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# The Sequential Movement Challenge of Higher Education Access

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## INTRODUCTION

Too often, discussion of how best to promote greater and more equitable access to higher education in the United States centers on a single set of challenges when in fact they are many, varied, and interrelated. There is the challenge of student diversity: the student body at the most elite institutions does not look like the population of the nation as a whole.[1] There is the burden of cost: the price of higher education both deters potential students[2] and burdens those who must borrow to enroll,[3] whether they

* Professor of Law, University of California, Irvine. The author also thanks Will Shortz for providing helpful advice when this Essay was in its formative stages, and Jennifer M. Chacón for patiently listening while he worked out the relationships described herein. The author is also grateful to the students at the Law Review, whose comments and suggestions only made the Essay stronger.

1. Jeremy Ashkenas, Haeyoun Park & Adam Pearce, *Even With Affirmative Action, Blacks and Hispanics Are More Underrepresented at Top Colleges Than 35 Years Ago*, N.Y. TIMES (Aug. 24, 2017), https://www.nytimes.com/interactive/2017/08/24/us/affirmative-action.html.

2. PAMELA BURDMAN, THE INSTITUTE FOR COLLEGE ACCESS AND SUCCESS, THE STUDENT DEBT DILEMMA: DEBT AVERSION AS A BARRIER TO COLLEGE ACCESS 22 (2005).

3. Sandy Baum, Jennifer Ma & Matea Pender, *Trends in Student Aid 2016*, C. BOARD 1, 20 fig.11B (2016), https://trends.collegeboard.org/sites/default/files/2016-trends-student-aid_0.pdf (last visited Nov. 22, 2017).

graduate or not. There are disturbing disparities in standardized test scores: the admissions criteria used by institutions that are most selective disfavor applicants whose families earn lower incomes[4] and who are African American or Latino.[5] There is the performance of for-profit higher education providers: these institutions produce worse outcomes for students, in the form of low completion rates,[6] greater debt burdens,[7] and greater likelihood of default,[8] and they disproportionately serve students who are poor and African American or Latino.[9] There is the potentially regressive effect of so-called merit aid: financial aid practices used by competitive colleges and universities to improve their placement in rankings work against recruitment of students who have greater financial need and in favor of those with higher test scores, who tend to be those whose families have more wealth or higher incomes.[10]

Each of these unpleasant facts about the college admissions and financial aid processes demands careful analysis. The causes of these trends are complex, intertwined, and deeply buried by years of unquestioned assumptions and implicit, widely shared beliefs about the role of government in promoting access to higher education and the roles of colleges and universities in society. To conduct such an analysis, in turn, demands careful attention to the preexisting distribution of higher education opportunity, the history of that distribution, and its relation to the distribution of wealth. This is so because the system that determines who goes where consistently and disproportionately favors those who enjoy relatively greater power, privilege, and whose families, further, have enjoyed relatively greater power and privilege.

Consider the characteristics of the college-going population: of the nearly 20 million undergraduates enrolled in 2015, almost 11 million were

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4. *2016 College-Bound Seniors: Total Group Profile Report*, C. BOARD 1, 4 tbl.10 (2016), https://reports.collegeboard.org/pdf/total-group-2016.pdf (last visited Nov. 22, 2017).

5. *Id.* at 3 tbl.7.

6. *Digest of Education Statistics*, NAT'L CTR. FOR EDUC. STAT. tbl.326.10 (2016), https://nces.ed.gov/programs/digest/d16/tables/dt16_326.10.asp (showing share of students in an entering class who graduated within six years, across different institution types) (last visited Nov. 22, 2017).

7. Stephanie Riegg Cellini & Rajeev Darolia, *Different Degrees of Debt: Student Borrowing in the For-Profit, Nonprofit, and Public Sectors*, BROWN CTR. ON EDUC. POL'Y 1, 4 tbl.1 (2016), https://www.brookings.edu/wp-content/uploads/2016/07/cellini.pdf (last visited Nov. 22, 2017).

8. *Comparison of FY 2014 Official National Cohort Default Rates to Prior Two Official Cohort Default Rates*, DEP'T OF EDUC. (2017), https://www2.ed.gov/offices/OSFAP/defaultmanagement/schooltyperates.pdf (last visited Nov. 22, 2017).

9. *Students Attending For-Profit Postsecondary Institutions: Demographics, Enrollment Characteristics, and 6-Year Outcomes*, DEP'T OF EDUC. tbl.2 (2011), https://nces.ed.gov/pubs2012/2012173.pdf (last visited Nov. 22, 2017).

10. *2016 College-Bound Seniors: Total Group Profile Report*, C. BOARD 1, 4 tbl.10 (2016), https://reports.collegeboard.org/pdf/total-group-2016.pdf (last visited Nov. 22, 2017).

white and more than 8 million were students of color.[11] A survey of first-year undergraduates found that more than 50% of African American and Latino students receive federal Pell grants, awarded on the basis of financial need.[12] These groups of students are dramatically underrepresented at the most elite institutions in the country.[13] Rates of completion of programs of study also vary widely and consistently across the same lines and at different kinds of institutions. While more students from across segments of society go to college, one recent examination by *The New York Times* found that the share of minority students at the most elite and prestigious institutions has held steady or declined.[14]

Yet to analyze any barrier to higher education access, in isolation, is inherently risky. Both the processes that put hurdles in the way of more potential college students who are already disadvantaged and the societal characteristics that put these students at a disadvantage are interwoven. Any reform effort will be far less likely to succeed if uninformed by recognition of the complexity created by relationships linking admissions decisions and aid decisions; linking poverty, race, and ethnicity; linking wealth, race, ethnicity, and conventional measures of merit; linking conventional measures of merit and financial aid decisions; and no doubt additional relationships too byzantine to summarize in a phrase.

This Essay does not seek to identify and analyze all the ways that student characteristics and institutional practices work together to the advantage of some and the disadvantage of others—that would be a lofty goal indeed. Yet, this Essay does aim to inform analysts of admissions and financial aid policy, and it aims to provoke analysts to ponder the ways in which potential reforms should be thought through. The goal of this Essay is to map the terrain and suggest possible implications of relationships among race, class, institutional incentives, measures of merit, and debt for possible reform. To be clear, the Essay assumes that greater and more equitable access to higher education is the ultimate ambition of both federal policy and institutional practice.

Equitable access to higher education opportunity is an appropriate and critical question for legal scholars. Lawmakers and courts have given shape to the architecture that makes opportunity more available to some and less available to others. Historically, legal challenges to exclusive practices of colleges and universities have opened the gates for members of

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11. *Digest of Education Statistics*, NAT'L CTR. FOR EDUC. STAT. tbl.306.10 (2016), https://nces.ed.gov/programs/digest/d16/tables/dt16_306.10.asp?current=yes (last visited Nov. 22, 2017).

12. *Federal Pell Grants*, EDUC. DEP'T OFF. FED. STUDENT AID, https://studentaid.ed.gov/sa/types/grants-scholarships/pell (last visited Mar. 6, 2018).

13. David Leonhardt, *America's Great Working-Class Colleges*, N.Y. TIMES (Jan. 22, 2017), https://www.nytimes.com/2017/01/18/opinion/sunday/americas-great-working-class-colleges.html.

14. Ashkenas et al., *supra* note 1.

marginalized and subordinated groups.[15] And regardless of the usefulness of the courts, legislation has, will, and must implement reforms.[16]

Part I of this Essay examines the role race plays in access to higher education. Part II assesses the role of wealth. Part III discusses the implications of conventional assessments of merit. Part IV examines the potentially important role played by academic support to help enrolled students achieve graduation. Part V discusses the impact of borrowing and indebtedness. In conclusion, Part VI identifies political obstacles to effective reform informed by recognition of the relationships previously analyzed in the preceding parts.

