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More than Merit: Reframing the Debate over Examination-Based Admissions in Public Schools

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MORE THAN MERIT: REFRAMING THE DEBATE OVER EXAMINATION-BASED ADMISSIONS IN PUBLIC SCHOOLS

*Aaron Saiger**

Some selective public schools use entrance examinations, either alone or in conjunction with other academic measures, to admit students. This practice often generates student bodies with tiny numbers of Black and Latino students, numbers dramatically disproportionate to the populations from which the schools draw. Many voices therefore call for test-based admissions to be abolished. More broadly, critics argue that, in addition to being poisonous to equity, “merit” is an incoherent and pernicious category for public-school admissions.

This Article seeks to expand what has been a narrow debate over selective admissions. The reasonableness and desirability of academically selective admissions do not depend solely upon the propriety of rewarding “merit,” either at all or in the ways that admissions tests define it. There are (at least) three ways to think about exam schools other than as meritocratic institutions: as contests not primarily designed to reward; as part of a strategy of differentiated instruction; and as pork, one among many state-created goods whose benefits politicians spread across constituencies. The choice of frame strongly affects the resonance of various arguments regarding exam schools, including disputes about disparate resources, the impact of exam-preparation services, and whether exam-school attendance benefits students.

The propriety of exam schools also depends not only upon the schools themselves but upon the structure of the school system in which they are embedded. Exam schools can be more easily justified when they are a part of a large set of diverse schools with multiple missions.

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INTRODUCTION

A public school admits students based, at least in substantial part, on an entrance exam. The student body that results looks, with respect to race, entirely different than the district it serves. *Res ipsa loquitur*, many say: Behold a racist admissions policy. Admissions schemes that yield titanicly disparate racial impacts are intolerable.¹ Certainly they are unacceptable in a *public* school — managed by the state, staffed by government employees, and funded by tax dollars.

In several high-profile cases across the country, this sort of reasoning has led to efforts to eliminate public school admissions tests — and then to backlash. In 2021, school boards in both Boston and Fairfax County, Virginia, dropped exam scores from the vector of requirements for admission to their prestigious Boston Latin School and Thomas Jefferson School for Science and Technology (respectively). Both decisions are being litigated in federal court.²

1. See, e.g., Alia Wong, *The Cutthroat World of Elite Public Schools*, ATLANTIC (Dec. 4, 2014), <https://www.theatlantic.com/education/archive/2014/12/the-cutthroat-world-of-elite-public-schools/383382/> [<https://perma.cc/RE9B-TY2C>] (describing racial differences in test-school enrollment in New York City as “staggering”).

2. Coal. for TJ v. Fairfax Cty. Sch. Bd., No. 21-296, 2022 WL 986994 (4th Cir. Mar. 31, 2022) (renumbered No. 22-1280), *stay entered*, 2022 WL 986994 (4th Cir. Mar. 31, 2022); Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos., 996 F.3d 37 (1st Cir. 2021).

The same year, the San Francisco school board embarked upon what proved to be an ephemeral experiment at its famed Lowell High School. The board, citing racial equity, replaced Lowell's longstanding academic admissions criteria with a lottery system. This led, in rapid succession, to litigation, the bitter and very public resignation of Lowell's principal, the successful (and even more bitter) recall of several school board members, and the reinstatement by the newly constituted school board of Lowell's original admission process.³

In New York City, meanwhile, exam-only admissions at the City's eight "exam schools" — three of which are required to use the exam by state statute — have been a perennial font of controversy.⁴ Two of those three schools, Stuyvesant High School and the Bronx High School of Science, have in recent years admitted classes where between one and three percent of students are Black, in a city where one in four public school students is Black.⁵ Advocates filed a high-profile complaint with the federal Department of Education,⁶ and New York City's then-Mayor Bill de Blasio aggressively took on Albany and some angry citizens in an effort to kill the test.⁷ Both efforts failed. Test-only admissions continue at Stuyvesant and

3. See Nathan Heller, *What Happens When an Élite Public School Becomes Open to All?*, NEW YORKER (Mar. 7, 2022), <https://www.newyorker.com/magazine/2022/03/14/what-happens-when-an-elite-public-school-becomes-open-to-all> [<https://perma.cc/R7ML-4558>]; Soumya Karlamangla, *Following Recall, San Francisco School Board Reverses Course*, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/2022/06/24/us/recall-san-francisco-school-board.html> [<https://perma.cc/7XFU-6SJ8>].

4. See Aaron Saiger, *Test Unrest*, 21 CITYLAW 1 (Jan./Feb. 2015).

5. See *id.*; see also Michelle Bocanegra, *Black, Latino Students Again Admitted to Elite NYC High Schools at Disproportionately Low Rates*, GOTHAMIST (June 15, 2022), <https://gothamist.com/news/black-latino-students-again-admitted-to-elite-nyc-high-schools-at-disproportionately-low-rates> [<https://perma.cc/KBT8-GFZH>] (reporting that, in the 2022 admissions cycle, Black and Latino students in New York City were extended offers to attend the City's test schools at rates an order of magnitude smaller than their representation among those who sat for the admissions exam).

6. See Letter from Debo P. Adebile et al., NAACP Legal Def. & Educ. Fund, to the N.Y. Off., Off. For Civ. Rts., U.S. Dep't of Educ. 15–16 (Sept. 27, 2012), <https://www.naacpldf.org/wp-content/uploads/Specialized-High-Schools-Complaint.pdf> [<https://perma.cc/QGH3-V29A>]. A similar filing was made regarding the Thomas Jefferson School in Fairfax in 2012. Janel George, *The Myth of Merit: The Fight of the Fairfax County School Board and the New Front of Massive Resistance*, 49 FORDHAM URB. L.J. 1091, 1092 (2022).

7. See Priscilla A. Consolo, *A Single Score No More: Rethinking the Admissions System for New York City's Specialized High Schools to Preserve Academic Excellence and Promote Student Diversity*, 94 N.Y.U. L. REV. 1244, 1254 (2019).

its sister New York schools,⁸ with the (hedged) support of de Blasio's successor⁹ and the chastened acquiescence of other local elected officials.¹⁰

Educational regulators in New York have simultaneously undertaken a "sweeping" repudiation of the de Blasio push to abolish the use of *any* academic measures for admission across the public school system; many City schools other than the exam schools had used not a single examination but a range of academic criteria to make their admissions decisions.¹¹ Such academic "screens" have been restored to their central role in those schools' admissions practices as well.¹²

The litigation in Boston and Virginia, the electoral recall and policy reversal in San Francisco, and the ongoing battles in New York suggest that the thing does *not* speak for itself. Test-based admissions (again, using "test-based" also to describe admissions schemes that use tests in conjunction with other academic measures) have found considerable political and intellectual support. Efforts to do away with them have met with stalwart and often effective resistance, including high profile political campaigns. As in the higher-education cases now before the Supreme Court, some Asian Americans have taken a leading role in wondering why systems that benefit their success should be understood to be racial problems, rather than racial victories.¹³ The tests, they and others argue, are the same for everyone. They benefit the diligent and the brilliant. And aren't grit, intelligence, and accomplishment — often lumped together as "merit" — things that we, as a society, need, value, and want to encourage?¹⁴

For social and educational critics who view the exam schools through the prism of racism and anti-racism — among whom one finds many legal advocates who view the issue exclusively in terms of federal constitutional

8. See Vinay Harpalani, *Testing the Limits: Asian Americans and the Debate Over Standardized Entrance Exams*, 73 S.C. L. REV. 759, 776, 778 (2022); Consolo, *supra* note 7, at 1254; Ginia Bellafante, *Bill de Blasio Knows He Isn't Loved*, N.Y. TIMES (May 27, 2022), <https://www.nytimes.com/2022/05/27/nyregion/bill-de-blasio-congress.html> [<https://perma.cc/VK4B-BEF2>].

9. See Bocanegra, *supra* note 5.

10. See Cayla Bamberger, *New NYC Council Bills Intend to Widen Access to Elite Public High Schools*, N.Y. POST (June 15, 2022, 9:29 PM), <https://nypost.com/2022/06/15/new-nyc-council-bills-would-widen-access-to-elite-public-high-schools/> [<https://perma.cc/PD4K-PYEH>] (reporting the introduction of reform proposals in the New York City Council that are consistent with retention of the admissions examination in the test-only schools).

11. Troy Closson, *In a Reversal, New York City Tightens Admissions to Some Top Schools*, N.Y. TIMES (Sept. 29, 2022), <https://www.nytimes.com/2022/09/29/nyregion/nyc-schools-admissions.html>; see also *infra* notes 138–47 and accompanying text.

12. *Id.*

13. See Harpalani, *supra* note 8, at 760–61, 770–71; Asra Q. Nomani, *School is for Merit*, N.Y. TIMES (Sept. 1, 2022), <https://www.nytimes.com/2022/09/01/opinion/us-school-merit.html> [<https://perma.cc/K96S-XHNU>]; Closson, *supra* note 11.

14. See, e.g., Nomani, *supra* note 13.

and civil rights law — the answer to this question is that the answer does not much matter. Test-based admission is formally neutral — it is not a facially racial criterion — but creates deeply disparate impacts.¹⁵ There can be no claim that the state has a *compelling* interest in sponsoring elite public schools; plenty of jurisdictions get along fine without them.¹⁶ So the only legal question is the perennial one of how to analyze disparate impact. If the law of equality should reject practices that have disparate impacts without compelling justification, test-based admissions ought to fall. If it should confine itself to blocking only practices that impose facial racial criteria or that are animated by racial animus, the schools are lawful.

This analysis is inadequate because the framing of the question is itself inadequate. The test schools do not pose only questions under federal civil rights law. States bear a positive duty to educate *all* children.¹⁷ They have concomitant leeway to structure the schools they provide — a massive government expenditure¹⁸ — in line with their citizens' preferences.¹⁹ No such system can require zero disparate impact, and certainly not one structured by our educational federalism. Therefore, neither the societal debate nor the legal debate over exam schools has been, or should be, *only* about disparate impact. It is also necessarily one about educational policy: Is the public preference for exam schools, as realized through the actions of

15. See Harpalani, *supra* note 8, at 776.

16. Cf. *Grutter v. Bollinger*, 539 U.S. 306, 355–56 (2003) (Thomas, J., dissenting) (stating that defendant “Law School seeks to improve marginally the education it offers without sacrificing too much of its exclusivity and elite status”). Justice Scalia pressed this point at the oral argument in *Grutter*, suggesting with respect to race-based affirmative action at University of Michigan’s Law School that:

[T]he problem is a problem of Michigan’s own creation, that is to say, it has decided to create an elite law school, it is one of the best law schools in the country . . . [I]f Michigan really cares enough about that racial imbalance, why doesn’t it do as many other State law schools do, lower the standards, not have a flagship elite law school, it solves the problem[?] . . . If [racial diversity is] important enough to override the Constitution’s prohibition of racial distribution, it seems to me it’s important enough to override Michigan’s desire to have a super-duper law school?

Transcript of Oral Argument at 30–31, *Grutter v. Bollinger*, 539 U.S. 306 (2003).

17. See Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 936 (2016).

18. See NAT’L CTR. FOR EDUC. STATS., ELEMENTARY AND SECONDARY PUBLIC SCHOOL EXPENDITURES AS A PERCENTAGE OF GROSS DOMESTIC PRODUCT (2022), <https://nces.nsf.gov/indicators/states/indicator/public-school-expenditures-to-state-gdp> [<https://perma.cc/7DTY-X6RQ>] (reporting that the United States spent 3.1% of its gross national product on pre-K–12 education in 2018).

19. This makes the debate over selective public school admissions quite different in kind from the debate over racial preferences in higher education, which is an elective service that government need not provide at all. See *supra* note 16.

elected officials, important enough, or plausible enough, to justify the disparate impact that it causes?

This debate is usually framed as a clash between racial fairness and educational “meritocracy.”²⁰ This frame is too narrow. This Article seeks to expand it, in two ways. First, it argues that the reasonableness or desirability of academically selective schools does not depend only on whether it is proper to reward “merit,” either at all or in the ways that admissions tests define it, given disparate impact. It suggests that, in addition to considering selective public school admissions as academic rewards, there are (at least) three other ways to think about them. They might be public *contests*, not primarily designed to reward. They might be a project of *differentiated instruction*, an effort to provide a learning environment to a particular kind of student that will best serve their educational needs. And they might be *pork*, one non-public good among many that politicians spread around favored constituencies for political reasons.

