nytimes.com/2020/04/29/magazine/racial-disparities-covid-19.html> [<https://perma.cc/ESA7-TKC4>] (describing higher mortality rates for Black victims of COVID-19); see also Alex

disease.¹¹⁰ Those without sufficient financial resources do not have broadband internet access at home to facilitate remote learning.¹¹¹ There is now widespread recognition that disparities in scores on the SAT and ACT play a role in limiting access to selective institutions of higher education for students who are Black and Latinx. The scores correlate with wealth and opportunity,¹¹² which in turn are correlated with race.¹¹³ In recognizing the possibility of disparate effects of the pandemic on different populations of potential University students, the president and the Regents also recognized the disparate effects of other challenges, such as a

Wigglesworth, *Institutional Racism, Inequity Fuel High Minority Death Toll From Coronavirus*, L.A. OFFICIALS SAY, L.A. TIMES (May 11, 2020, 8:02 AM) <https://www.latimes.com/california/story/2020-05-11/institutional-racism-inequity-high-minority-death-toll-coronavirus> [<https://perma.cc/Q42Z-2AVE>] (describing higher mortality rates for Black and Latinx victims of COVID-19).

110. See, e.g., Amy Finkelstein, Sarah Taubman, Bill Wright, Mira Bernstein, Jonathan Gruber, Joseph P. Newhouse, Heidi Allen & Katherine Baicker, *The Oregon Health Insurance Experiment: Evidence From the First Year*, 127 Q.J. ECON. 3–4 (2012) (describing a study of the positive effects of expansion of health insurance availability on self-reported physical and mental health, as well as—not surprisingly—financial health); accord David L. Coleman, *Viewpoint: The Impact of the Lack of Health Insurance: How Should Academic Medical Centers and Medical Schools Respond?*, 81 ACAD. MED. 728, 730 (2006) (noting that the “basis for the profoundly negative effect of uninsurance on access to preventive care, medications, and primary care is obvious”); see also Anne Case & Angus Deaton, Opinion, *America Can Afford a World-Class Health System. Why Don’t We Have One?*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/opinion/sunday/covid-inequality-health-care.html> [<https://perma.cc/WBS3-2YWK>] (criticizing the disparate access to health care in the United States).
111. Nicol Turner Lee, *What the Coronavirus Reveals About the Digital Divide Between Schools and Communities*, BROOKINGS: TECHTANK (Mar. 17, 2020), <https://www.brookings.edu/blog/techtank/2020/03/17/what-the-coronavirus-reveals-about-the-digital-divide-between-schools-and-communities> [<https://perma.cc/XL2U-H4PH>]; see also Nicholas Casey, *College Made Them Feel Equal. The Virus Exposed How Unequal Their Lives Are*, N.Y. TIMES (May 5, 2020), <https://www.nytimes.com/2020/04/04/us/politics/coronavirus-zoom-college-classes.html> [<https://perma.cc/C63H-SCGK>] (describing how “[t]he outbreak of the coronavirus—and the accompanying economic devastation that has left 10 million people almost instantly unemployed—has put America’s class divide on full display,” including showing differences in wealth of college students’ now attending class remotely from very different lives off-campus).
112. REPORT, *supra* note 30, at 81 (“It is true that SAT and ACT scores are positively correlated with family income, as are many other measures of student achievement.”).
113. The families of Black and Latinx Californians are disproportionately poor. *Who’s in Poverty in California?*, PUB. POL’Y INST. OF CAL., <https://www.ppic.org/interactive/whos-in-poverty-in-california> [<https://perma.cc/K76K-A6EB>] (last visited May 5, 2020). While Black people make up about 6 percent of the population of the state, they are more than 17 percent of those in poverty. Compare *id.*, with *QuickFacts: California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/CA> [<https://perma.cc/A6C9-EEC4>] (last visited May 22, 2021). Although Latinx people make up the largest share of poor people in the state—nearly 24 percent—that is less than that group’s share of the total state population. Compare *Who’s in Poverty in California?*, *supra*, with *QuickFacts: California*, *supra*.

history of discrimination. The pandemic compels advocates of new approaches to undergraduate admissions to develop alternative processes to reach different and more equitable results.

CONCLUSION

The pandemic enabled reform to undergraduate admissions practices at the University of California because the impact of COVID-19 so convincingly demonstrated the weakness of justifications of disparities along lines of race and class. Suspending the use of standardized test scores in admissions followed recognition that a narrow conception of academic excellence is neither necessary nor sacred. The Regents of the University of California decided that applicants' SAT and ACT scores were not essential in choosing whom to admit; the Regents' decision showed that the goal of admitting students with high scores was contextual and could be abandoned to pursue other goals. The threat of COVID-19 has made more likely the adoption of an admission assessment that does not penalize students who historically were excluded from opportunity. One result may be the enrollment of a student body that looks more like the population of California. Calamity, in short, created opportunity.