## I. RACE AND ETHNICITY

Gaps in participation in higher education by members of different racial and ethnic groups have long received critical scrutiny, with the differences attributed to a wide variety of factors. These factors include a history of discrimination, different levels of wealth accumulation, and prior educational opportunity. Most notoriously, some have attributed lower rates of matriculation, worse performance, and lower rates of completion—hereinafter referred to collectively simply as "gaps"—to innate differences between members of different racial and ethnic groups.[17] This Part presents data illustrating the persistent and troubling differences in rates of participation in, and completion of, higher education across racial and ethnic groups. This Part also addresses the shortcomings of affirmative action in the higher education realm, financial aid, and the policy solutions historically used in an effort to remedy these shortcomings. This Part then offers a brief critique of the alternative remedy, class-based affirmative action, proposed with increasing frequency.[18]

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15. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (elementary and secondary schools); McLaurin v. Okla. State Regents, 339 U.S. 637 (1950) (mandating opening graduate program to a black applicant); Sweatt v. Painter, 339 U.S. 629 (1950) (law school).

16. For example, periodic updates to the Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219-1270 (codified as amended at 20 U.S.C. §§ 1001-1003, 1011, 1015, 1018-1019, 1021-1022, 1031-1036, 1041, 1051, 1057-1063, 1065-1068, 1070-1099, 1101-1103, 1121-1128, 1130-1138, 1140-1141, 1161 (2017)) reflect recognition of new challenges and evolving goals lawmakers have sought to achieve.

17. *See, e.g.*, RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 560 (1994) (summarizing the authors' argument that there are group differences in intelligence that are intractable).

18. David Leonhardt, *The Liberals Against Affirmative Action*, N.Y. TIMES (Mar. 10, 2013), http://www.nytimes.com/2013/03/10/sunday-review/the-liberals-against-affirmative-action.html ("A class-based system would be more expensive, forcing colleges to devote some money now spent on buildings and other items to financial aid instead, but it would also arguably be more meritocratic."); *see also* SHERYLL D. CASHIN, PLACE NOT RACE: A NEW VISION OF OPPORTUNITY IN AMERICA xv (2015) (proposing that geography, rather than race, should form the basis of affirmative action to promote equity in higher education opportunity).

But first, as a threshold matter, analysts should not just accept the broad categories typically used in discussions of differences, but should instead question them. This is so even though in the data available through the federal Department of Education and relied upon by important research institutions such as The College Board, only these broad categories—"African American," "white," and "Asian American" are the primary classifications of race, while "Hispanic" is the ethnic category applicable to students of any race[19]—are represented. Each classification hides considerable variation. All students classified as African American are not the same, and differences in performance may vary significantly. African American students who are recent immigrants or international students may disproportionately populate more selective colleges and universities relative to students who are descendants of slaves, and while Asian American students may be overrepresented at those same institutions, it may be that those students disproportionately are of Chinese, Japanese, and Korean descent, rather than Laotian, Cambodian, Thai, Indian, Pakistani, or Filipino.[20] The differences within racial and ethnic groups reflect the particular history of each. This Essay will not attempt comprehensive disaggregation and will, with misgivings that should now be clear, work with the broad federal data most accessible to researchers.

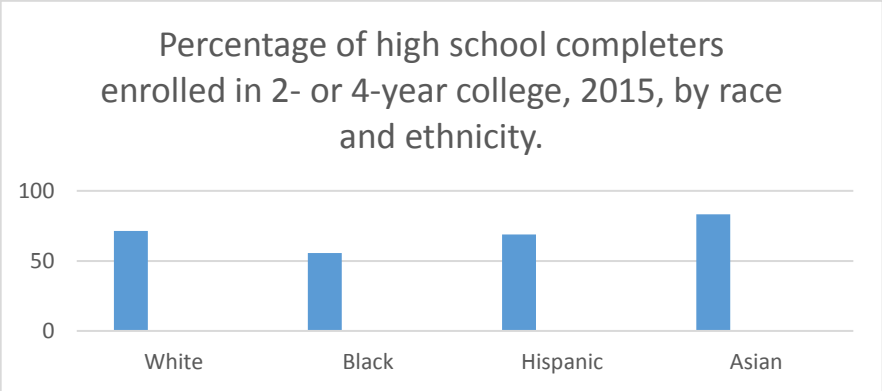
### A. Snapshot of the Now

The charts and tables that follow aim to provide a snapshot of the gaps in matriculation and completion of programs of study at four-year colleges and universities across racial and ethnic groups.

19. *See, e.g.*, *Digest of Education Statistics*, *supra* note 11 (providing racial and ethnic breakdown of the population enrolled in postsecondary institutions nationwide).

20. Robert T. Teranishi, Laurie B. Behringer, Emily A. Grey, & Tara L. Parker, *Critical Race Theory and Research on Asian Americans and Pacific Islanders in Higher Education*, 142 NEW DIRECTIONS FOR INSTITUTIONAL RES. 57, 61 (2009) (calling for more research on ethnic background of Asian Americans in college in the United States), available at http://onlinelibrary.wiley.com/doi/10.1002/ir.296/full.

**FIGURE 1**[21]



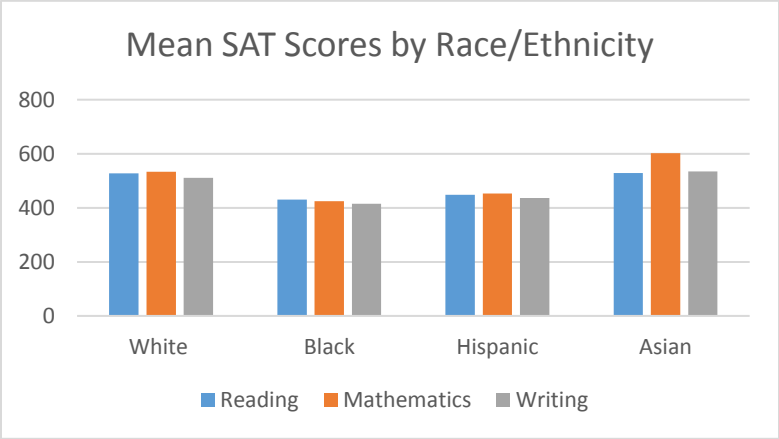

The above chart does not include those who failed to complete high school. A greater share of African American and Hispanic students fail to complete high school, while more than 90 percent of Asian American students do graduate from high school.[22]

Gaps along lines of race and ethnicity are also evident in scores on standardized tests, as the following table illustrates:

21. *Digest of Education Statistics*, NAT'L CTR. FOR EDUC. STAT. tbl.302.20 (2016), https://nces.ed.gov/programs/digest/d16/tables/dt16_302.20.asp?current=yes (last visited Feb. 17, 2018).

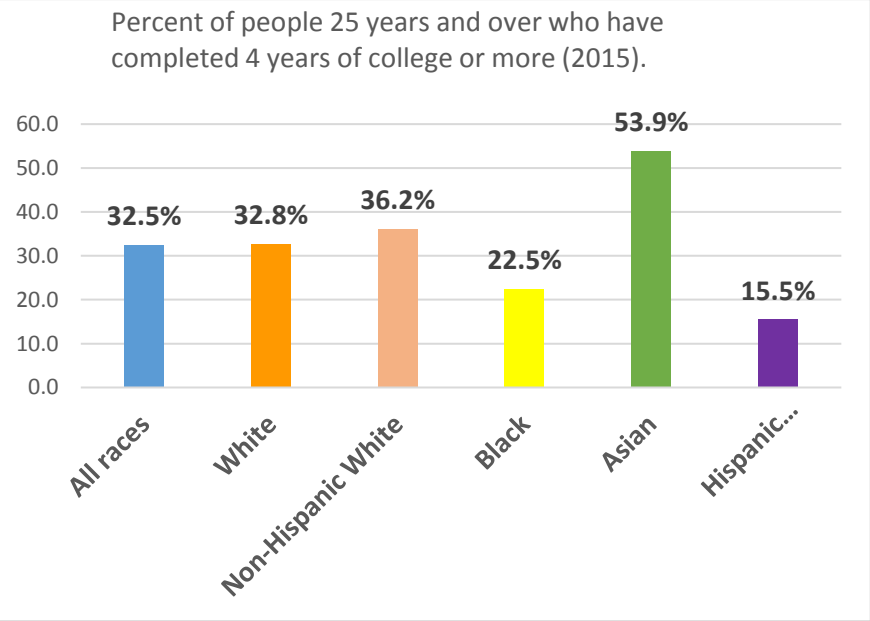
22. *Digest of Education Statistics*, NAT'L CTR. FOR EDUC. STAT. tbl.104.10 (2017), https://nces.ed.gov/programs/digest/d16/tables/dt16_104.10.asp?current=yes ("Rates of high school completion and bachelor's degree attainment among persons age 25 and over, by race/ethnicity and sex: Selected years, 1910 through 2016") (last visited Nov. 22, 2017). Please note that the figure on Asian Americans includes Pacific Islanders.