These possibilities lead to the Article’s second argument: The normative appeal of test-based admissions policies depends not only on the policies themselves but upon the structure of the entire local school system in which the test school is embedded. A system that has special schools for strong test-takers but offers no corresponding kinds of programs for other kinds of students must meet a higher standard of justification than a system with programs that select for a wide range of needs and attributes. The analysis draws upon the concept of “second-order diversity,” introduced by Heather Gerken in 2004, to develop these claims.²¹

Part I of the Article makes some brief introductory remarks regarding what is (or should be) a consensus about structural racism and geography-based school assignment. Part II then develops the framing argument, and Part III the argument about second-order diversity.

I. SOME POINTS OF AGREEMENT

Two propositions about the exam schools, and the racial unrepresentativeness of the populations they serve, are not controversial — or at least should not be, among reasonable people.

First, everyone should agree that the racially skewed results of admissions by test are evidence of serious racial problems in American education.

20. See generally Richard R. Buery, Jr., *Public School Admissions and the Myth of Meritocracy: How and Why Screened Public School Admissions Promote Segregation*, N.Y.U. L. REV. ONLINE 101 (Apr. 2020) (arguing that by directly confronting the myth of meritocracy, there can be meaningful progress towards expanding educational opportunity for all).

21. Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1101 (2004).

Reasonable people can disagree about what kind of problem the evidence suggests. Some will see evidence of bad tests, skewed notion of merit, and an obstinate willingness of society to double down on the consequences of structural racism.²² Others, comfortable with the tests and the importance of what they measure, will see evidence of underlying social and structural disparities that lead to racial variability in academic performance and that need amelioration.²³ Controversy swirls over which of these two groups has the better account of the problem. But reasonable people cannot look at the results of admission by testing and see no problem at all.

Second, school assignment by test is undeniably better policy than school assignment by geography — which is the modal method of student assignment in use in the United States. Every criticism of testing — that it does not predict success, that it does not measure merit, that it misunderstands merit, that it tests for the wrong things, that it is racially and culturally biased, that it magnifies the advantages of wealth — applies *a fortiori* to the geographical assignment of students to schools. To whatever extent testing is a poor measure of potential, merit, knowledge, or desert, geography is a worse measure. To whatever extent testing disadvantages particular racial or cultural groups, the educational costs that America's segregated housing system imposes upon such groups are orders of magnitude larger.²⁴ The wealth that allows some but not all to purchase test-preparation services or tutors, buying advantage for their children, is dwarfed by the wealth required to access schools in a wealthy part of town by buying or renting a home there, and the advantages that flow from doing so.²⁵

Indeed, a good part of the test-school concept is to ameliorate the racial and class barriers that arise from geographical student assignment in an environment of segregated housing. The test is in that sense a leveler.²⁶

22. See Heller, *supra* note 3, at 4 (San Francisco school board understood the racial demographics of Lowell to demonstrate “some hidden bias [that] was being amplified by its supposedly meritocratic admissions”).

23. See, e.g., Kathryn Paige Harden, *The SAT Isn't What's Unfair*, ATLANTIC (Apr. 2, 2022), <https://www.theatlantic.com/ideas/archive/2022/04/mit-admissions-reinstates-sat-act-tests/6219455/> [<https://perma.cc/4VSA-B5PV>] (“The test measures differences in academic preparedness, including the ability to write a clear sentence, to understand a complex passage, and to solve a mathematical problem. [It] doesn't *create* inequalities in these academic skills. It *reveals* them.”).

24. See, e.g., Buery, *supra* note 20, at 102; see also LaToya Baldwin Clark, *Barbed Wire Fences: The Structural Violence of Education Law*, 89 U. CHI. L. REV. 499, 511 (2022) (“the coconstitutive forces of residential segregation and school segregation . . . reinforce each other”); Osamudia James, *Superior Status: Relational Obstacles in the Law to Racial Justice and LGBTQ Equality*, 63 B.C. L. REV. 199, 209 (2022).

25. See Atila Abdulkadiroğlu, Joshua Angrist & Parag Pathak, *The Elite Illusion: Achievement Effects at Boston and New York Exam Schools*, 82 ECONOMETRICA 137, 138 (2014).

26. See Harden, *supra* note 23.

Many (not all) poor students can and do take the test, and some succeed. Even if the correlation of high scores with privilege in general or preparation in particular is significant and substantial, it is less than one. And some of the drivers of that correlation can be ameliorated. As will be noted below, many (not all) families for whom a wealthy neighborhood is utterly out of reach can, with effort, scrape together funds to pay for test preparation.²⁷

Geographic assignment to schools — the localism of American education — is, on the other hand, the driver of racial segregation in American schools, dwarfing admission by examination or any similar policies by orders of magnitude. Most racial segregation is among districts, while exam-school controversies all arise in the context of intra-district choice programs. Because the Supreme Court many decades ago put the kibosh on judicial enforcement of remedies for inter-district racial segregation that is not *de jure*,²⁸ lawyers and advocates have by necessity come to focus on intra-district policy as a second-best option. But this should not disguise the fact that the two primary institutions that generate educational segregation are housing segregation and educational localism.²⁹ Moreover, in districts that have substantial intradistrict housing segregation, geographic assignment to schools within the district is also pernicious, in ways that admission by test would be expected usually to ameliorate and rarely to make significantly worse.³⁰ Whether it ameliorates them sufficiently and in the right way is, again, the source of legitimate controversy. But that controversy arises in the context of a system characterized by geographical assignment that is fundamentally unjustifiable.

II. COMPETING FRAMES FOR THE EXAM SCHOOL

A defining characteristic of the public and lawyerly conversation about exam schools is its interlocutors' inconsistent and often unstated understandings of what these schools are *for*. There are four frames through which the exam-school project can be understood. Exam schools can be thought of as state-sponsored contests or competitions, as efforts to reward "merit," as a pedagogical strategy, and as an exercise in pork-barrel politics. These frames are not entirely discrete, nor are they mutually exclusive, but they are broadly incompatible with one another. Which of them prevails, or where on the spectrum of hybrid conceptions one places the exam schools,

27. See *infra* notes 51–52 and accompanying text.

28. See *Milliken v. Bradley*, 418 U.S. 717, 744–45 (1974).

29. See Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 493, 500–06 (2010).

30. See Kendra Taylor & Erica Frankenberg, *Student Assignment Policies and Racial and Income Segregation of Schools, School Attendance Zones, and Neighborhoods*, 57 EDUC. ADMIN. Q. 747, 752–53 (2021).

determines in large measure how one understands the schools' value, assesses objections to the racial and other unfairnesses they generate, and contemplates reform.

A. Exam Schools as State-Sponsored Contests

One way to see exam schools is as state-sponsored competitions. The exam is the contest and enrollment in the school the prize. In this frame, admission to the exam school is like the trophy in the school district spelling bee, or the blue ribbon at a county fair. The prize has little or no intrinsic value. What matters is the competition. The ribbon is just a ribbon. Gilded trophies are abundant and cheap online. They are valuable only insofar as they symbolize winning the contest. If the ribbon turns out to be flimsy, or a substitute trophy is awarded because the first one shattered, we do not expect complaints, because the real justification is the competition itself.

State-sponsored contests do demand a certain kind of fairness. Procedures for judging must be transparent and unbiased with respect to the identity of the winner. You cannot skew the best-pie award towards the county executive's kid, or feed the answers to a cheating speller. But the frame of the contest does not require that the contest further some urgent and clearly defined public goal, or that the criteria for winning be objectively specified, or that one be able to justify why the state should organize it in one particular way as opposed to some other. There is little government interest in nurturing star spellers; the standards for what makes a prize pig can be qualitative and idiosyncratic, so long as evenly applied; and no general benefit accrues from the most delicious pie (which the judges and the baker, and perhaps the baker's family, consume on their own). A speller or baker who loses their contest will find little sympathy for demands that the criteria for judging be fully and neutrally explicated, or that the contest be reworked to reward something else. Like games and sports, the rational basis for contests is the process of contestation, not that the contest reward something that reasonable people care about.³¹

Governments are clearly entitled to sponsor such competitions. Rational basis is the right test, and it allows state activities that are unnecessary and

31. See JAMES MAGUIRE, *AMERICAN BEE* 56 (2006) ("By the early 1800s the spelling match became a social event. Having no television, apple-checked students trooped to the schoolhouse on winter evenings for a high-spirited spelling bee. The emphasis was on fun rather than orthographic rigor."); *id.* at 62–64 (national fad for spelling matches in the 1870s); H.W. Mumford, *Report of Committee on Prize Competitions*, 1 J. HEREDITY 138, 144 (1909) (arguing that "the educational features of prize competitions" and the competitions' "appeal to the young" advance agricultural education); Allen Walker Read, *The Spelling Bee: A Linguistic Institution of the American Folk*, 56 PMLA 495, 500, 502–04, 509, 510 (1941) (describing the spelling bee variously as a "for[m] of entertainment," an "amusement," and a "social event" in nineteenth-century American communities).

even frivolous. Only egregious unfairnesses — a spelling bee or the fair that discriminated against racial or gender minorities, or one where bribes and favors were exchanged for victory — would lead a court to act.

Moreover, the spelling bee and county fair are not frivolous. They create incentives to participate and try to win.³² This makes the frame of the contest particularly appealing when thinking about the exam school. While the state has no special interest in identifying the best pie or the finest hog in the county, it does have an interest in nurturing skill in the domestic sciences and animal husbandry.³³ The recondite skills of the top spellers who win contemporary spelling bees are of actual use to no one, but there is a genuine state interest in encouraging kids to study their spelling words.³⁴ Of science-fair experiments that take top honors, only one in a million is a breakthrough in its field —but competing for those honors gives numerous children “experience [of] the practices of science.”³⁵ Likewise, staging a contest of

32. As Georg Simmel writes:

The runner who wants to make his mark merely through his speed, the merchant who wants to be effective merely by means of the price of his wares, the missionary who wants to have results only through the intrinsic power of conviction of his teachings, are all examples of this strange type of struggle, which is equal to any other type in the intensity and passionate mobilization of all available energies; which is, moreover, maximized in the direction of utmost performance merely by the mutual awareness of the opponent’s performance; and yet, if observed from the outside, seems to proceed as if there were no adversary present in this world, but merely the goal.

Georg Simmel, *Sociology of Competition*, 33 CANADIAN J. SOCIO./CAHIERS CANADIENS DE SOCIOLOGIE 957, 959 (2008). There does not, however, appear to be empirical support in the social-psychology literature for the claim that competition creates desirable incentives. See, e.g., Brynne C. DiMenichi & Elizabeth Tricoli, *The Power of Competition: Effects of Social Motivation on Attention, Sustained Physical Effort, and Learning*, 6 FRONTIERS PSYCH., Sept. 2015, at 1, 1–2. Studies of science fairs reach mixed conclusions regarding whether competition creates incentives for participation. See Frederick Grinnell, *Reinventing Science Fairs*, 36 ISSUES SCI. & TECH, Spring 2020, at 23–24 (2020) (“[T]he competitive aspect can be positive or negative depending on the student’s personality . . .”); Giuliano Reis, Liliane Dionne & Louis Trudel, *Sources of Anxiety and the Meaning of Participation in/for Science Fairs: A Canadian Case*, 15 CANADIAN J. SCI, MATHEMATICS & TECH. EDUC. 32, 34 (2015) (“Although competition associated with the possibility of praise and winning may undermine students’ personal satisfaction for the challenges of individual or collaborative problem solving, it can also be a potential motivation factor for participation.”).

33. See Mumford, *supra* note 31, at 139 (positing that agricultural contests at county fairs “have been instrumental in doing much good in arousing public sentiment in favor of good seeds and have been the means of making our county fairs of a more educational character.”).

34. See MAGUIRE, *supra* note 31, at 56 (earliest spelling bees in American culture were classroom activities); *id.* at 65 (after the 1870s “the bee as educational method kept gaining momentum”); Read, *supra* note 31, at 509, 511 (“In the first half of the nineteenth century, spelling bees developed naturally to meet an educational need felt by the populace”).