**FIGURE 2** [23]




Rates of college completion also vary across racial and ethnic groups:

**FIGURE 3**[24]

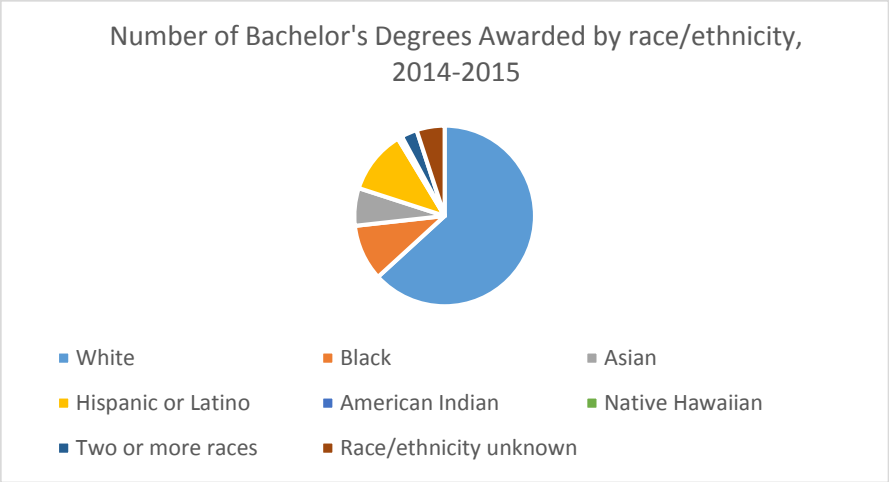



23. *2016 College-Bound Seniors: Total Group Profile Report*, C. BOARD 1, 3 tbl.7 (2016), https://reports.collegeboard.org/pdf/total-group-2016.pdf (last visited Nov. 22, 2017).

24. *Educational Attainment in the United States*, CENSUS BUREAU, tbl. 1 (2015), https://www.census.gov/content/dam/Census/library/publications/2016/demo/p20-578.pdf.

To put this in perspective, of the 323 million people who make up the United States population, nearly 61 percent are what the Census Bureau classifies as "white, non-Hispanic," while 13 percent are black, 5.7 percent are Asian, and nearly 18 percent are Hispanic or Latino.[25] The pie chart below illustrates the difference between the demographic characteristics of the general population and those of the 4.9 million recipients of a bachelor's degree in 2014-2015:

**FIGURE 4**[26]




These charts illustrate some of the significant differences in higher education access across racial and ethnic groups. Race and ethnicity literally color each stage of the process from application, to financing, to graduation.

## B. Remedial Tools

The policy tool aimed squarely at getting more nonwhite students into the nation's colleges and universities is affirmative action. This vaguely defined set of practices, relevant at those institutions that both select their students with some degree of care and that choose to implement policies that consider the racial and ethnic backgrounds of applicants, has been controversial since its inception. Beginning more than forty years ago, legal attacks have effectively narrowed the justifications available to those

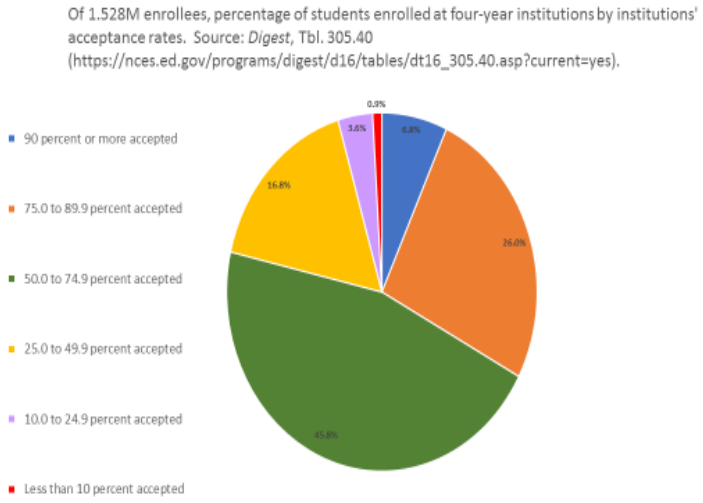
25. *QuickFacts*, CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045216#qf-headnote-a (last visited Oct. 13, 2017).

26. *IPEDS Trend Generator*, NAT'L CTR FOR EDUC. STAT. (2014-15), https://nces.ed.gov/ipeds/trendgenerator/tganswer.aspx?sid=4&qid=24 (last visited Nov. 22, 2017).

institutions that consider race in admissions,[27] and the justices of the Supreme Court have intimated that their tolerance of the practice has an expiration date.[28] Popular and judicial skepticism has persisted and even increased despite the limited impact that affirmative action has had on the demographic composition of the college student population.

At most colleges and universities, especially at those that most African American and Latino students attend, affirmative action likely plays little role in the admissions process. This is so because, as the following pie chart shows, the majority of institutions in the United States are either not highly selective or are not selective at all.

**FIGURE 5** [29]




At for-profit institutions, African American and Latino students are over-represented. Of the 1.3 million students enrolled in for-profit higher education institutions in 2015, 402,566 were African American and 207,454

27. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307-15 (1978) (considering different rationales that could justify taking into account race in making admissions decisions and concluding that only the goal of greater student diversity is sufficient).

28. Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (suggesting that the need for race based affirmative action, a policy adopted in the wake of hundreds of years of slavery followed by segregation and subordination mandated by law, will abate within twenty-five years of the date of the decision, or in 2028).

29. *Digest of Education Statistics*, NAT'L CTR. FOR EDUC. STAT. tbl. 305.40 (2017), https://nces.ed.gov/programs/digest/d17/tables/dt17_305.40.asp?current=yes.

were Hispanic, while 586,756 were white and 48,161 were Asian.[30] These institutions generally produce worse outcomes for students, i.e., lower graduation rates and higher student loan default rates.[31]

But the admissions practices of the most selective institutions, the elite and highly selective colleges and universities, garner the most popular attention and generate the most controversy. This is so even though the student population on elite college campuses is overwhelmingly white and disproportionately Asian American. What is more, the composition of the student body at these institutions has not changed significantly in decades, no matter the admissions policies implemented.[32] The stability of the numbers renders arguments that admissions results reflect merit of applicants suspect: It is unlikely that across multiple classes of applicants, and multiple years, the same number of students of different racial and ethnic backgrounds have whatever it takes to gain admission. At the same time, the fact that numbers of African American and Latino students have not grown beyond a certain point and continue to lag behind their respective shares of the larger youth population is consistent with a narrative of ongoing exclusion—again, admissions practices notwithstanding.

Critics of consideration of race in admission processes at selective colleges and universities have argued that taking race into account is unfair to students who do not belong to the groups that appear to be favored. These critics contend that admission to such places, viewed as a ticket to a lifetime of privilege, should turn purely on merit, or merit in light of applicant characteristics other than race, a possibility addressed further in the next section.[33] The consideration of race in admissions in this view is morally equivalent to, and consequently as deserving of prohibition as, formal, explicit exclusion of potential students of specific racial and ethnic backgrounds under color of law. This view, which elides centuries of *de jure* subordination and thus ignores both the past and present context, is the subject of extensive critique by legal scholars, and this Essay will not devote effort to restating analyses by a host of capable law scholars.[34]

Further, critics argue that consideration of race in selective institutions' admissions practices is overbroad, in that not all applicants who are African American or Latino need any special consideration. Wealthier students, in this view, should not be deemed as disadvantaged as poorer students, regardless of race or ethnicity. Admissions practices that focus on

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30. *Digest of Education Statistics*, NAT'L CTR. FOR EDUC. STAT. tbl.306.50 (2015), https://nces.ed.gov/programs/digest/d16/tables/dt16_306.50.asp?current=yes (last visited Nov. 22, 2017).

31. *See Digest of Education Statistics*, *supra* note 6; Cellini et al., *supra* note 7, at 4; *Comparison of FY 2014 Official National Cohort Default Rates to Prior Two Official Cohort Default Rates*, *supra* note 8.

32. Ashkenas et al., *supra* note 1.

33. *See infra* Part I.C.

34. *See* WHAT BROWN VS. BOARD OF EDUCATION SHOULD HAVE SAID (Jack M. Balkin ed., N.Y. Univ. Press) (2001).

race may reward relatively privileged students of color, who tend to have higher test scores than those who are less well-off, and their admission may yield a class that is socioeconomically less diverse, even if more colorful. The prizing of "racial esthetics," in the words of Justice Thomas in one of the cases involving a challenge to an institution's affirmative action policy,[35] does not and should not sit well with the ideal of equity in access across all dimensions of student identity. Thus, policies that focus on race to the exclusion of other student characteristics invite backlash both from those who object that race should be irrelevant to admissions decisions and from those who argue that consideration of race in isolation may contribute to ongoing socioeconomic stratification. Proposals aimed at increasing class diversity tend to be made by those seeking to replace, rather than to supplement, the practice of considering race in admissions decisions.[36] The next section challenges the validity of this dichotomy.

Relevant to consideration of the role of race in determining who matriculates is the graduation rate. There is a gap in completion rates within each type of institution. African American and Latino students disproportionately attend for-profit colleges, which report the lowest rates of completion of all institution types. The reasons for differential rates of completion, which may reflect several years of a student's experience, are no doubt myriad, but colleges and universities can also offer support to their students to make it easier for them to finish what they start. Often absent from discussions of gaps in higher education access and performance is student academic support, a category that may include advising students on academic matters such as what courses to take, what major(s) to pursue, and how to study. Another aspect of academic advising may address questions of culture—how to interact with students who are different, teachers who are different, and potential employers who are different. There are good reasons to believe that such support makes a difference and can bolster the chances of not just completion, but of excellence.[37]

### C. Alternative Remedial Tools

Popular among supporters of consideration of student disadvantage in admissions decisions is the idea of class-based affirmative action. This is

35. Grutter v. Bollinger, 539 U.S. 306, 355 (2003) (Thomas, J., concurring in part and dissenting in part).

36. *See, e.g.*, Richard D. Kahlenberg, *Race-Based Admissions: The Right Goal, but the Wrong Policy*, ATLANTIC (June 4, 2015), https://www.theatlantic.com/education/archive/2015/06/race-based-admissions/394784/ (arguing that "class-based affirmative action" should be adopted and can achieve comparable racial diversity in higher education without triggering as fierce resistance as consideration of race has).

37. The success of the Posse Foundation, which provides cohorts of students with an advisor on each campus that students attend, is evidence of the importance and effectiveness of on-campus advising. *About Posse*, POSSE FOUND. (2014), https://www.possefoundation.org/about-posse (last visited Nov. 22, 2017).

the case in part because of a visceral reaction to consideration of race as fundamentally unfair, as well as resistance to the presumption that whites still enjoy advantage in access to opportunity in the United States. To acknowledge the need for any consideration of race is to acknowledge that race still matters, and that acknowledgment flies in the face of the conviction that success is the result of personal merit, not societal structure or discriminatory practices that favor certain groups over others.

Class-based affirmative action, however, carries no such stigma. It is relatively uncontroversial to favor recognition in the admissions process of socioeconomic factors that hinder access. To recognize that a student whose family is poor faces obstacles in pursuing advanced education in no way suggests that those who have confronted fewer such obstacles benefitted from a racially biased social structure—i.e., that the successful did not win fairly, but in a rigged game. If admissions practices are biased against the poor, that bias can be understood as the unfortunate but understandable result of the benefits that wealth confers. Because being wealthy carries no social stigma in the United States, a nation of "temporarily embarrassed millionaires,"[38] to recognize and respond through policy to bias that favors the wealthy is not to indict the privileged. Racial advantage, on the other hand, is not easily characterized as honestly earned through accumulation of wealth, and so to suggest that racial bias rather than class bias underlies differences in matriculation and completion is to impugn students who belong to the privileged group. All of this is simply to state that support of class-based affirmative action has greater cultural appeal in particular, though not only, to those whites who might prefer to avoid questioning of the fairness of their material success.

Nevertheless, states have enacted bans on consideration of race in admissions,[39] the Court has made clear that the days of such practices are numbered,[40] and the current executive has shown clear hostility to affirmative action.[41] As a result, widespread consideration of class in admissions decisions is likely, and a number of selective institutions already take socioeconomic status and other class indicators into account in deciding whom to let in. These practices are likely to spread. In popular perception,

38. RONALD WRIGHT, A SHORT HISTORY OF PROGRESS 124 (2004).

39. For example, California voters approved a statewide prohibition along these lines. Robert Pear, *In California, Foes of Affirmative Action See a New Day*, N.Y. TIMES (Nov. 7, 1996), http://www.nytimes.com/1996/11/07/us/in-california-foes-of-affirmative-action-see-a-new-day.html. So has Michigan. Adam Liptak, *Court Backs Michigan on Affirmative Action*, N.Y. TIMES (Apr. 23, 2014), https://www.nytimes.com/2014/04/23/us/supreme-court-michigan-affirmative-action-ban.html.

40. *See Grutter*, 539 U.S. at 345 (suggesting in 2003 that consideration of race in admissions in colleges and universities will be neither necessary nor permitted in 25 years).

41. The Justice Department under the Trump Administration has been widely reported to be investigating and preparing to sue universities that consider race in their admissions policies. Charlie Savage, *Justice Dept. to Take On Affirmative Action in College Admissions*, N.Y. TIMES, Aug. 2, 2017, at A1.

this may be viewed as favoring African American and Latino applicants. Poverty in this country is itself raced, and the color of poverty is black or brown. Were this the case, then *ceteris paribus*, class-based affirmative action alone could well advance equity in access to higher education.

Unfortunately, all else is not equal. To the extent that other indicators of merit, that is, test scores and to a lesser degree high school grades, correlate with race, then in a given pool of students whose families earn low incomes, African American and Latino students will be underrepresented among the apparent high achievers whom admissions officers and college administrators crave, and overrepresented among the apparent low achievers whom they would prefer to exclude.[42] Compounding the problem is the fact that, popular perception notwithstanding, there are far more poor white people in the United States than there are poor black people.[43] If the class selection criterion is neutral, other criteria in the admissions process will have a disparate impact along the lines of race, and it will be—indeed, as it is now—possible to have a socioeconomically diverse class that is hardly diverse across other dimensions at all. The clear implication is that advocating adoption of class-based affirmative action in place of consideration of race runs the risk of perpetuating the disproportionate underrepresentation of African American and Latino students at selective colleges and universities, unless attention is also paid to other criteria that determine admission decisions. Class matters, as the next Part illustrates in more detail, but much else does, too.[44]

## II. CLASS

Cutting across racial and ethnic lines is the class divide. Students whose families earn lower incomes or possess less wealth are underrepresented in institutions of higher education overall.[45] High school graduates whose families' incomes put them high in the national distribution are significantly more likely to matriculate than students from families low on the distribution.[46] This is true even though there are more college-age youth in the United States who are in lower income brackets than in the

42. Caroline Hoxby & Christopher Avery, *The Missing "One-Offs": The Hidden Supply of High-Achieving, Low-Income Students*, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2013, at 18 fig.5.

43. *People in Poverty by Selected Characteristics: 2014 and 2015*, CENSUS BUREAU, https://www2.census.gov/programs-surveys/demo/tables/p60/256/pov_table3.xls.

44. WILLIAM J. WILLIAMS, THE DECLINING SIGNIFICANCE OF RACE ix (1978).

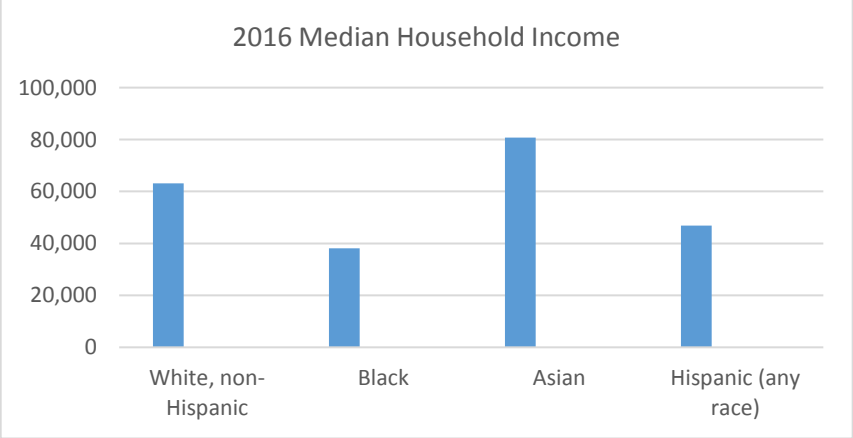
45. Raj Chetty, John N. Friedman, Emmanuel Saez, Nicholas Turner, & Danny Yagan, *Mobility Report Cards: The Role of Colleges in Intergenerational Mobility*, NBER WORKING PAPER 23618, at 1 (2017) (reporting that at elite colleges "more students come from families in the top 1% of the income distribution . . . than the bottom half").