35. Grinnell, *supra* note 32, at 23; see also Tammy V. Abernathy & Richard N. Vineyard, *Academic Competitions in Science: What Are the Rewards for Students?*, 74 CLEARING HOUSE 269, 269 (2001).

academic merit leads kids to hit the books, even if nobody cares, or nobody reasonable cares, about the differences between the winner and the third runner-up. The state interest is served by the fact of the contest; having prizes for the winner is a method by which the state draws people in to compete.³⁶

B. Exam Schools as “Meritocratic” Prizes

A related but ultimately very different way of understanding the exam school is that it is a *prize* or *reward*. This view shares with the county-fair perspective the views that the admissions examination is a contest, and that drawing people to compete in an activity that has social benefits — studying for the exam — is a social good. But it understands the prize not only as a means for promoting the contest, but also as a reward for the deserving. It matters not just that you try hard to bake a good pie but that your pie is the best pie; not just that you study your spelling but that you be able to spell “bougainvillea” or “pendeloque.”³⁷ Merit deserves reward.³⁸

Opponents of exam schools are operating within this frame when they argue that merit does *not* deserve reward, especially from the government and especially where children are concerned.³⁹ The right to vote, for example, is given to each adult with equal weight, regardless of their ability to make sound voting decisions, because each adult is an equal citizen.⁴⁰

36. See Simmel, *supra* note 32, at 960 (“Competition results in added value because from the perspective of the group, subjective motives and means are employed in order to generate objective social values; and because from the perspective of the competing party, the generation of something objectively valuable is used as a means to gain subjective satisfaction.”); Dael Wolfe, *Science Fairs*, 140 *Sci.* 1055, 1055 (1963) (“Children are plastic and quite responsive to the rewards offered them; let us therefore give careful attention to the prizes . . . Rewards can be used to encourage attainment of the excellent objectives of science fairs and to discourage the objectionable features.”).

37. Mark Abadi, *The National Spelling Bee Ended With 8 Winners — Here’s the Winning Word from Every Spelling Bee since 1925*, *BUS. INSIDER* (Aug. 7, 2022), <https://www.businessinsider.com/winning-words-spelling-bee-1925-2017-5> [<https://perma.cc/8E3V-3ZEP>].

38. High-level contemporary American science fairs operate predominantly in this frame, awarding very substantial scholarship and cash prizes to their winners. See Maureen Byoko, *Kid Geniuses: Fame, Fortune, and Science Fairs*, *JOM: J. MINERALS, METALS & MATERIALS SOC’Y*, Sept. 2004, at 13, 14 (“These contests offer students access to millions of dollars in scholarships. The largest awards go to the STS and Siemens Westinghouse winners, at \$100,000. For the International Science and Engineering Fair (ISEF), the three top winners receive the Intel Foundation Young Scientist Award of \$50,000.”).

39. See Buery, *supra* note 20, at 114–15 (noting that “merit” is a meaningless concept until “after all children in America receive a truly excellent education, with the emotional, economic, and social supports that all humans need and deserve”).

40. See Jason Brennan & Christopher Freiman, *Why Paternalists Must Endorse Epistocracy*, 21 *J. ETHICS & SOC. PHIL.* 329, 337–38 (2022); Nicholas O. Stephanopoulos, *Accountability Claims in Constitutional Law*, 112 *Nw. U. L. REV.* 989, 995–96 (2018).

Likewise, schooling should be provided to all students in equal measure regardless of their academic prowess, because education is a right independent of the characteristics of the students involved.

This understanding of education is deeply ingrained in American education. The common-schoolers of the nineteenth century and the Progressive educators of the twentieth devoted themselves to the idea, if not the practice, that the experience of school should be “common,” essentially the same for everyone.⁴¹ The civil rights fighters of the twentieth and twenty-first centuries focused on schools in substantial part because discrimination against children, whether because of race or other characteristics, rubbed particularly hard against views of equality deep in the American creed.⁴² Contemporary advocacy that objects to school choice also rests in substantial part on this view of educational equality.⁴³

But for others, it is obvious that where schools are concerned, academic “merit” does deserve reward. They may see it as innately worthy of recognition, or emphasize that rewarding it generates social value.⁴⁴ “Smart” people have the best shot, if well-trained, at curing cancer, or building bridges, or running social-welfare programs, or winning Senate elections.⁴⁵ As journalist Nathan Heller wrote in his reporting on the experiment with selective admissions at Lowell High, for many “an important role of education is to identify people with talent and motivation and cultivate their potential. It’s good for society — you won’t have to worry about the universe in which Mozart never got piano lessons.”⁴⁶

Social good is also the strongest justification for exam schools under the contest frame. But pure competition might not create strong enough incentives, especially for a contest that requires drudgery at the books and is preparatory for many other academic contests to come that require more

41. See CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780–1860*, 95–100 (1983); Aaron Saiger, *Deconstitutionalizing Dewey*, 13 *FIU L. REV.* 765, 784–85 (2019).

42. See JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 249 (2018).

43. See, e.g., James, *supra* note 24, at 248 (“[S]chool choice policies problematically encourage the sort of competition that renders some schools as ‘better’ than others.”).

44. DANIEL MARKOVITS, *THE MERITOCRACY TRAP: HOW AMERICA’S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE* 14 (2019)

45. This is an untestable intuition without a working definition of “smart” and a way to measure it, neither of which is to be had. The economic literature shows strong labor-market returns both to “skill” and educational achievement, both of which are presumably neither perfectly correlated nor uncorrelated with the undefinable “smartness.” See, e.g., Beth F. Ingram & George R. Neumann, *The Returns to Skill*, 13 *LAB. ECON.* 35, 35–36, 38, 55 (2006).

46. Heller, *supra* note 3.

single-minded drudgery. To get everyone in the game who should be in the game, you need a prize intrinsically worth fighting for.

This kind of thinking is also baked into American education. Rewards pervade schooling. Exam schools are a marginal phenomenon as against the institutions of grading and tracking (to which, of course, egalitarians also object).⁴⁷ Proponents of rewarding merit cannot stop there, of course; in order to reward merit, one has to determine what constitutes it, how to measure it, and what rewards work best. But these questions are all asked within the frame that rewarding merit is a legitimate undertaking.

One critical way in which the frame of the contest and the frame of the reward differ is in its understanding of the roles played by diligence, resources, luck, and talent. Competitive success, whether one is trying to raise a winning heifer or ace the admissions exam, depends on all of these. You can't win the best-in-show ribbon if you don't work at it. As I have said, that's the reason to have the contest in the first place.⁴⁸ But you also can't win if you have no access to a farm or know no farmers willing to teach you how to run it. Even given a farm and a farmer, the particular farm and farmer you have might not be as good (either as farmers or as teachers) than those accessible to someone else. Even if the quality and quantity of access is the same, dumb luck makes a difference: your cow might win or lose some genetic lottery, or break its leg before the big show. And even if everyone has equal access and equal luck, some people are just better at baking, or hog-raising, or spelling, or test-taking, or mathematics, than others.⁴⁹

Luck is random; resources, talent, and diligence are not. Both resources and luck are orthogonal to the central purpose of competition. They play a big role by necessity, because there can be no competition without them. (In some competitions, luck has positive value, because some randomness makes competition more exciting and attractive. Admissions examinations are not in this category.) Talent and diligence *are* central to the goal of competition; but the former is (mostly) not up to the competitor, and the latter (to some important but incomplete extent) is.⁵⁰

The area where the interplay between luck, circumstance, diligence, and talent is most vivid is the exam school context is in the discussion of the role

47. See Lorin W. Anderson, *A Critique of Grading: Policies, Practices, and Technical Matters*, 26 EDUC. POL'Y ANAL. ARCHIVES 1, 3 (2018) ("Despite a century of fairly constant criticism, . . . the practice of grading students remains a cornerstone of our educational system.").

48. See ROGER CAILLOIS, *MAN, PLAY AND GAMES* 15 (Meyer Barash trans., 2001).

49. See MAGUIRE, *supra* note 31, at 63 (quoting Mark Twain to say, "Some people have an idea that correct spelling can be taught, and taught to anybody. That is a mistake. The spelling faculty is born in man, like poetry, music, and art. It is a gift; it is a talent").

50. See CAILLOIS, *supra* note 48, at 19; Simmel, *supra* note 32, at 965.

of test preparation. Purchasers of test-preparation services, which can be fairly expensive, include the financially comfortable, but also include striving families for whom the fees are a stretch. It does not include, of course, families who don't think prep services are a good investment; neither does it include families who can't afford it⁵¹ or who don't know about it.⁵² Demurring to the claim that preparation services raise scores — there is little research on this point,⁵³ although there are numerous marketing claims⁵⁴ — one might ask in what sense it is a problem that they can do so. Is the problem that preparation works at all, because it prioritizes diligence over talent?⁵⁵ Is it a problem because not everyone can afford it, or is in equal position to take advantage of it, which privileges circumstance, and particularly financial means?⁵⁶ Is the utility of preparation in fact a virtue, because it rewards diligence, and mitigates the importance of other kinds of

51. There are free preparation services available, both online and through government programs. Some of the latter have been established in response to the critique that test preparation unfairly advantages those with resources. These programs obviously do not mitigate unfairness entirely. They are not universally available and require a certain amount of capital to access. Even if they are free, a student needs knowledge, hardware, time, and support—in addition to talent, drive, and diligence—in order to make best use of them.

52. See Bamberger, *supra* note 10.

53. I have not located empirical research on the impact of test preparation on test outcomes at the high school level. For highly mixed evidence on coaching in the contexts of other high-stake admissions examinations, see, e.g., Betsy Jane Becker, *Coaching for the Scholastic Aptitude Test: Further Synthesis and Appraisal*, 60 REV. EDUC. RES. 373, 380 (1990) (metaanalysis as of 1990 noting that variable results and design problems make it impossible to conclude that coaching has positive effects); Derek C. Briggs, *The Effect of Admissions Test Preparation: Evidence from NELS:88*, 14 CHANCE 10, 10 (2001) (“There is an emerging consensus that particular forms of test preparation have the effect of improving scores on sections of the SAT I for students who take the tests more than once”); William C. McGaghie, Steven M. Downing & Ramune Kubilius, *What is the Impact of Commercial Test Preparation Courses on Medical Examination Performance?*, 16 TEACHING & LEARNING MED. 202, 202–03 (2004) (metaanalysis in the medical-school context concluding that “current research lacks control and rigor; the incremental validity of the commercial courses on medical examination performance, if any, is extremely small; and evidence in support of the courses is weak or nonexistent”); Qin Xie, *Does Test Preparation Work? Implications for Score Validity*, 10 LANGUAGE ASSESSMENT Q. 196 (2013) (assessing the effects of coaching for tests of English competency for foreign-language speakers).

54. See, e.g., Donald E. Powers & Donald A. Rock, *Effects of Coaching on SAT I: Reasoning Test Scores*, 36 J. EDUC. MGMT. 93, 112 (1999) (coaching effects are positive and real but small compared to marketing claims); Valerie Strauss, *Can Coaching Truly Boost SAT Scores? For Years, the College Board Said No; Now It Says Yes*, WASH. POST (May 9, 2017), <https://www.washingtonpost.com/news/answer-sheet/wp/2017/05/09/can-coaching-truly-boost-sat-scores-for-years-the-college-board-said-no-now-it-says-yes/> [<https://perma.cc/UBN6-KS32>].

55. See, e.g., Harpalani, *supra* note 8, at 784 (reporting comments by the Virginia Secretary of Education, during the debate over admissions at Fairfax's Thomas Jefferson School, comparing “test prep to illegal performance enhancement drugs”) (internal quotation marks and citation removed).

56. See Grinnell, *supra* note 32, at 25 (raising this question with respect to science fairs).

circumstances, including good preparation in earlier schooling, access to non-curricular experiences that help with the test, and innate ability?

Whether we think in terms of contest or in terms of reward strongly affect the valence of the answers to these questions. If an entrance exam is just a pie-baking (or pie-eating) contest, we are happy to reward both diligence and talent, and not too concerned about the complicating presence of resources and luck. It's a shame if a contestant's oven breaks down on the morning of the big day, but that possibility does not undermine the legitimacy of the contest; likewise the exam.⁵⁷ If a person who otherwise would have been the baker of the century grows up with two diabetic parents and no sugar in the house, that's again a shame, but again does not delegitimize the contest. We want to know if America's got talent — finding a diamond in the rough is why people tune in. As between talent and diligence, people's tastes vary: Some thrill to see the innately talented win effortlessly; others are impressed by hard work. Generally, we design contests to focus upon results and leave the diligence-versus-talent tradeoff to the spectators as they choose which contestants to root for.⁵⁸

If exam-based admission is about desert, these issues play out very differently. A contest designed to reward merit should, most people will think, seek to mitigate as much as feasible the roles of circumstance and of luck. It should, many (but not all⁵⁹) people will think, place a premium on hard work, because that is the ingredient necessary for victory most in the control of the contestant. Talent, on this view, is a special case of luck. For others, talent is what *matters*, and therefore its etiology does not. In wanting to reward the person who cures cancer, or finds the means for cheap carbon sequestration, or can run fifty meters in the shortest time, we don't feel the need to pretend that *only* diligence deserves reward.