46. *Digest of Education Statistics*, NAT'L CTR. FOR EDUC. STAT. tbl.302.30 (2016), https://nces.ed.gov/programs/digest/d16/tables/dt16_302.30.asp (last visited Feb. 17, 2018).

higher income brackets.[47] On elite college campuses, the children of wealthy and high-earning parents dominate.[48]

To put the pattern into perspective, consider the following breakdown of the national population. In the United States, about 31 million people are between the ages of 18 and 24, the age of the typical, traditional college student.[49] Broadening the parameters to include "nontraditional" students sharply increases the number of potential students pursuing higher education: the number of people between 18 and 44 is 113 million.[50] Of the nearly 117 million households in the country, slightly under two-thirds earn less than $75,000 per year.[51] Now-familiar patterns exist in the income distribution, too: white, non-Hispanic households have a median annual income of $63,155, according to the Census Bureau, while African American households take in $38,555; Asian households, $80,720; and Hispanic households (including those that are white), $46,882.[52] The national median household income is $57,617.[53] In chart form:

**FIGURE 6** [54]




47. *Marital Status-People 18 Years Old and Over, by Total Money Income in 2016, Work Experience in 2016, Age, Race, Hispanic Origin, and Sex*, CENSUS BUREAU (2017), https://www2.census.gov/programs-surveys/cps/tables/pinc-02/2017/pinc02_1_1_3.xls.

48. Leonhardt, *supra* note 13.

49. Lindsay M. Howden & Julie A. Meyer, *Age and Sex Composition: 2010*, CENSUS BUREAU 2 tbl.1 (May 2011), https://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf (last visited Nov. 22, 2017).

50. *Id.*

51. *American FactFinder, Selected Economic Characteristics*, U.S. CENSUS BUREAU (2015), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_5YR_DP03&src=pt (last visited Nov. 22, 2017).

52. Gloria G. Guzman, *Household Income: 2016*, U.S. CENSUS BUREAU 6 tbl.3 (Sept. 2017), https://www.census.gov/content/dam/Census/library/publications/2017/acs/acsbr16-02.pdf (last visited Nov. 22, 2017).

53. *Id.*

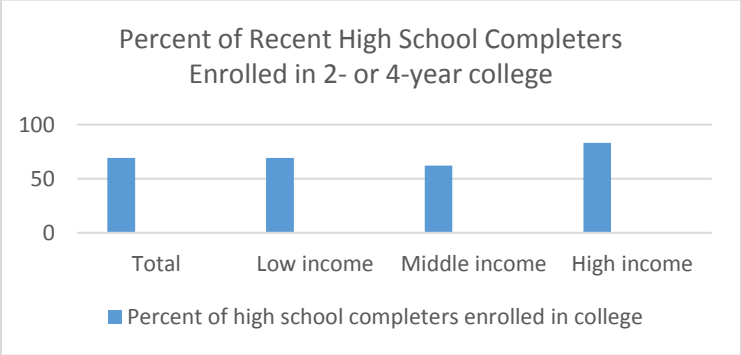
54. *Id.*

The same pattern exists in the distribution of wealth, including equity in a home, assets held in financial institutions, and other assets.[55] The median value of assets owned by white, non-Hispanic households in 2013 (the most recent year for which the Census Bureau has released the data) is $132,483; for African American households, $9,211; for Asian households, $112,250; and for Hispanic households (of any race), $12,460.[56]

Disproportionately, those who are poor are also people of color. But in absolute numbers, poor white people outnumber poor, non-white people. Of the 43 million people living below the poverty line, according to the Census Bureau, 27 million are white (17 million of them white and non-Hispanic), while 9 million are African American and 11 million are Hispanic.[57] The number of whites in poverty thus is nearly triple the number of African Americans. This flies in the face of the popular perception that the face of poverty in the United States is African American, although it is true that the percentage of the African American population that is poor is larger than the percentage of the white population that is poor.[58]

Fewer students from lower income families go to college, as the following chart shows:

**FIGURE 7**[59]




55. *Wealth, Asset Ownership, & Debt of Household Detailed Tables: 2013*, U.S. CENSUS BUREAU tbl.1 (2013), https://www2.census.gov/programs-surveys/demo/tables/wealth/2013/wealth-asset-ownership/wealth-tables-2013.xlsx (last visited Nov. 22, 2017).

56. *Id*.

57. Jessica L. Semega et al., *Income and Poverty in the United States: 2016*, U.S. CENSUS BUREAU 1, 13 tbl.3 (Sept. 2017) https://www.census.gov/content/dam/Census/library/publications/2017/demo/P60-259.pdf (last visited Nov. 22, 2017).

58. According to the Census Bureau, one fourth of African Americans in the United States live below the poverty line. *Id.* About 11 percent of the white population lives in poverty. *Id.*

59. *Digest of Education Statistics*, NAT'L CTR FOR EDUC. STAT. tbl.302.30 (2016), https://nces.ed.gov/programs/digest/d16/tables/dt16_302.30.asp?current=yes (last visited Nov. 22, 2017). The Department classifies students as "low income" if their families are in the bottom 20 percent of all family incomes, "high income" as those in the top 20 percent in between. *Id.*

At elite colleges and universities, lower-income students are also significantly underrepresented.[60] The usual indicator cited is the share of the student body eligible for Pell Grants, which are federal grants provided to students whose families typically earn less than $70,000 annually.[61] Few selective institutions, and very, very few highly selective institutions, enroll a student body of which more than 20 percent are eligible for these grants.[62] Some institutions have made a serious effort to enroll students who are less well-off, but overall, not much has changed.[63] No doubt there is good reason for institutional reluctance: colleges and universities with smaller or no endowment rely on tuition income to cover costs, and students who cannot pay, cannot pay.

Not surprisingly—indeed, correspondingly—these gaps are evident in graduation rates. Not only do fewer students from families with lower incomes enroll in four-year courses of study, fewer complete a four-year undergraduate program.[64] Perhaps more frustratingly, these gaps persist across students who perform well on standardized tests—students whose families earn different incomes but who have comparable scores in mathematics, the Education Department reports, graduate at different rates.[65] This implicates not only the effort to quantify merit, discussed in the next Part, but also the possible importance of support to students while enrolled to help them finish their studies, as further discussed in Part V.

There is one segment of the higher education universe in which poorer students are well-represented, and that is the for-profit sector.[66] For example, 8.6 percent of students whose families earn less than $20,000 per year attend for-profit institutions, while 1.5 percent of students whose families make more than $100,000 do.[67] As discussed above, these are the institutions that produce relatively poor outcomes: Students who attend for-

60. Chetty et al., *supra* note 45, at 1.

61. David Leonhardt, *California's Upward Mobility Machine*, N.Y. TIMES (Sep. 16, 2015), https://www.nytimes.com/2015/09/17/upshot/californias-university-system-an-upward-mobility-machine.html. Of course, that income benchmark—which represents a rough estimate based on the rules for calculating eligibility and need—covers most households in the country, because most households earn less than $75,000 per year.

62. *Id.* (showing share of student body eligible for Pell Grants at selective institutions nationwide).

63. Chetty et al., *supra* note 45, at 36 (describing "substantial tuition reductions and other outreach policies" at Ivy-Plus colleges, yet finding only a very small increase in the fraction of students from the bottom income quintiles).

64. *Postsecondary Attainment: Differences by Socioeconomic Status*, NAT'L CTR. FOR EDUC. STAT. fig.1 (2015), https://nces.ed.gov/programs/coe/indicator_tva.asp (last visited Nov. 22, 2017).