The contest and reward frame also matter to how we understand the prize. One reason not to get too worked up about whose pie is best is that the blue ribbon is not worth much. If the prize for the best pie is a million dollars, on the other hand, citizens might appropriately want more transparent criteria and to participate in discussion and analysis of why those criteria, and not others, measure the thing to be rewarded.

57. See CAILLOIS, *supra* note 48, at 46 (“A good player must be able to contemplate with objectivity, detachment, and at least an appearance of calm, the unlucky results of even the most sustained effort or the loss of large sums”).

58. Maxwell J. Mehlman et al., *Doping in Sports and the Use of State Power*, 50 ST. LOUIS U. L.J. 15, 39–43 (2005).

59. See, e.g., Harpalani, *supra* note 8, at 765 (presenting examples of white parents complaining that Asian students' participation in after-school tutoring programs harms white children's college prospects).

Is admission to an exam school more like a blue ribbon or more like a million dollars? The intensity of competition around the examinations suggests the latter. Why else would so many families, including those of modest means, invest significant time and treasure in preparing for them? Likewise, the ferocity of the opposition to exam schools, and the sustained policy, political, and academic engagement with them,⁶⁰ suggests that they matter.

That people think the stakes are high, however, is not enough. Demand in the market is a measure that aggregates personal preferences. Those personal preferences could be based upon mistaken, foolish, or even nefarious ideas. To take the most obvious example, the state should not establish segregated schools because many people prefer them. Nor should the state run programs that people perceive to be beneficial only because they have been misled.

It is, therefore, vital to consider whether the exam schools genuinely confer value on the students they admit. More precisely, one must look at whether they confer excess educational value, above the value of the education they would get in the schools they would otherwise attend.

There are three ways that the exam schools could deliver excess value to students. First, the exam schools might have more public resources than other schools in the system, resources that could translate into educational advantage. Second, they might provide students with a peer group that enhances educational achievement. Third, exam school enrollment might confer benefits upon students by allowing them to demonstrate that they were chosen to enroll, independent of any actual benefits that they enjoy when they do enroll. This would make exam schools a (very particular) kind of status good.

i. Public Resources

The resource question is difficult to document. Exam schools as a group offer opportunities for advanced academic study not generally offered by other schools. This need not be a matter of resources; it could be a function entirely of the achievement and academic preferences of enrolled students. But it is clear that exam schools teach multiple languages, higher mathematics, and sophisticated science at levels very different from the modal public school.⁶¹ The relative value of these kinds of offerings may become more pronounced if more non-exam schools adopt some current proposals by educators concerned with equity to de-emphasize academic

60. See, e.g., MARKOVITS, *supra* note 44, at 11–12.

61. See, e.g., Heller, *supra* note 3.

subjects in the regular curriculum.⁶² However, there is little reason to think that absent the exam schools these kinds of offerings could not be available in many other kinds of schools, at least to some extent. Districts could offer these types of experiences across their systems in a number of ways, including exchange programs, partnerships with colleges and universities, and the deployment of remote-learning technologies.

Considering resources more broadly, most exam schools receive per capita funding from the district and the state at the same baseline level as the other schools in the public system. States and districts do not simply hand over extra funds to such schools. However, a variety of mechanisms, none of them exclusive to one another, may work to increase the resources available to exam schools above the public school baseline. It has been suggested, for example, that some districts' policy of giving schools a premium payment for each Advanced Placement course that they teach provides exam schools with extra resources, because the payment exceeds the actual marginal cost of teaching those additional courses.⁶³ This argument suggests another: Although I have seen no data, it might be that required per capita expenditures on special education are lower in exam schools than in the modal public school, since some (but not all) disabilities make it difficult to achieve on the exams, even with accommodations.⁶⁴ To the extent that special education payments are lower than the actual costs of

62. See *Position Statement: Media Education in English Language Arts*, NAT'L COUNCIL TCHRS. ENG. (Apr. 12, 2022), https://ncte.org/statement/media_education [<https://perma.cc/645P-K2J3>] (advocating for an emphasis on “media texts” in English-language classrooms, and on genres of communication other than essay-writing, although insisting that “media education need not displace the study of literature”); Howard Blume, *Will Your Gifted Child Take Calculus? Maybe Not under California's Reimagined Math Plan*, L.A. TIMES (May 20, 2022), <https://www.latimes.com/california/story/2021-05-20/california-controversial-math-overhaul-focuses-on-equity> [<https://perma.cc/EE7S-HYKH>] (documenting California proposals to use heterogeneous grouping in mathematics classes through the tenth grade in order to promote equity, which opponents regard as a “manifesto against calculus” but which professors of education insist need not limit mathematics achievement).

63. See Mike Elsen-Rooney, *Mysterious Bonus Makes Rich NYC Schools Richer, Critics Say*, WNYC NEWS (Nov. 8, 2017), <https://www.wnyc.org/story/mysterious-bonus-makes-rich-nyc-schools-richer-critics-say/> [<https://perma.cc/PR2U-UBKE>]; Heller, *supra* note 3 (noting a policy, recently repealed, under which “Public schools [in San Francisco were] awarded six hundred dollars for each A.P. test taken” and observing that “Lowell offers thirty-one A.P. courses. The cash is supposed to pay for extra prep time for A.P. teachers, but what’s left over supports other staffing: Peer Resources, tutoring, arts faculty, and a rich catalogue of language instruction. This produces an upward spiral.”); Atila Abdulkadiroğlu, Joshua Angrist & Parag Pathak, *The Elite Illusion: Achievement Effects at Boston and New York Exam Schools* 5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 17264, 2011) (“Stuyvesant offers thirty-seven AP courses, while Boston Latin School offers 23.”).

64. See Abdulkadiroğlu et al., *supra* note 25, at 179 (“[T]here are few special education students in an exam school . . .”).

special education services, this is also a financial advantage for exam schools. There might also be other kinds of expenses, on social services or security for example,⁶⁵ that exam schools can avoid in ways other schools cannot because their populations are skewed towards self-selected strivers who are there by their families' choice.⁶⁶

Another potential factor is that seniority provisions of teachers' contracts, which often weight the preferences of more senior teachers regarding where they teach, provide a resource advantage to exam schools only partially reflected in budget documents.⁶⁷ If better and more experienced teachers prefer to teach in exam schools, this will benefit those schools' students in ways that appear on no balance sheet. Yet another possibility is that exam schools have PTAs and alumni associations disproportionately willing and able to provide extra funds.⁶⁸ And there are still other possibilities.

These possibilities all seem plausible. The debate over exam schools would benefit greatly from a systematic effort to identify and quantify these kinds of resource inequities.

There are also normative issues. Many argue that good public policy forbids giving exam-school students some kinds of resources in amounts above what other students receive, because they "need" it least.⁶⁹ To my

65. Cf. Karen J. DeAngelis, Brian O. Brent & Danielle Ianni, *The Hidden Cost of School Security*, 36 J. EDUC. FIN. 312, 329 (2011) ("Controlling for locale type and size, district wealth has a significant negative association with security spending, although the impact is fairly small.").

66. See Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 412–13 (2012).

67. Cf. Clifford B. Donn et al., *Teacher Working Conditions With and Without Collective Bargaining*, 14 NEV. L.J. 496, 502 (2014) ("Senior teachers use their seniority to transfer into schools and classes that have the best students and are the easiest to teach. This leaves the neediest students and schools with the most junior teachers who may or may not be those best suited to teach them."). More senior teachers also earn more, raising teaching costs.

68. See Abdulkadiroğlu et al., *supra* note 63.

69. It is not always clear what "need it the least" might mean. One might say that high-performing students do not "need" public investment because high levels of performance are correlated with wealth, whiteness, and other forms of privilege; because the utility of the marginal educational dollar spent on this group is lower, in terms of the quantum of learning purchased, than it is for others; or because there is an attenuated public interest in raising achievement levels for those who already perform above par. Each of these versions of "need" commends different policies. A focus on background suggests intensive targeting of education dollars to serve marginalized groups. A focus on the utility of the marginal dollar across different types of students threatens many kinds of special-education funding along with funding for services for high achievers. And the idea that the public is interested more in educating everyone up to some floor of adequacy and less interested in educating above that floor would imply, for example, that all high-school advanced courses should be phased out. Many reasonable people would oppose all of these policies, for a range of good reasons. See, e.g., *supra* notes 44–46 and accompanying text.

mind, this is unpersuasive. Schools need not take as their unidimensional mission bringing as many students as possible to a floor of achievement. Both law and good policy permit the distribution of government benefits for reasons other than need, and states spend for such reasons all the time. The public school system itself is Exhibit A, which spends enormous amounts to educate *all* children, including those who might not “need” it at all.⁷⁰ As noted below,⁷¹ a state committed to educating every child as well as possible might spend disproportionately on both high-achieving and special education students.⁷²

These arguments aside, the propriety of supplementation of any given magnitude for exam schools is debatable. Unlike special education students, exam-school students might be thought already to enjoy advantages in the markets for employment and higher education that it is scarcely necessary to magnify.

In the end, it may not matter very much. There is a strong (though not universal) consensus in the educational literature that exam-school attendance cannot be shown to improve the educational achievement of high-performing students.⁷³ This finding is not entirely counterintuitive: the

Arguments based upon “need” also have denominator problems. Is “need” the criterion for distributing funds only *within* the public education system, or should it also determine the allocation of funds across education, housing, sanitation, recreation, and so on?

A full explication of the idea of educational “need” is far beyond the scope of this Article.

70. Depending on the definition of “need,” see *supra* note 69, students who don’t “need” public education might be those with family resources to acquire education privately, or, quite differently, those least likely to benefit from the kinds of educational services the schools provide.

71. See *infra* Section II.C.

72. See Claire S. Raj, *Rights to Nowhere: The IDEA’s Inadequacy in High-Poverty Schools*, 53 COLUM. HUM. RTS. L. REV. 409, 460 (2022) (noting that per capita special-education expenditures are well above those for general-education students).

73. See, e.g., Abdulkadiroğlu et al., *supra* note 25, at 161, 178 (reporting “only scattered” evidence that attendance at test schools improves scores on later standardized tests, even for “ultra-high (baseline) achievers”); Elaine M. Allensworth et al., *The Educational Benefits of Attending Higher Performing Schools: Evidence from Chicago High Schools*, 39 EDUC. EVAL. & POL’Y ANAL. 175, 187 (2017) (all of the academic benefits associated with selective school attendance are the result of preadmission differences among students); Will Dobbie & Roland G. Fryer, *Exam High Schools and Academic Achievement: Evidence from New York City 2* (Nat’l Bureau of Econ. Rsch., Working Paper 17286, 2011) (insubstantial or negative effects of exam-school attendance on testing outcomes of marginal exam-school students); Robert E. Slavin, *Achievement Effects of Ability Grouping in Secondary Schools: A Best-Evidence Synthesis*, 60 REV. EDUC. RSCH. 471, 486 (1990) (concluding that “[t]aken together, research comparing ability-grouped to heterogeneous placements provides little support for the proposition that high achievers gain from grouping whereas low achievers lose”); Saiying Steenbergen-Hu, Matthew C. Makel & Paula Olszewski-Kubilius, *What One Hundred Years of Research Says About the Effects of Ability Grouping and Acceleration on K–12 Students’ Academic Achievement*, 86 REV. EDUC. RSCH. 849, 875 (2016) (demonstrating that for low-,

suggestion is that high achieving students will achieve regardless of their circumstances. But it does suggest that any unfairness in the allocation of resources to exam schools does not ultimately bring exam-school students actual educational advantage. One might still object that resource differences are unfair in themselves, and wasteful besides. And one can surely challenge the quality, relevance, and scope of the research itself.⁷⁴ But the absence of detectable effects of exam schools on student performance, holding student characteristics constant, blunts the force of claims that exam-school students unjustifiably benefit from unfairly allocated public funds or state assets.

ii. Peer Effects

Exam schools offer students a source of potential value beyond resources: An admitted student finds herself among schoolmates who have also excelled on the test. Setting aside the opportunities for advanced coursework that sorting might bring, having classmates who succeed on the test might benefit students. However, as noted above, researchers have been unable to demonstrate any such peer effects.⁷⁵ Some of the same research, moreover, suggests that homogeneous or tracked environments do harm lower-achieving students even as they fail to help higher achievers.⁷⁶ If one accepts this view of homogeneous grouping, abolishing exam schools would be, roughly speaking, a Pareto improvement, hurting no one and helping many.

This conclusion is an instance of a fairly robust social-science research finding that is inconsistent with very strong and widespread intuitions about how schools work.⁷⁷ Many exam-school parents and some teachers clearly think that attending exam schools helps children by educating them among high-achieving peers.⁷⁸ People who have been successful students — among whom one disproportionately finds both lawyers and academics, whose professions are organized in many respects around both criteria of “merit”

moderate-, and high-achieving learners, between class grouping yielded insignificant effects on academic achievement).

74. See *infra* notes 84–86 and accompanying text.

75. See Dennis Epple & Richard E. Romano, *Peer Effects in Education: A Survey of the Theory and Evidence*, in 1 HANDBOOK OF SOCIAL ECONOMY 1053, 1054 (Jess Benhabib, Alberto Bisin & Matthew O. Jackson eds., 2011) (“For given educational resources provided to student A, if having student B as a classmate or schoolmate affects the educational outcome of A, then we regard this as a *peer effect*.”); *supra* note 69.

76. See Black, *supra* note 66, at 409–11.

77. See Epple & Romano, *supra* note 75, at 1054 (“The notion that peer effects are important to educational outcomes has great intuitive appeal.”).

78. See, e.g., Heller, *supra* note 3 (reporting that Joe Ryan Dominguez, “hired as Lowell’s principal” after elite admissions were abolished, “acknowledged weaker performance in the lottery class”).

and extensive testing⁷⁹ — can find it particularly difficult to believe that sorting does not benefit academically successful children.⁸⁰

The conflict between these popular intuitions and the research literature might be resolved in several ways. One is to insist upon the research findings. We do research in order to analyze and sometimes debunk intuitions plausible on their face but incorrect in fact.⁸¹ The failure of research to detect peer effects, therefore, is often emphasized by opponents of exam schools, who argue their costs to other students and schools, and to racial equity, have no countervailing benefits.⁸² Counterintuitively, however, the same research can also blunt the critique of the exam schools. If the prize for acing the test is in fact of low value, the exam-school process is more like a contest than a reward for merit, and needs correspondingly less rigorous justification.⁸³

A second approach to the counterintuitive findings of the research is to note its very substantial limitations — limitations shared by much academic research into student achievement more generally.⁸⁴ The studies rely upon outcome measures, usually standardized tests, grades, and graduation rates, that arguably fail to capture important kinds of learning. Achievement tests are often limited to reading and mathematics. None of the outcome measures gauge success above some arbitrarily defined level, making them less useful with respect to student performance at the top tail of the distribution. Nor do the outcome measures incorporate many nonacademic features of learning that parents and governments reasonably care about — including, notably, the social learning that many advocates of heterogeneous grouping argue is the result of diversity. The studies also find it very difficult to control for teacher effects,⁸⁵ which educational economists define as

79. See Pamela Edwards, *The Shell Game: Who is Responsible for the Overuse of the LSAT in Law School Admissions?*, 80 ST. JOHN'S L. REV. 153, 157 (2006) (“Most law schools rely heavily on LSAT scores when evaluating candidates for admission.”); Susan Katcher, *Legal Training in the United States: A Brief History*, 24 WIS. INT’L L.J. 335, 346 (2006) (noting the requirement in all but two states of passage to the bar examination to practice law).

80. See Maimon Schwarzschild, *Academic Admissions at Elite Universities and at Specialized Public High Schools: Déjà Vu All Over Again?*, 49 FORDHAM URB. L.J. 1187, 1198 (2022) (“[I]t is surely difficult to maintain plausibly that reducing academic standards for admission would not have any negative effect in the classroom, or on the academic demands that students could be held to in these schools.”).

81. See Eloise Pasachoff, *Two Cheers for Evidence: Law, Research, and Values in Education Policymaking and Beyond*, 117 COLUM. L. REV. 1933, 1968–69 (2017).

82. See Abdulkadiroğlu et al., *supra* note 25, at 179 (“[P]arents either mistakenly equate attractive peers with high value added, or . . . they value exam schools for reasons other than their impact on learning.”); Buery, *supra* note 20, at 115–16.

83. See *supra* Section II.A.

84. See Pasachoff, *supra* note 81, at 1952–61.

85. See Dobbie & Fryer, *supra* note 73, at 2 n.3.

“differences in effectiveness between teachers within schools.”⁸⁶ And teacher effects are plausibly at the root of the gap between research and intuition in this area. It is possible that heterogeneous grouping can succeed in the classroom of a master teacher, but that students taught by teachers of more ordinary skill will learn better if grouped homogeneously.

The strength of one’s intuitions will affect how one understands the shortcomings of the studies. All social science, and educational research in particular, has methodological limits like these.⁸⁷ Education research does not so much establish facts as try to understand the likelihood that some set of effects is at work and the ways in which they might offset one another.⁸⁸ That research design is limited or imperfect is no reason to ignore findings. But the limitations of the science can also be sufficiently substantial that one should conclude that it should not drive the resolution of a particular educational policy question. As Eloise Pasachoff has persuasively demonstrated, decisions about education law and policy are often and justifiably made notwithstanding a *contrary* research consensus — justifiably both because educational research is inherently limited⁸⁹ and because, at bottom, the decisions to be made rest on value judgements rather than empirical questions.⁹⁰

The intuition that sorting benefits academic performance is quite robust. It is reflected in numerous aspects of secondary education, organizes much of the higher education sector, and helps organize the learned professions. At the same time, the research in this area is substantially limited. In my view, these factors together make it reasonable to treat the creation of peer effects as a genuine benefit that accrues to exam-school students. At a minimum, it is difficult — not impossible, not logically incoherent, but difficult — *simultaneously* to argue (a) that exam schools should be abolished because the research documents no benefits to their students and (b) that the exam schools unjustifiably reward the privilege by giving them extra public and peer resources — when the research cannot document that those resources translate into advantage.

At the same time, there is a duty on the part of those who seek to privilege these kinds of intuitions to recognize that an intuition or conviction that

86. Hans Luyten, *The Size of School Effects Compared to Teacher Effects: An Overview of the Research Literature*, 14 SCH. EFFECTIVENESS & SCH. IMPROVEMENT, 31, 31 (2003).

87. See Pasachoff, *supra* note 81, at 1958–59; Benjamin Michael Superfine, *New Directions in School Funding and Governance: Moving from Politics to Evidence*, 98 KY. L.J. 653, 670 (2010) (noting that courts making school finance decisions often fail to “loo[k] deeply at scientific evidence” and ignore or discount disagreements among researchers).

88. See Pasachoff, *supra* note 81, at 1937.

89. See *id.* at 1967–68.

90. See *id.* at 1968–71.

homogeneous grouping helps the talented, research notwithstanding, may in fact disguise racial preferences, whether conscious, unconscious, or some combination.⁹¹ Parents and others who insist that test-excelling students learn more when surrounded by similarly accomplished peers may in fact be using the test to recast less palatable preferences for students to learn among others like them. Society, of course, should not honor such preferences. I am aware of no empirical work that even attempts to determine the role that racist preferences and racist systems play in shaping public views of tracking and grouping. The methodological challenges would be substantial.

In addition, or in the alternative, these intuitions might reflect preferences that cannot fairly be said to be *about* race but that have been powerfully shaped by cultural and institutional factors that developed as they did *because* of race. Parents might be thinking as they do about excellence and peer groups in the context of a racialized culture.⁹² One might accept this argument in principle without being sure of its extent; and one might demur to it without its being clear what the policy cash-out should be. “Although no less harmful than schooling segregation animated by intentional discrimination,” Osamudia James notes, such beliefs and the choices to which they lead are “beyond the reach of equality jurisprudence.”⁹³ One might extend James’s observation to legislative and regulatory decisions about exam schools as well.

iii. Signaling and Status

Finally, even if individuals wrongly associate exam schools with academic benefit, they might rationally devote even substantial resources to securing admission if enrollment is rewarded by other institutions. For example, if matriculation at an exam school came with no substantial benefits to learning, but substantially increased the likelihood of admission to an elite university,⁹⁴ then the exam school is providing value to its student

91. See James, *supra* note 24, at 210.

92. See Chase M. Billingham & Matthew O. Hunt, *School Racial Composition and Parental Choice*, 89 SOCIO. EDUC. 99, 101 (2016) (“parents’ bounded rationality often leads them to make choices based on expedient, non-academic factors, including schools’ racial composition . . .”).

93. James, *supra* note 24, at 212.

94. See Ellen Barry, *Boston Overhauls Admissions to Exclusive Exam Schools*, N.Y. TIMES (July 15, 2021), <https://www.nytimes.com/2021/07/15/us/boston-schools-entrance-exams-admissions.html> [<https://perma.cc/2YGQ-N25Y>] (stating that Boston Latin School “serve[s] as a gateway to elite colleges.”). Cf. Consolo, *supra* note 7, at 1251 (“The admissions process for [New York’s] Specialized High Schools is so competitive because attending these institutions is ‘considered one of the only ways to access an elite education that virtually guarantees a pathway to college.’”).

— even if the elite institution is wrong to think that exam-school students are better prepared for college work.

It is also the case that a university might rationally favor exam-school students for admission even if they did *not* think they were better prepared, because success on the initial exam is plausibly correlated with, as we have seen, both talent and diligence (even as it also depends upon luck and circumstance). This idea, that elite institutions serve their students not by training them better than other places but merely by sorting and then credentialing them has been most thoroughly developed in the context of elite universities themselves.⁹⁵ Elite universities arguably benefit their students primarily by giving them a credential attesting to their brilliance, a credential with which they can enter the working world.⁹⁶ As the Wizard tells the Scarecrow, people who come out of universities “think deep thoughts, and with no more brains than you have; but they have one thing you haven’t got — a diploma.”⁹⁷ The exam school embodies the same idea, one level down. And even though people change, sorting at younger ages can rationally inform sorting at older ages. Only if talent and diligence at time one were entirely uncorrelated with talent and diligence at time two would exam-school admission be irrelevant to a university that itself is in the business of sorting.

If exam schools are about credentialing, exam-school admission is a way that students can buy themselves — or that parents can buy for their children — status that is a ticket to future value. Admission might even be a “status good” in the economists’ sense, *i.e.*, a Veblen good whose price goes up as demand increases — because the exclusivity of the diploma is greater the fewer people have it.⁹⁸ Even if not a Veblen good *per se*, exam-school admission could be a valuable investment in status in the sociologists’ sense of the term as a marker of relational superiority.⁹⁹ Education clearly

95. See, e.g., MICHAEL J. SANDEL, *THE TYRANNY OF MERIT: WHY THE PROMISE OF MOVING UP IS PULLING AMERICA APART* 155 (2020) (“[H]igher education has become a sorting machine that promises mobility on the basis of merit but entrenches privilege and promotes attitudes towards success corrosive of the commonality democracy requires.”).

96. See, e.g., Roy Y. Chan, *Understanding the Purpose of Higher Education: An Analysis of the Economic and Social Benefits for Completing a College Degree*, 6 J. EDUC. POL’Y, PLANNING, & ADMIN. 1, 19 (2016) (“More educated workers may receive higher pay wages because higher education provides them with a credential, rather than acquired skills.”).

97. THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

98. See, e.g., B. Curtis Eaton & Mukesh Eswaran, *Well-Being and Affluence in the Presence of a Veblen Good*, 119 ECON. J. 1088, 1089 (2009). For a suggestion that elite university degrees can be Veblen goods, see Paul F. Campos, *The Extraordinary Rise and Sudden Decline of Law School Tuition: A Case Study of Veblen Effects in Higher Education*, 48 SETON HALL L. REV. 167, 177 (2017).