65. *Id*. at fig.5.

66. *Students Attending For-Profit Postsecondary Institutions: Demographics, Enrollment Characteristics, and 6-Year Outcomes*, NAT'L CTR FOR EDUC. STAT. tbl.2 (2011), https://nces.ed.gov/pubs2012/2012173.pdf (last visited Nov. 22, 2017).

67. *Profile of Undergraduate Students: 2007-08*, NAT'L CTR FOR EDUC. STAT. tbl.1.2 (2010), http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2010205 (last visited Nov. 22, 2017).

profit institutions are more likely than students attending public and nonprofit institutions to borrow larger amounts, to drop out, and to default on any student loan.[68] Thus, students whose financial condition is already more precarious, due to lower income and less wealth, disproportionately pursue higher education at institutions where attendance correlates with adverse outcomes that are financially difficult to bear.

One reason for the difference in representation of poorer students and wealthier students at selective institutions and less- or non-selective institutions is the parallel difference in test scores alluded to above. Students with lower scores are less often admitted to selective institutions that value standardized tests, which influence placement on prominent rankings. The next Part examines the disparity in scores and the difficult question of student "merit."

## III. MERIT

At selective institutions of higher education, which garner the most media attention and enjoy the most power to shape the image of higher education in popular culture, admissions procedures seek to sort students. This is a conflicted process because admissions offices both aim to identify those applicants with the most promise and those who have already demonstrated excellence. Students in the latter group, whose "promise" is manifest in characteristics like grades, test scores, and prizes, are easier to recognize and probably safer—a student with high scores who performs poorly once admitted is easily held culpable for any failure, while poor performance by a student admitted despite low scores may well be attributed to lack of ability that an admissions officer should have spotted given the indicators. The incentives are clear, and the results are obvious: the more selective the institution, the more prevalent are students who have excelled at gathering the objective markers of quality. Admission, in the eyes of these students, may be something earned, to be sure, but is also something deserved, to which they are entitled.

As has been noted in previous Parts of this Essay, desirable indicia of excellence are not evenly distributed across student populations but vary consistently along the lines of race and class. White and Asian American students consistently report higher scores than do African American and Latino students on high-stakes standardized tests like the SAT.

68. *See Digest of Education Statistics*, *supra* note 6; Cellini et al., *supra* note 7, at 4; *Comparison of FY 2014 Official National Cohort Default Rates to Prior Two Official Cohort Default Rates*, *supra* note 8.

**TABLE 1**[69]

Scores and race/ethnicity.

Table 7: Total Mean Scores by Ethnicity

| SAT | Test-Takers | | Critical Reading | | Mathematics | | Writing | |
|---|---|---|---|---|---|---|---|---|
| Test-Takers Who Described Themselves As: | Number | Pct | Mean | SD | Mean | SD | Mean | SD |
| American Indian or Alaska Native | 7,778 | 0 | 468 | 112 | 471 | 111 | 447 | 106 |
| Asian or Asian American | 196,735 | 12 | 529 | 126 | 602 | 126 | 534 | 131 |
| Black or African American | 199,306 | 12 | 430 | 102 | 425 | 101 | 415 | 97 |
| Native Hawaiian or Pacific Islander | 2,371 | 0 | 432 | 109 | 438 | 111 | 423 | 99 |
| Hispanic, Latino, or Latin American | 355,829 | 22 | 448 | 104 | 453 | 104 | 436 | 99 |
| White | 742,436 | 45 | 528 | 104 | 533 | 104 | 511 | 103 |
| Two or More Races, non-Hispanic | 28,460 | 2 | 511 | 106 | 505 | 110 | 488 | 106 |
| Other | 20,604 | 1 | 496 | 132 | 519 | 130 | 491 | 129 |
| No Response | 84,070 | 5 | 451 | 137 | 501 | 135 | 452 | 134 |
| Total | 1,637,589 | 100 | 494 | 117 | 508 | 121 | 482 | 115 |

Source: College Board, *2016 College Bound Seniors Total Group Profile Report*.

Based on these patterns, critics of consideration of race in admissions decisions argue that there is a simple tradeoff between "merit," as measured by the test results, and "diversity," referring to building an entering class with some number of students who are not white.[70]

This perspective must encompass the fact that students from wealthier and/or higher-income families report higher scores than less well-off rivals for admission,[71] depicted below.

**TABLE 2**[72]

| Family Income | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Less than $20,000 | 124,290 | 13 | 435 | 104 | 453 | 115 | 426 | 101 |
| About $20,000 to $40,000 | 158,909 | 16 | 465 | 102 | 477 | 109 | 452 | 99 |
| About $40,001 to $60,000 | 132,182 | 14 | 488 | 101 | 495 | 107 | 471 | 99 |
| About $60,001 to $80,000 | 115,998 | 12 | 503 | 101 | 509 | 105 | 485 | 99 |
| About $80,001 to $100,000 | 119,593 | 12 | 517 | 100 | 527 | 106 | 501 | 100 |
| About $100,001 to $140,000 | 146,434 | 15 | 530 | 101 | 539 | 105 | 513 | 101 |
| About $140,001 to $200,000 | 93,275 | 10 | 542 | 102 | 553 | 106 | 528 | 103 |
| More than $200,000 | 87,482 | 9 | 569 | 105 | 586 | 107 | 562 | 108 |
| No Response | 659,426 | | 482 | 126 | 501 | 131 | 473 | 125 |

69. *2016 College-Bound Seniors: Total Group Profile Report*, C. BOARD 1, 3, tbl.7 (2016), https://reports.collegeboard.org/pdf/total-group-2016.pdf (last visited Nov. 22, 2017).

70. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 340 (2003) (suggesting a tradeoff between academic excellence and diversity and consequently justifying consideration of race in Law School's admissions process because if the school were "simply [to] lower admissions standards for all students, a drastic remedy[,] that would require the Law School to become a much different institution and sacrifice a vital component of its educational mission").

71. *2016 College-Bound Seniors: Total Group Profile Report*, C. BOARD 1, 4, tbl. 10 (2016).

72. *Id.*

This table makes clear the sad reality that admissions officials could rely on students' or their parents' tax return as a substitute for SAT scores and produce the same entering class. Thus, critics of race-based affirmative action, who argue that test scores are a valid indicator of merit, must accept that merit apparently can be bought.

There are, at least, tens of thousands of students from low-income families who have high scores on standardized tests.[73] These students are the subject of outreach by institutions seeking greater socioeconomic diversity in their classes.[74] The challenge here is, within that population, the same gaps in test scores along lines of race are evident.[75] This is another reason, in addition to the simple demographic characteristics of relatively poor families, that unsophisticated attention to class alone may fail to promote racial diversity.

Sophisticated attention may work.[76] The University of Colorado experimented with a very nuanced assessment of applicants by criteria not including race and was successful in putting together a class that was socioeconomically and racially diverse.[77] But it is not clear that many institutions have moved to adopt the admissions process that Colorado tested.

Standardized tests that play a significant role in admissions decisions may also fairly be criticized not just for their effects, but for their content. Scholars who have investigated both the process through which the tests are

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73. Hoxby & Avery, *supra* note 42, at 14-15.

74. Christopher Avery, *The Effects of College Counseling on High-Achieving, Low-Income Students*, *in* NBER WORKING PAPER SERIES 16539 (2010) (describing an experiment with counseling of high-achieving high school students to encourage application to highly selective colleges).

75. Hoxby & Avery, *supra* note 42, at 17, fig.4.

76. *See* Sean F. Reardon, Rachel Baker, Matt Kasman, Daniel Klasik, & Joseph Townsend, *Can Socioeconomic Status Substitute for Race in Affirmative Action College Admissions Policies? Evidence from a Simulation Model*, CEPA WORKING PAPER NO. 15-04, at 22, available at http://cepa.stanford.edu/wp15-04 (running a model simulating college admission process and concluding that to achieve rates of Black and Hispanic enrollment comparable to rates achieved using race-based affirmative action would require both class-based affirmative action and active recruiting of Black and Hispanic applicants).