99. See Elizabeth Currid-Halkett, Hyojung Lee & Gary D. Painter, *Veblen Goods and Urban Distinction: The Economic Geography of Conspicuous Consumption*, 59 J. REG’L SCI.

functions in this way in many contexts, including but not limited to racial status.¹⁰⁰ And although status investment is eminently reasonable for individuals, status seems like a bad thing for the state to invest in providing for its citizens. To do so is to reify unfair relationships and pay for increased inequity, essentially for its own sake.¹⁰¹

Given all the unknowns, it seems fair to say that exam schools might well provide educational benefits to their students above and beyond those of other schools — but they might not. To the extent that those benefits are about resources or status, it is hard to justify making them prizes in a state-sponsored competition. But to the extent that the benefits flow from sorting, the reward is tied to the fact of the exam. And to the extent that the benefits of sorting are substantial, this is a justification for the exam school itself. Therefore, the nature and magnitude of these benefits should determine how much rigor is required in determining what should be tested for, whether the test measures what it purports to measure, and how to minimize the impact of luck and circumstance.

C. Exam Schools as Sites of Differentiated Instruction

The discussion of the benefits of the exam school has, to this point, focused on their role as a contest, with the reward of enrollment being a prize whose value is subject to dispute. The disputed benefits of sorting, however, suggest a third frame through which to view the exam schools: not as a contest or as a reward, but simply as a publicly provided service. A fairly blunt way of inhabiting this frame is to argue that the polity as whole benefits from educating especially talented and diligent students to the boundaries of their potential. Even if unfair, it helps everyone to identify these students and prioritize their education.¹⁰² A more sophisticated framing is to say that the state has a duty, constitutional and civic, to educate all children.¹⁰³ The exam school might be the best way — or just a good way — to educate some of those children.¹⁰⁴ This would justify establishing such schools — not as

83, 85 (2019) (“[A]n emerging line of research . . . studies ‘inconspicuous consumption,’ which is defined as subtle, luxury goods and services that are not overtly materialistic but that also act as social signifiers [E]ducation . . . and efforts toward attaining cultural capital are cited as examples . . .”).

100. See James, *supra* note 24, at 227, 232.

101. See *id.* at 242 (arguing that public investment in status is inconsistent with the anti-subordination goals of civil rights law).

102. See *supra* notes 44–46 and accompanying text.

103. See Weishart, *supra* note 17, at 936 (“The right to education has taken the form of a claim-right held by children ‘[M]ost state constitutions [furnish] a strong textual basis for an explicit . . . duty to provide for education.’”) (internal citations omitted).

104. See Buery, *supra* note 20, at 118.

a contest or as a reward, but as an effort to do well by a group of children with particular needs.

Framing exam schools as a method of serving a population with particular needs has its own resonance in American educational theory, which has grafted onto the idea of schools common to all that education should meet each student where she is.¹⁰⁵ Equity, goes the educators' refrain, is not equality; each student should be given what she needs, and students need different things.¹⁰⁶ To be sure, this principle is most often articulated on the contemporary scene to justify providing additional resources to students who face various kinds of *disadvantage*. But a truly robust concept of equity might lead one to insist that *all* students should get what they need, even those already blessed by circumstance, luck, diligence, or talent.¹⁰⁷ (And, of course, many students are disadvantaged in some ways and advantaged in others.¹⁰⁸)

Educators call an approach in which teachers adapt their teaching to the needs of each pupil "differentiated instruction."¹⁰⁹ The practice of differentiated instruction partially explains and justifies the commitment of the education-research establishment to heterogeneous grouping.¹¹⁰

105. See, e.g., SIGAL R. BEN-PORATH & MICHAEL C. JOHANEK, MAKING UP OUR MIND: WHAT SCHOOL CHOICE IS REALLY ABOUT 64 (2019) ("[C]urrent school choice developments reflect only the latest manifestation of th[e] enduring trend [since World War II] toward more differentiated schooling options for a republic of consumers.").

106. See, e.g., Harerimana Jean Paul, *Equity vs. Equality: Facilitating Equity in the Classroom*, 6 INT'L J. RSCH. & SCI. INNOVATION 216, 216 (2019) ("Equality can be defined as treating every individual in the same manner irrespective of needs and requirements . . . [while] [e]quity can be defined as the quality of treating individuals fairly based on their needs and requirements."); N.Y.C. SCH. DIVERSITY ADVISORY GRP., MAKING THE GRADE: THE PATH TO REAL INTEGRATION AND EQUITY FOR NYC PUBLIC SCHOOL STUDENTS 25 (2019) (henceforth MAKING THE GRADE I) ("Equity . . . means all people receive what they need to be successful in their education. It focuses on equal opportunities not equal inputs, recognizing that different individuals have different access, challenges, histories and needs.").

107. See, e.g., Elizabeth Chu et al., *Family Moves and the Future of Public Education*, at 61–63 (August 10, 2022) (unpublished Article), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4187069 [<https://perma.cc/LH7P-3R2Y>] (sketching a program of "developmental contextualization" through which schools can advance both democratic and pedagogical goals by tailoring schooling to individual differences); Dante Dixon et al., *A Call to Reframe Gifted Education as Maximizing Learning*, 102 PHI DELTA KAPPAN 22, 24 (2020).

108. See Dixon, *supra* note 107, at 22–23; Charles J. Russo, *Unequal Educational Opportunities for Gifted Students: Robbing Peter to Pay Paul?*, 29 FORDHAM URB. L.J. 727, 731–32 (2001).

109. See, e.g., CAROL A. TOMLINSON, DIFFERENTIATED INSTRUCTION 262 (2005); Pearl Subban, *Differentiated Instruction: A Research Basis*, 7 INT'L EDUC. J. 935, 940 (2006).

110. See, e.g., Stavroula Valiandes, *Evaluating the Impact of Differentiated Instruction on Literacy and Reading in Mixed Ability Classrooms: Quality and Equity Dimensions of Education Effectiveness*, 45 STUD. EDUC. EVAL. 17, 17 (2015).

Homogeneous grouping is not necessary if every student can get what she needs in any classroom. But if differentiation makes sense at the individual level, it can also make sense at the level of the classroom — that's tracking — or the school. Differentiation thus undergirds both commitments on the left to heterogeneity and conservative and libertarian commitments to school choice and consumer sovereignty. The same thing is not good for everyone, the right-leaning version of this argument goes; so, the best way to be fair to everyone is to give them what they want, which is the closest implementable version of giving everyone what they need.

Is it plausible to see exam schools just as a mode of differentiated instruction? It is hard to imagine objections in a context where resources are plentiful enough and the non-equality version of equity valued enough that one feels confident that *all* students are given what they need. That, of course, is not our system, where inequality and inequity are both pervasive. Exam schools are Exhibit A for those who fear that differentiation will benefit only some.¹¹¹ But movement towards differentiation, even in an imperfect and unfair system, could still be labeled as progress — as not letting the perfect be the enemy of the good. And it is progress, relative to a grim Harrison Bergeron world where everyone is treated exactly the same.¹¹²

If sorting by examination benefits high-scoring students whose instruction is differentiated, then the legitimacy of the exam school depends, as it does in the frame of the meritocratic contest, on the exam itself. Is the particular exam used, or any exam, the best way to sort in order to realize the benefits of differentiation for this group of students? Perhaps a different exam, or a vector of academic measures that excludes the exam, or a vector that weights the exam differently, or even a vector that includes both academic and non-academic measures, would sort better than the current exam, or sort as least as well with fewer costs to fairness and equity. These are mixed empirical and normative questions, but we are far from being able to generate the kinds of evidence that would address their empirical dimensions. These questions are therefore likely to be debated on the basis of intuition, parental and professional judgment, and politics.

D. Exam Schools as Pork

If, on the other hand, exam schools generate value not through sorting but through the application of disproportionate resources or through the manufacture of status through scarcity, then the exam schools start to look like any public good or public bad whose benefits or costs cannot be evenly

111. See *supra* notes 48–52 and accompanying text.

112. See Kurt Vonnegut, Jr., *Harrison Bergeron*, *MAG. FANTASY & SCI. FICTION*, Oct. 1961, at 5, *reprinted in* KURT VONNEGUT, JR., *WELCOME TO THE MONKEY HOUSE* 7 (1998).

distributed to all.¹¹³ A jobs-generating military base has to be placed somewhere, but everywhere can't have a military base; some particular place gets the base and its jobs and other places do not.¹¹⁴ A pollution-generating power plant or waste treatment facility has to be placed somewhere, but you don't need them everywhere; some particular place will ultimately bear the pollution costs and others will not.¹¹⁵ Likewise, if everyone cannot have schools that are equally good, then an unusually good school will benefit some particular students and not others. Like decisions about where to place military bases or polluting facilities, the public-good exam school question becomes one about *siting*, although not in a geographical sense. Who benefits and who does not?

In the United States, siting decisions are generally made through politically inflected bureaucratic procedure.¹¹⁶ Public goods are pork, and pork is what politicians allocate.¹¹⁷ This seems a fair characterization of an important slice of the contemporary debate over exam schools. In New York City, some advocates who oppose exam schools have opposed the use of any sorting of students into schools by academic criteria. But many others have sought instead to tweak the measure of merit: Instead of or in addition to the exam, they argue, admission should depend upon grades, or teacher recommendations, or attendance.¹¹⁸ These proposals seem motivated by the understanding that any given measure of "merit" — more accurately, any set of criteria whatsoever — comes with particular distributional effects.¹¹⁹ Advocates for recommendations and grades and test-only purists all seem to believe that, at least in New York City, adding grades and recommendations to exam scores as admissions criteria will redistribute seats to Black and Latino youngsters and away from Asian American students. As is true in the debate over affirmative action by race in higher education, what you favor

113. See Robert Cameron Mitchell & Richard T. Carson, *Property Rights, Protest, and the Siting of Hazardous Waste Facilities*, 76 AMER. ECON. REV. 285, 287 (1986).

114. See Lilly Goren, *The Politics of Military Bases*, 9 FORUM 1, 8–9 (2011); Andy Hultquist & Tricia L. Petras, *An Examination of the Local Economic Impacts of Military Base Closures*, 26 ECON. DEV. Q. 151, 152 (2012).

115. See Mitchell & Carson, *supra* note 113.

116. See *Dalton v. Specter*, 511 U.S. 462, 464–65, 476–77 (1994).

117. See ROBERT M. STEIN & KENNETH N. BICKERS, PERPETUATING THE PORK BARREL: POLICY SUBSYSTEMS AND AMERICAN DEMOCRACY 4 (1997); Diana Evans, *Pork Barrel Politics*, in THE OXFORD HANDBOOK OF THE AMERICAN CONGRESS 315–316 (George C. Edwards III, Frances E. Lee, & Eric Schickler eds., 2011).

118. See, e.g., Consolo, *supra* note 7, at 1260–1262.

119. See *id.* at 1262; RSCH. ALL. FOR N.Y.C. SCH., PATHWAYS TO AN ELITE EDUCATION: EXPLORING STRATEGIES TO DIVERSIFY NYC'S SPECIALIZED HIGH SCHOOLS 5–6 (2015) (modeling the distributional effects by race and ethnicity of alternative admissions regimes).

depends on whom you seek to benefit.¹²⁰ Those who see the exam school process as a competition for seats among racial and ethnic subgroups, and seek to engineer admissions criteria to get the distribution that they desire, are engaged in the politics of pork.

There is nothing wrong with pork. Politics is the process by which society determines who gets what, and not every good is evenly divisible. To be against pork is therefore like being against gravity, or friction — good or bad, we are stuck with it. But framing the process as one about pork makes clear an important frame for the exam-school debate, which is that it is about the intergroup power politics of who gets what.

*

It is not wrong to say that the debate over examination schools is a debate about fairness; but it is a mistake to say that it is a debate only about meritocracy. Clearly, rewarding merit is one way to see, and a way in which many interlocutors in the exam-school debate do see, the purpose of the exam school. This understanding brings with it certain duties of fairness and equity on the part of the state. But there are ways in which the meritocratic frame does not reflect the exam-school problem, including in particular that admission to the exam school may be a prize that does not bring any real benefit to its recipients. It is therefore imperative to recognize that exam schools can also be seen in other ways — as contests where the prize is not the point, as attempts to differentiate instruction, and as pork for politicians to distribute.

This Part has shown that the selection of frame has enormous bearing on the plausibility and persuasiveness of various arguments for and against admission by test. In the next Part, I note one thing that the frames other than meritocracy all have in common: They elevate the importance, in thinking about the legitimacy of exam schools, of the structure of the school system in which those schools are located.

III. SECOND-ORDER DIVERSITY

A. First- and Second-Order Diversity

In 2005, Heather Gerken elaborated a distinction between two sorts of diversity that might characterize a population divided into multiple districts or subgroups.¹²¹ She calls these “first-order” and “second-order” diversity.