77. Matthew Gaertner & Melissa Hart, *Considering Class: College Access and Diversity*, 7 HARV. L. & POL'Y REV. 367, 392-93 (2013). The University of Colorado designed an admissions procedure intended to "identify[] disadvantaged and overachieving applicants" but that did not consider race. *Id.* at 369. Instead, the University sought to identify students who were outliers: those whose socioeconomic characteristics, including variables such as parental educational level, family income, native language, income of families of students attending the applicants' high school, the teacher-student ratio at the school, as well as GPA and standardized test scores. *Id.* at 380. Using this information, the admissions office could compare an applicant's actual academic performance to what the student's academic performance would be predicted to be, in light of the variables under consideration. *Id.* at 379. In other words, the goal is to identify "students [who] perform much better than one would predict based on their backgrounds." *Id.* Perhaps most intriguing, the University's experiment with a class-based admissions regime yielded greater racial diversity. *Id.* at 392-93.

written and the questions asked have found that test-maker biases find their way in.[78] Consider: exam writers who intend to craft a question that half of test-takers will answer correctly, may not know that nearly all of the half who answer incorrectly belong to a particular racial, ethnic, or socioeconomic group; they will simply conclude that the question should be used because it produces the desired pass rate.[79] Questions that are often easier for some students, because of understandings and perspectives shared by the writers and the takers of the tests, are more difficult for other students. Such possible bias in the test might warrant less criticism, were the SAT's predictive power of student success in college better than it is. But the SAT is not a consistently reliable indicator of how well or poorly students will do—even assuming that colleges should aim to admit only students who will do well, and that students who do not do well neither contribute enough to the educational experience nor get enough out of it. A recent study that encompassed more than 120,000 students found that high school grades, which presumably reflect years of work by an applicant, predicted college performance and graduation more effectively than standardized tests and that high standardized test scores, if considered in isolation, could result in admission of students who would perform less well and in denial of admission of students who could excel.[80]

## IV. SUPPORT

Gaining admission to a college or university is not the end of the story, of course. Students must complete a course of study and graduate. Both students and institutions have come to recognize this, and at least one in five students (more at public institutions) enroll in undergraduate classes aimed at making up for weaker primary and secondary schooling.[81] However, remedial coursework is only one form of support potentially meaningful to students whose backgrounds have created obstacles to graduation. For students who are first in their family to enroll, first generation immigrants, or

78. *See, e.g.*, William C. Kidder & Jay Rosner, *How the SAT Creates Built-In Headwinds: An Educational and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 131, 133 (2002) (finding that "[a]lthough this [test-writing] process may appear facially-neutral and non-discriminatory, the SAT unfairly exacerbates the test's already significant disparate impact on African Americans and Chicano test-takers").

79. *Id.* at 157.

80. William C. Hiss & Valerie W. Franks, *Defining Promise: Optional Standardized Testing Policies in American Colleges and Universities*, DEPAUL 1, 61 (2014), https://offices.depaul.edu/enrollment-management-marketing/test-optional/Documents/HISS DefiningPromise.pdf (warning of "dramatic choices" to be made about reliance on standardized tests and the implications for the distribution of higher education opportunity) (last visited Nov. 22, 2017).

81. Dinah Sparks & Nat Malkus, *First Year Undergraduate Remedial Coursetaking: 1999-2000, 2003-04, 2007-08*, NAT'L CTR. FOR EDUC. STAT. 1, 2 fig.1 (2013). I say "at least" because this study relied on reports from students themselves on courses taken rather than institutional reports on course offerings, and students may not include all courses properly categorized as remedial. *Id.*

socioeconomically or otherwise disadvantaged,[82] mechanisms including formal and informal mentoring and support can make a tremendous difference in completion. The efficacy of particular forms of intervention is beyond the scope of this Essay, but demonstrating the need for them is not.

Students whose families were low in socioeconomic status, defined for purposes of this discussion using a composite score taking into account parental education level, parental occupation, and family income, are less likely to receive either an undergraduate degree or bachelor's degree. Of the 810,000 high school sophomores in the lowest socioeconomic status quartile in 2002, 8.2 percent achieved an associate's degree and 14.2 percent achieved a bachelor's degree by 2012.[83] While nearly 60 percent of students in the top income quartile who enrolled at a postsecondary institution in 2009 graduated within six years, only 26 percent of students in the bottom quartile and about one-third of those in the second-lowest quartile graduated within six years.[84] Further, the same study found that while completion rates have been slowly rising for students whose families are in the top half of the income distribution, they have not for those in the bottom half.[85]

Gaps in completion rates also exist along lines of race. According to data collected by the Department of Education, between 1996 and 2009 approximately 55 to 60 percent of students who began a four-year undergraduate program graduated within six years.[86] A slightly higher share of white students graduated in each year in that period, while a smaller share—between 38 and 41 percent—of African American students did.[87] The graduation rate for Latino students has steadily improved, reaching 53.5 percent for the class that enrolled in 2008. For Asian American students, recent completion rates have reached or exceeded 70 percent.[88] Across all groups, public institutions report slightly worse numbers, nonprofits report slightly better numbers, and for-profits report much worse numbers, but the racial gaps within each class of institution are consistent.[89]

Finally, there are gaps in retention rates across institution types. Private, nonprofit institutions retain more of their students than public

82. For example, the more education achieved by a parent, the lower likelihood that a student enrolled is in a remedial course. *Id*. at 5.

83. *Digest of Education Statistics*, NAT'L CTR. FOR EDUC. STAT. tbl.104.91 (2015), https://nces.ed.gov/programs/digest/d14/tables/dt14_104.91.asp (last visited Nov. 22, 2017).

84. *Indicators of Higher Education Equity in the United States: 2016 Historical Trend Report*, PELL INST. 1, 65 (2016), http://www.pellinstitute.org/downloads/publications-Indicators_of_Higher_Education_Equity_in_the_US_2016_Historical_Trend_Report.pdf (last visited Nov. 22, 2017). This indicator does not take into account aspects of socioeconomic status other than income.

85. *Id*.

86. *See Digest of Education Statistics*, *supra* note 6.

87. *Id.*

88. *Id.*

89. *Id.*

institutions, and both retain more than for-profits do.[90] The more selective an institution, the better its retention rate.[91] Though all of these disparities do not suggest that focusing on barriers to admission is a mistake, they do suggest focusing on barriers to admission *alone* is. Greater equity in access should mean greater equity in meaningful access, reflecting not just inclusion but a fair chance at excellence.

## V. DEBT

As tuition has increased more quickly than federal and state grant aid to students, borrowing has assumed a greater role in the lives of students pursuing higher education. Debt may not have been the tool members of Congress intended to be the primary facilitator of access—in decades past, federal grant aid, which students did not have to repay, was sufficient to cover nearly all the cost of attending a public, four-year university.[92] But tuition and other costs of attendance have increased dramatically since the 1970s, and federal grant aid has not kept pace.[93]

Debt as a policy tool has certain drawbacks. It is regressive because only those with less money need to borrow, of course, and the less money they have, the larger the amounts they have to borrow. Education debt in particular is risky for borrowers because the federal Bankruptcy Code treats student debt exceptionally, permitting discharge only when the borrower can show that repayment would constitute "undue hardship," a phrase the Code does not define.[94] Any analysis of the impact of student debt must take risk into account. Students who borrow face not only the risk that they will not graduate, but also the risk that they will not be able to repay the debt, which exacerbates the downside. Some students will be deterred from seeking higher education because they do not want to borrow, and this aversion to debt is not evenly distributed across the population of potential college students.[95] Debt aversion may undermine the goal of federal policy intended to promote access.

Those not averse to borrowing and who complete a course of study are constrained in their life and career choices by the necessity of making monthly payments. Those with heavier debt burdens are disproportionately students of color, especially African Americans.[96] The likelihood that a

90. *Digest of Education Statistics*, NAT'L CTR. FOR EDUC. STAT., tbl.326.30 (2015), https://nces.ed.gov/programs/digest/d16/tables/dt16_326.30.asp (last visited Nov. 22, 2017).

91. *Id.*

92. SUZANNE METTLER, DEGREES OF INEQUALITY: HOW THE POLITICS OF HIGHER EDUCATION SABOTAGED THE AMERICAN DREAM 53 (2014).

93. *Id.*

94. 11 U.S.C. § 523(a)(8) (2012).

95. Jonathan D. Glater, *Student Debt and Higher Education Risk*, 103 CALIF. L. REV. 1561, 1589-91 (2015).

96. Sara Goldrick-Rab et al., *The Color of Student Debt: Implications of Federal Loan Program Reforms for Black Students and Historically Black Colleges and Universities*, WIS.

student will have to borrow is also affected by the definition of merit, as more and more institutions allocate financial aid on the basis of high school academic performance.[97] If colleges and universities award grant aid to those who do well on standardized tests, they are likely awarding aid to students who need it less.[98] Both debt and working in school to avoid more debt may affect academic performance while enrolled, and worse grades will impact subsequent career opportunities. Thus, attention to debt in isolation will elide connections between borrowing and race, class, and merit.

One policy response is loan forgiveness. Under the Obama Administration, forgiveness was expanded, and repayment regimes were made more flexible and kind to student borrowers.[99] Students could elect a repayment plan under which their monthly payments were capped at a fixed percentage of their income, for example, and after twenty years of repayments, the balance would be forgiven.[100] For students that enter public interest careers, that forgiveness is available after ten years.[101] But addressing debt after graduation does not address possible debt aversion at the front end, and may not remove the incentive to work while enrolled. Grant aid is the obvious solution, but of course, it is costly. Some states, including New York[102] and Tennessee,[103] have begun to experiment with radical reductions in tuition, and time will tell how successful these efforts are at drawing into

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HOPE LAB 11 (2014), https://news.education.wisc.edu/docs/WebDispenser/news-connections-pdf/thecolorofstudentdebt-draft.pdf?sfvrsn=4 (last visited Nov. 22, 2017).

97. *Average Grant Aid at Four-Year Institutions: Need-Based, Non-Need-Based Meeting Need, and Exceeding Need, 2011-12,* C. BOARD tbl.326.10 (2012), https://trends.collegeboard.org/student-aid/figures-tables/average-grant-aid-four-year-institutions-need-based-non-need-based-meeting-need-exceeding (last visited Nov. 22, 2017). This chart almost certainly understates the prevalence of non-need-based aid because awards, any fraction of which is allocated on the basis of need, are classified as need-based, even if the total award significantly exceeds actual need.

98. And there is evidence that this happens, in the form of studies of grant aid awarded to students by states that reward good high school academic performance. *See, e.g.*, Susan Dynarski, *Race, Income, and the Impact of Merit Aid*, *in* WHO SHOULD WE HELP? THE NEGATIVE SOCIAL CONSEQUENCES OF MERIT SCHOLARSHIPS 73, 80 (Donald E. Heller & Patricia Marin eds., 2002) (finding that "[h]igher-income youths were far more likely to increase their schooling after the introduction of HOPE than those from lower-income families.").

99. Ann Cairns, *Revised Program Will Reduce Student Loan Repayments*, N.Y. TIMES, Aug. 15, 2015, at B5.

100. *Repaying Your Loans*, EDUC. DEP'T OFF. FED. STUDENT AID 10 (2015), https://studentaid.ed.gov/sa/sites/default/files/repaying-your-loans.pdf.

101. *Public Service Loan Forgiveness*, EDUC. DEP'T OFF. FED. STUDENT AID https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service (last visited Mar. 6, 2018).

102. David W. Chen, *New York's Free-Tuition Program Will Help Traditional, But Not Typical, Students*, N.Y. TIMES, Apr. 12, 2017, at A19. *See also Tuition Free-Degree Program: The Excelsior Scholarship*, N.Y. ST. (2016), https://www.ny.gov/programs/tuition-free-degree-program-excelsior-scholarship (last visited Nov. 22, 2017).

103. Abigail Hess, *Tennessee Is the First State to Offer Free Community College*, CNBC (June 2, 2017), https://www.cnbc.com/2017/06/19/tennessee-is-the-first-state-to-offer-free-community-college.html.

higher education students who otherwise would not have pursued their studies due to high tuition and the risk of student debt.

## VI. CONCLUSION

The preceding description and analysis has attempted to identify some of the relationships that complicate policy efforts to increase the equity of access to higher education. To focus on just one dimension of difference, such as race, runs the risk of increasing the adverse effect of another barrier, like class. All students have multiple facets to their identity, as Kimberlé Crenshaw and others have famously recognized.[104] The web of interlocking student attributes forms what gamers refer to as a "sequential movement puzzle,"[105] like a Rubik's Cube: any partial victory, like successfully getting all the tiles of one color to one side of the Cube, makes further progress more difficult. The multidimensional puzzle is daunting and potentially disheartening; multiple paths forward exist, but which is the right one?[106]

As of this writing, there is little reason to think (or hope) that any of the three branches of the federal government will attempt to take on the problem of inequity in higher education access. The Supreme Court is hostile to remedies aimed at ameliorating racial disparities,[107] has rejected class-based arguments,[108] and has historically declined to second-guess academic institutions' evaluations of student merit.[109] The executive branch in recent years focused on the adverse effects of debt and has supported increased

104. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245 (1991) (emphasizing the "need to account for multiple grounds of identity when considering how the social world is constructed").

105. Will Shortz, Puzzle Editor of *The New York Times*, E-mail message on file with the Belmont Law Review.

106. The analogy is of limited utility. The goal when manipulating a Rubik's Cube is separation of all the colors. Our higher education selection and financial aid processes already manage to do a good deal of that; the normative perspective of this essay is, the colors need to be better mixed.

107. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 341 (2003) ("We acknowledge that 'there are serious problems of justice connected with the idea of preference" to promote diversity in higher education classrooms); *see also* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747-48 (2007) (equating de jure segregation of black children in the years prior to 1954 and use of race as a factor in student assignment procedures intended to prevent racial isolation in 2007 and stating that the "way to stop discrimination on the basis of race is to stop discriminating on the basis of race").

108. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37-38 (1973) (ruling that education is not a constitutionally protected, fundamental right and that disparate funding levels to poorer and wealthier school districts did not present a constitutional question).

109. Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985) (in rejecting a student's challenge to a school's evaluation, the majority held that "[w]hen judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment").

grant aid for needy students,[110] but these steps do not get to the root of the problem. The Trump Administration has shown little interest in the issue and indeed proposed abolishing loan forgiveness for indebted students who pursue careers in public service,[111] even as it has suggested that it will investigate race-based affirmative action at colleges and universities.[112]

Unfortunately, the political state of affairs suggests that policies at the state level offer the best hope of multidimensional reform anytime soon. In California, lawmakers have just begun to consider updating the state's "Master Plan," to revisit the structure and relationships of the state's web of public colleges and universities, for example.[113] Tennessee, host state to this Symposium, has established a scholarship program that will provide grant aid for two years of community college.[114] A few other states are following suit.[115]

Given the difficulty of making legal arguments to which courts will be receptive, and the likely resistance of the national executive and legislature to reform, local activism—local politics—likely offer the best avenue for informed change. This Essay has sought to provide a platform of shared understanding of the problems faced and to enable a more informed debate over possible solutions among a constituency that will matter most: thoughtful people who vote.

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110. Peter Baker & David M. Herszenhorn, *Obama Signs Overhaul of Student Loan Program*, N.Y. TIMES, Mar. 31, 2010, at A14.

111. Erica L. Green, *Trump's Budget, Breaking Tradition, Seeks Cuts to Service Programs*, N.Y. TIMES, May 26, 2017, at A16.

112. Savage, *supra* note 411.

113. Larry Gordon, *College Leaders Urge Changes to California's Higher Education Master Plan to Improve Access and Affordability*, EDSOURCE.ORG (Aug. 31, 2017), https://edsource.org/2017/college-leaders-urge-changes-to-californias-higher-education-master-plan-to-improve-access-and-affordability/586647; *see also*, *Assembly Select Committee on the Master Plan for Higher Education*, ASSEMBLY MEMBER MARC BERMAN (2017), https://a24.asmdc.org/article/select-committee-master-plan-higher-education-california (announcing formation of a legislative committee to review the state's higher education master plan).

114. *About*, TENN. PROMISE, http://www.tnpromise.gov/about.shtml (last visited Jan. 25, 2018).

115. David. W. Chen, *Free Tuition? Tennessee Could Tutor New York*, N.Y. TIMES, May 15, 2017, at A1 (describing initiatives aimed at eliminating the cost of public higher education in New York, Oregon, and other states).