120. *Cf.* MAGUIRE, *supra* note 31, at 73–74 (noting that the spelling bees were important to immigrants in the 1900s because they “play[] no favorites . . . in any sense” and offered “the levellest of level playing fields”); *id.* at 81 (same with respect to equity between “boys and girls”).

121. *See generally* Gerken, *supra* note 21.

Consider a jurisdiction 70% of whose population is from Group A and 30% from Group B. If every electoral district and jury in the jurisdiction is designed to have 70% A and 30% B, then these institutions are “first-order” diverse; each district and jury reflects the diversity of the jurisdiction.¹²² Such a system, however, never gives minority group B enough power to control outcomes. Second-order diversity seeks diversity in composition *among* subgroups. Some juries and districts are created where B has a majority. This gives B access to real power some of the time. The cost, however, is that B is *underrepresented* in *other* juries and districts. This is second-order diversity.¹²³ Institutional design, Gerken argues, requires “tradeoffs” between these two types of diversity.¹²⁴

Gerken’s distinction was made with voting districts and juries, not schools, in mind. This Part suggests that Gerken’s binary can be adapted to nonetheless offer a productive way to think about test-only school admissions.¹²⁵ Admission by test, I argue, is often reasonable and may even be desirable in school systems whose schools display robust second-order diversity. When second-order diversity among schools is anemic, test schools pose much greater concerns.

One issue in applying Gerken’s work in this new context is that the term “diversity” itself has repeatedly changed in meaning between the time of *Bakke v. Regents*, when that the Supreme Court elevated diversity to a central concern of school integration debates,¹²⁶ the time in which Gerken wrote, and today. Many now reject diversity as a policy goal for schools.¹²⁷ Critics on the right — a group that, it seems nearly certain, will soon include the Supreme Court¹²⁸ — seek to replace diversity with a principle of formal

122. *See id.* at 1107 (proponents of first-order diversity “believe that, in the best of all possible worlds, half of our legislators would be women, all of our schools would be racially integrated, and the proportion of African American corporate executives in the United States would correspond to the proportion of African Americans in the population”).

123. *See id.* at 1122.

124. *See id.* at 1111.

125. I have applied Gerken’s analysis to other school governance questions as well. *See* Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 493, 524–25 (2010).

126. *See* *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978).

127. *See* Meera E. Deo, *The End of Affirmative Action*, 100 N.C. L. REV. 237, 275 (2021); N.Y.C. SCH. DIVERSITY ADVISORY GRP., MAKING THE GRADE II: NEW PROGRAMS FOR BETTER SCHOOLS 10 (2019) (henceforth MAKING THE GRADE II) (“Diversity means something different in each community and recommendations should speak to that broad definition.”).

128. *See* Order Granting Petition for Certiorari in *Students for Fair Admissions v. Harvard*, 142 S. Ct. 895 (2021) (mem.); Order Granting Petition for Certiorari in *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (2022) (mem.); Erwin Chemerinsky, *The Supreme Court and Racial Progress*, 100 N.C. L. REV. 833, 852 (2022) (“[T]here are now likely six votes on the Court — Roberts, Thomas, Alito, Gorsuch, Kavanaugh, and Barrett — who will say that *Bakke*, *Grutter*, and *Fisher* were wrongly decided.”); Deo, *supra* note 127, at 239 (“The Supreme Court has signaled the end of affirmative action.”).

fairness: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹²⁹ On the left, critics argue that diversity criteria inappropriately center the values of mixing and the well-being of majorities instead of focusing on reparative justice.¹³⁰ Nevertheless, “diversity” in Gerken’s primary sense — how to manage assignment and representation of multiple groups within institutions — remains the central concern of school law and policy with respect to race.

Gerken’s fundamental concern is with “disaggregated democracy.”¹³¹ Her subject is *governance*. This is why she focuses on representative bodies like juries and electoral districts.¹³² Schools are public services, the object rather than the mechanism of governance.¹³³ To apply Gerken’s taxonomy to schools themselves, rather than just to their governing “committees,”¹³⁴ is therefore an extension of Gerken’s theory. But it is not an inappropriate one. First, schools are unique among public services in their relationship to the project of democratic governance. There is substantial consensus that a central goal of public education is to promote the democratic project. Many also argue that public schools should adopt aspects of democratic governance internally, in order to model democratic practice for their students and give them experience in such practice.¹³⁵ Schools are not themselves institutions of governance, but it is important that they instantiate the same political values that underlie governing institutions.

129. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion).

130. See, e.g., Adam Chilton et al., *Assessing Affirmative Action’s Diversity Rationale*, 122 COLUM. L. REV. 331, 350–52 (2022) (“[T]he diversity rationale may well be perceived as treating the minority . . . as an ornament, a curiosity, one who brings an element of the piquant to the lives of white professors and students”; “If diversity of views or experience were the objective, one would expect to see a preference for foreign students or members of minority religions, which is not the case.”); Deo, *supra* note 127, at 240 (“Instead of relying solely on diversity, we need an equity-focused affirmative action model that targets the full inclusion of our most vulnerable students.”); Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 426 (2014) (“[T]he diversity rationale does not promote progressive thinking about race and identity. Rather it perpetuates an old story . . . about the expendability of [black and brown] bodies once they are no longer needed.”).

131. See Gerken, *supra* note 21, at 1108–09.

132. See *id.* at 1102 (describing second-order diversity as a way of thinking about “decisionmaking bodies,” such as “juries, electoral districts, appellate panels, [and] school committees”).

133. See *id.* at 1107–08 (using schools as examples to illustrate first- and second-order diversity while noting that the example is “outside of the governance context”).

134. See *id.* at 1102.

135. See, e.g., Emily Buss, *Developing the Free Mind*, in THE OXFORD HANDBOOK OF U.S. EDUCATION LAW 81, 86–87 (Kristine L. Bowman ed. 2021).

Second, as Gerken herself notes, schools share with juries and voting districts their “disaggregated” institutional design.¹³⁶ There are multiple schools in a jurisdiction; each student in the jurisdiction must be assigned to one and no more than one; no one is left out.¹³⁷ The process of populating schools with students can therefore be designed with either first- or second-order diversity in mind.¹³⁸

This Article does not undertake fully to analyze or even to explicate how best to resolve the conflicting visions offered by educational policies that focus upon first-order and second-order diversity. Rather, it makes the more modest point that a policy of test-only or test-based admissions in a small number of public schools has greater potential to advance the democratic and educational project when a school system is broadly characterized by robust second-order diversity. Conversely, in systems where exam schools reduce first-order diversity where second-order diversity is also absent, the critique of the exam schools gains force.

B. The Case of New York City

The case of the public high schools of New York City, the battlefield over which so many engagements in test-school debate has been fought, provides an excellent context for developing this argument because proponents of both first- and second-order diversity — both of whom see the two kinds of diversity as incompatible — stage their dispute in full voice in contemporary debates over how New York City schools should operate.¹³⁹ Should every city school “look like the city,” representative across the many axes of difference that characterize the New York student population? Or should schools be different from one another, so that the schools *taken together* “look like” the city — some places integrated over all kinds of difference, and others dominated by particular groups? The debate over the test schools is a synecdoche for this conflict.

136. Gerken, *supra* note 21, at 1107–09.

137. See Saiger, *supra* note 125, at 536 (“Unlike general local governments, but like electoral districts, school districts are a complete, discrete map.”).

138. Cf. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 711–14, 716–17 (2007) (describing diversity-conscious student assignment systems).

139. This conflict is not new; indeed it is of long-standing, although its political valence has shifted repeatedly. Ironically, the cry that organized the fierce and formative educational politics of New York in the 1960s emanated from the same communities where advocacy for first-order diversity is concentrated today—and that cry was for “community control,” i.e., second-order diversity. African American educators in the 1960s sought the right to choose their own teachers for their own students, a right they would not have when all schools were built to serve the political needs of the whole city. See generally RICHARD D. KAHLBERG, *TOUGH LIBERAL: ALBERT SHANKER AND THE BATTLES OVER SCHOOLS, UNIONS, RACE, AND DEMOCRACY* (2009); DIANE RAVITCH, *THE GREAT SCHOOL WARS* (1974).

New York's current system of high-school admissions is one of citywide choice, where students may request admission to wide range of very different high schools across the city. Only a handful of schools among the hundreds available — Stuyvesant, Bronx Science, and a few sister schools — admit students solely on the basis of an admissions test.¹⁴⁰ Scores of other city high schools use tests as one among several academic measures that determine admission, notably but not exclusively middle-school grades.¹⁴¹ (These schools share this approach with the pre-reform policy in San Francisco's Lowell and Fairfax's Thomas Jefferson schools.)¹⁴² Still other schools combine academic measures with measures intended to diversify the student population by wealth or neighborhood.¹⁴³ Neighborhood, in New York as in many other places, is a proxy for race, because race cannot factor directly into individualized admission decisions under current Supreme Court caselaw.¹⁴⁴

Still other schools seek diversity not only by wealth and neighborhood, but by academic achievement, looking to admit classes with a large range of academic abilities and accomplishments.¹⁴⁵ Some schools use interviews, auditions, and portfolios to screen for student characteristics orthogonal to both academics and wealth, such as leadership potential or artistic ability.¹⁴⁶

140. See MAKING THE GRADE I, *supra* note 106, at 74.

141. See MAKING THE GRADE II, *supra* note 127, at 20. This was the model that Mayor de Blasio unsuccessfully advocated for the City's test schools. See Consolo, *supra* note 7, at 1254.

142. See Chester Finn, *A Progressive Assault on Selective High Schools*, WALL ST. J., Nov. 27, 2020, at A15 (noting that Thomas Jefferson [formally] used a 'holistic' admissions process that consider[ed] essays, interviews . . . teacher recommendations . . . grades, and tests scores"); see also Jay Mathews, *Why Not Lottery Admissions for Great High Schools?*, WASH. POST (Jan. 16, 2022), <https://www.washingtonpost.com/education/2022/01/16/selective-high-school-lottery/> [<https://perma.cc/SZF8-QS4B>] (noting Lowell High School considered grades and test scores in making admissions decisions before its lottery system was introduced).

143. See MAKING THE GRADE I, *supra* note 106, at 47.

144. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–48 (2007) (plurality opinion); *id.* at 789 (Kennedy, J., concurring) (permitting the use of "race conscious" proxy categories, but not individual racial identities, in public-school student assignment); see also Sarah Diem, *Seeking Diversity: The Challenges of Implementing a Race-Neutral Student Assignment Plan in an Urban School District*, 28 INT'L J. QUAL. STUDS. EDUC. 842, 847 (2015) ("Although SES is not considered by some to be an adequate substitute for race, because of the current legal and political context, districts are increasingly implementing SES-based and other race-neutral student assignment plans").

145. See MAKING THE GRADE II, *supra* note 127, at 19 (describing the City's "Ed Opt" model as one that seeks for each high school "an appropriate mix of high, medium and low academic achieving students").

146. See Consolo, *supra* note 7, at 1249 n.17. For a description of the audition process in 2022, see *High School Auditions*, N.Y.C. DEP'T EDUC., <https://www.schools.nyc.gov/enrollment/enroll-grade-by-grade/high-school/high-school-auditions>. [<https://perma.cc/ZDE9-ZSUC>] (last visited Sept. 14, 2022).

And still others do not “screen” at all, taking all comers on a first-come-first-serve or lottery basis. Some of these have developed special programs of interest to particular students, so that students who share those interests apply disproportionately.¹⁴⁷ Others function essentially as neighborhood high schools, although they are formally available to students citywide.¹⁴⁸

New York City’s high school system, in other words, is organized to be second-order diverse. There are many schools. Their programs differ from one another. Both student choice and different admissions procedures result in different kinds of student bodies.¹⁴⁹ This is a model that privileges differentiation. It also means, in practice, that some schools — the test-only schools first among them — do not exhibit first-order diversity either by race or by academic achievement.¹⁵⁰

The debate over which kind of diversity should organize New York City schools, especially with regard to race, is explicit and heated. In two reports issued in 2019,¹⁵¹ an important advisory commission convened by New York City’s Mayor, Bill de Blasio — who expended a great deal of political capital on opposing test schools — recommended that every school should “look like,” *i.e.*, have a racial composition that mirrors, its borough (in the short term), and the City as a whole (in the medium term).¹⁵² Screened schools, including test schools, come in for special criticism.¹⁵³ This recommendation frames the City’s alternatives as a stark choice between first-order diversity and segregated schools. And segregated schools, the reports argue, are both intolerably unjust and pedagogically perverse. Second-order diversity is valuable only as a stop gap¹⁵⁴ — and perhaps, once first-order diversity has been thoroughly achieved, as a way to add even more value to the system.

New York’s exam schools challenge this conclusion. Several of the benefits of second-order diversity that Gerken lists directly echo the exam-schools debate. One is the tradeoff between presence and control. In a first-

147. *See generally* N.Y.C. DEP’T EDUC., 2022 NYC PUBLIC SCHOOLS ADMISSION GUIDE (2022).

148. *See id.*

149. *See* Wong, *supra* note 1 (New York City’s system confronts students with a “cornucopia of beautiful and horrible choices”).

150. *Cf.* Gerken, *supra* note 21, at 1113.

151. *See* MAKING THE GRADE I, *supra* note 106; *see also* MAKING THE GRADE II, *supra* note 127.

152. *See* MAKING THE GRADE II, *supra* note 127, at 6.

153. *See id.* at 77 (noting the relationship between screened admissions and school segregation in high school).

154. *See, e.g.*, John A. Powell, *Black Immersion Schools*, 21 N.Y.U. REV. L. & SOC. CHANGE 669, 680 (1995) (arguing that “during a crisis in which Black children are consigned to inferior ghetto schools, [Black] communities should have room to experiment with immersion schools”).

order diverse system, minorities are never entirely excluded, but neither are they ever majorities in a position to control outcomes.¹⁵⁵ This observation closely tracks the complaint of many Asian American advocates of the test schools. Because Asian American students apparently enjoy some comparative advantage in test-taking, regardless of reason, admission by test gives the Asian American community the relatively rare chance to be the majority group in some school community.¹⁵⁶ Likewise, the argument tracks the views of those unconcerned by race who see test schools as way to serve extraordinarily talented youth — talented on a particular dimension — by placing them among others similarly talented. Even if one demurs to the argument that such environments do not create better educational outcomes, schools are not entirely about outcomes (and certainly not only about the outcomes measured by researchers.)¹⁵⁷

Moreover, unlike the juries or appellate panels with which Gerken is concerned, schools are also communities characterized by cultures (both racial and otherwise), social norms, and democratic practice. The exam school concentrates particular approaches to these in a particular place. That concentration does trade “influence” for “control;”¹⁵⁸ to be in control in the exam schools means less influence in other schools. Gerken suggests that a minority can benefit from such a tradeoff.¹⁵⁹ I suggest that this argument applies to racial minorities but also to minorities defined by test-taking prowess. Second-order diversity offers both kinds of minorities substantial influence over school culture in some schools, at the cost of reducing their already modest control in the remaining schools.

Moreover, Gerken suggests, the overall “democratic fairness” of a system can benefit from second-order diversity.¹⁶⁰ The same could be said about “educational fairness.” A test school might promote an educational vision different than, and even in conflict with, the modal vision, forcing conversation¹⁶¹ but not undermining modal practice.¹⁶²

This last suggestion is connected to Gerken’s provocative observation that second-order diversity can bring benefits “in the aggregate.”¹⁶³ Having argued that the jury is a quintessentially second-order diverse institution, she

155. See Gerken, *supra* note 21, at 1126.

156. See Saiger, *supra* note 4 (documenting Asian American majorities in four of New York’s eight test schools in the 2013–14 school year); Harpalani, *supra* note 8, at 774 (documenting the same phenomenon in admissions to Stuyvesant High in 2019).

157. See *supra* note 84 and accompanying text.

158. See Gerken, *supra* note 21, at 1126.

159. See *id.*

160. See *id.* at 1125.

161. See *id.* at 1134.

162. Cf. *id.* at 1131.

163. *Id.* at 1139.

writes: “If we understand ‘the law,’ as shaped by jury verdicts, to be the aggregation of many jury verdicts, then the influence/control tradeoff takes place not only at the level of individual jury verdicts, but also at the level of jury verdicts *in the aggregate*.”¹⁶⁴ Minorities, she suggests, might be better served by a system that sometimes produces outlier verdicts than by one that moves all verdicts in the same direction, because those anticipating a theoretical jury must account for the possibility of outliers, and because outlying views are systematically introduced into the overall system. Translated to the exam-school context, this suggests that educational practice outside the exam schools could benefit from the presence in the system of schools that cater to the needs of students who can be admitted into the exam schools.¹⁶⁵

Such a suggestion seems entirely plausible. De Blasio’s advisory council in New York, for example, justified its recommendation to abolish screened admissions not only on the grounds of fairness but on the grounds of pedagogical imperatives it felt apply to “all” students:

Decades of research has taught us that diverse, integrated schools offer academic and social benefits for all students . . . (1) all students benefit when they can learn from classmates who have different life experiences to share, increased . . . creativity; (2) all students benefit from reductions in prejudices and implicit biases and improved social-emotional well-being; and (3) all students benefit from experiences that prepare them for an increasingly diverse society.¹⁶⁶

The exam schools offer a different pedagogical vision. It does not reject the claims of the de Blasio committee, but it does reject the unvarying, universal weight the committee assigns to them. The foundational understanding of the exam schools elevates certain pedagogical values that the de Blasio committee dramatically undervalues. By allowing exam schools to operate, the totality of the City’s school system continues to carry both views as it moves forward. This might, perhaps, lead both to more careful attention to the differentiated needs of high-end learners in the non-test schools and to the benefits of diverse classrooms in the test schools.

Gerken’s analysis also leads to the recognition that sacrificing some influence for occasional control sounds not only in outcomes, or even in the nature of school communities, but also in the nature of the individual experiences of participating individuals. Second-order diversity, she writes:

164. *Id.*

165. *See id.* at 1157 n.162 (“Will an African American governed by a predominantly white school committee be affected by the fact that elsewhere African Americans are setting educational policy? Such a claim would, of course, raise a number of questions related to the debates over virtual representation.”).

166. MAKING THE GRADE I, *supra* note 106, at 13–14.

[D]istributes participatory experiences more symmetrically. It grants electoral minorities a chance to enjoy the same type of participatory experience — the sense of efficacy or agency associated with being in charge — that is usually reserved for members of the majority. Instead of being the junior partners to every decision, electoral minorities occasionally enjoy . . . power¹⁶⁷

Such occasional power at the school level carries benefits in terms of political incorporation—those who have the experience of successfully wielding power can use that experience to build more political power and to gain elective office.¹⁶⁸ There are also benefits beyond the instrumentally political. The exercise of power has a “purely dignitary” dimension, because it offers the experience of effective participation.¹⁶⁹ It also operates as “a sign of trust, an acknowledgment of equal status.”¹⁷⁰ It is hard not to hear the value these advantages carry in the protests of immigrant and poorer communities, some Asian American but others as well, against the abolition of the test schools. (It is easy and appropriate, of course, not to see these advantages when the protests emanate from communities of wealth and privilege whose dignity and status are assured).

Another of Gerken’s observations is about constituent service. In a governance system characterized only by first-order diversity, those not in the majority are essentially powerless to serve their constituents. Those constituents benefit only when their interests track those of majorities. Second-order diversity empowers representatives to serve their constituents in some cases where constituent interests are opposed to the majority’s.¹⁷¹ In our context, schools themselves take on the role of representatives, as the institution serving constituents. From that perspective, Gerken’s argument tightly tracks many of the arguments for test schools made by those who think that students with test-taking aptitude are benefited by environments that place them among similar peers. The argument is not that *most* schools should organize themselves to benefit this group specially, but rather that overall utility might increase if a few schools do.

All of these benefits, however, require a system that is genuinely characterized by second-order diversity. A jury or districting system

167. Gerken, *supra* note 21, at 1143. See generally Heather K. Gerken, *Second-Order Diversity: An Exploration of Decentralization’s Egalitarian Possibilities*, in DIFFERENCE WITHOUT DOMINATION: PURSUING JUSTICE IN DIVERSE DEMOCRACIES 227, 244 (Danielle Allen & Rohini Somanathan eds., 2020).

168. See, e.g., Kim Geron & James S. Lai, *Beyond Symbolic Representation: A Comparison of the Electoral Pathways and Policy Priorities of Asian American and Latino Elected Officials*, 9 ASIAN L.J. 41, 61 (2002).

169. See Gerken, *supra* note 21, at 1143.

170. *Id.*

171. See *id.* at 1135.

assumes many juries or districts. Second-order diversity means that some juries will not be representative, but also that everyone is represented, because each jury is drawn from a representative pool. The benefits that Gerken notes — policy, political, discursive, and dignitary — require this feature. And it is a feature that many school systems do not have. If a school district offers the benefits of second-order diversity *only* to those who excel on tests, without making it available to a variety of non-majority communities, it is not engaged in second-order diversity at all. It is engaged instead in favoritism, and, in the case of test-based admissions, favoritism unavoidably inflected by race.

This same point can be appreciated by returning to the alternative frames identified in Part II. If test schools are to be justified plausibly as exercises in differentiating instruction, then the system must differentiate instruction across the board, for children who test well but for other sorts of children too. If the test schools are just a public contest, then the prize needs to be relatively innocuous — which in part depends upon the test schools' being an idiosyncratic trophy and not the only educational game in town. Even if test-school admission is a reward for “merit,” the care with which public officials must define merit and the precision with which they must measure it varies with the extent that that reward is valuable. Genuine second-order diversity gives public authorities more justification to reward even imperfectly measured traits, since the system is characterized by a plethora of measurements and a multitude of rewards. Finally, to the extent that admissions by exam are a species of pork barrel politics, such politics also require that there be multiple recipients with multiple stakes in the system jockeying for multiple rewards.

The various jurisdictions whose test schools (whether test-only or tests as one important academic measure) have been at the forefront of controversy — New York, San Francisco, Cambridge, and Fairfax, Virginia — embed those schools in systems that display very different levels of second-order diversity. The diversity of New York's high school ecology, as noted, is robust. Both San Francisco and Cambridge have systems of public-school choice of which the test schools are a part, but the range and number of choices is far more limited than in New York. The system in Fairfax essentially offers Thomas Jefferson as a singular “elite” opt-out from regular geographical assignment. These differences are not about the schools themselves, but about the systems in which they participate. Nevertheless, such differences should substantially shape the public assessment of the reasonableness and desirability of the test-school approach, on any frame.

CONCLUSION

The examination school question is difficult because all sides are right.

Certainly, the extraordinary racial disparities that result from exam-based admissions are a tocsin warning that something is deeply amiss. Intuitively, an exam full of questions about math and vocabulary, neutral on its face and blindly administered, is an entirely legitimate way — and perhaps the fairest achievable way — to identify students with vitally important traits of intelligence, aptitude, diligence, and grit. Plausibly, it makes sense to provide such students with a particular kind of intense education from which they can benefit.¹⁷²

It matters that, at a school like New York's Stuyvesant, the principal beneficiaries of the racial disparities associated with the exam are not white students of privilege but Asian American students of poor and moderate means. It matters that other schools in the New York system provide groups of students defined by criteria other than strong test-taking abilities with other kinds of specialized education, with different and perhaps even complementary racial effects. And it matters that not all exam schools are like Stuyvesant and not all school systems are like New York's.¹⁷³

There is also a great deal that we just don't know, both about the tests and about ourselves. Do exam schools enjoy meaningful financial advantages relative to other public schools? Does test preparation work, and how, and for whom? What do the exams actually measure? What are we trying to measure anyway?¹⁷⁴ Can a school system be "common" and equitable but still respond effectively to the extraordinary range of differences among children, or are trade-offs between these two goals inevitable?¹⁷⁵ If trade-offs are unavoidable, how do we want to make them? Does concentrating academically advanced students in a single institution even help them to learn in the first place?

These claims and questions are about race, and they are about "merit." But they are not *only* about race and merit. They operate simultaneously on different and disjunctive frames. Recognizing this is the only way for productive debate to move forward. All interlocutors should acknowledge that the exam school both reinforces structural racism for some groups and mitigates it for others. It engages a problematic conception of value, but at the same time differentiates instruction in a way we should want for all children who differ from the norm. It generates a competitive struggle that simultaneously elevates some important values in society, challenges other important values, and generates a values-free, rough-and-tumble, pork-barrel

172. *See supra* Sections II.A and III.B.

173. *See supra* Section III.B.

174. *See supra* Section II.B.

175. *See supra* Sections II.C and II.D.

scuffle among political constituencies. Its inequities are structural, and its fairnesses are too.