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RETHINKING DIVERSITY AND PROXIES FOR ECONOMIC DISADVANTAGE IN
HIGHER EDUCATION:
A FIRST GENERATION STUDENTS' PROJECT

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ABSTRACT

On the fiftieth anniversary of the Civil Rights Act of 1964, this Article argues for a renewed focus on disadvantage and social mobility in higher education law and policy. When President Lyndon Johnson urged passage of the Civil Rights Act and originally advocated affirmative action, the goals of rooting out discrimination and ensuring social mobility for all Americans motivated him. Over time, these goals receded in law and policy. Courts justified affirmative action on grounds of diversity. More recently, commentators urged consideration of -class-based affirmative action or advocated policies that favor -low-income students. Both initiatives can help open up access to selective institutions of higher education. However, neither is a dependable proxy for disadvantage in education. Race-based affirmative action justified on grounds of diversity is a vital tool for ameliorating racial inequality, but it does not necessarily address class-based disadvantage. Class- or income-based policies do not necessarily benefit the neediest students.

The demographic makeup of selective institutions of higher education today suggests that neither effort is particularly effective in ensuring social mobility. Campuses are more racially heterogeneous, but largely economically homogenous. If the social mobility objectives of the Civil Rights Act are to be more fully realized, universities must supplement current admissions and aid policies.

Today's costly, ultra-competitive, and strategically managed admissions environment makes it even more vital to create pathways for talented students from truly disadvantaged backgrounds to selective institutions. To avoid the crowding out of the neediest students, disadvantage must be identified more precisely and attacked at its roots instead of indirectly. Favorable treatment of first-generation, Pell Grant-eligible students in three areas—admissions, financial aid, and institutional outreach—can facilitate greater access for truly educationally disadvantaged students. Through initiatives focused on these students, colleges can simultaneously tackle social problems related to income, socio-culture, place, and race, advance equal educational opportunity and pursue the national interest in social mobility.

INTRODUCTION

This Article argues for a renewed focus on disadvantage and social mobility in higher education law and policy. The fiftieth anniversaries of the Civil Rights Act (CRA) and the Economic

Opportunity Act (EOA), the centerpiece of the War on Poverty, provide the occasion for the argument. Five decades ago, President Johnson urged passage of the CRA, followed by the EOA, and advocated affirmative action to root out discrimination and ensure social mobility for Americans disadvantaged by race and social class.

By 1971, when the US Supreme Court decided Bakke v California, the origins and aims of the CRA had receded in legal thought, and its relationship to the EOA, the landmark antipoverty statute, had been lost. Affirmative action justified on diversity grounds detached access to higher education from questions about group-based disadvantage. Instead of focusing on group-based harm, diversity-based reasoning asked how individual student's traits or characteristics might be educationally advantageous.

To be sure, diversity-based affirmative action has proved beneficial to some of the CRA's intended beneficiaries. It opened up selective universities to certain groups of deserving students of color—particularly black and multiracial immigrants, Hispanics, and biracial students, especially those from more affluent and well-educated backgrounds. This is a welcome development. The racial integration of elite institutions serves compelling purposes. It creates wealth and social capital in communities of color and solidifies their still tenuous place in the American middle class.

However, affirmative action, as now practiced by selective universities, also has left deserving students behind. The interests of students of color from more disadvantaged communities—inspirations for the landmark civil rights laws—have lost ground in the current legal regime. The limited conception of equality in legal thought today reflects a closing opportunity structure in higher education for disadvantaged students of all races. Costs are high and admission is ultra-competitive; officials practice strategic enrollment management in which the fiscal implications of admissions and financial aid decisions affect access. In this environment, talented but impoverished students can fall through the cracks if universities do not make a conscious effort to reach them.

The furious legal debate over affirmative action tends to crowd out conversation about the overall direction of higher education and policy and how educational disadvantage fits within it. Following the lead of the Supreme Court, scholars have argued for decade after decade about racial classifications and their status under the Constitution. The formalism inherent in such discussions pushes structural inequality in

society¹ and in higher education² to the background or completely out of view.

This Article intervenes in the literature not with another perspective for or against affirmative action, but by shifting the conversation to new and, I hope, more fertile ground. It foregrounds a group of students seldom discussed in legal scholarship: talented yet truly disadvantaged students of all racial and ethnic backgrounds. The article focuses, in particular, on first-generation college students. For the first time, these collegians, who comprise up to thirty percent of students, receive sustained treatment in the law review literature.³ Moreover, the article discusses higher education from the inside out, delving deep into policy matters, rather than outside in, the approach understandably taken in much of legal scholarship. Methodologically, the article traverses the fields of history, sociology, and psychology and joins insights from these fields to constitutional and education law.

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¹ For a rich analysis, see generally Charles Lawrence III, Two Views of the River: A Critique of the Liberal Defense of Affirmative Action, 101 Columbia L Rev 2001.

² See Lani Guinier, Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals, 117 Harv L Rev 113, 123 (Nov 2003).

³ The figures are from the National Center for Education Statistics, First Generation College Students in Postsecondary Education iii (2005) online at <http://nces.ed.gov/pubs2005/2005171.pdf>; see also College Board, First Generation Students 9 (2013), online at <http://research.collegeboard.org/sites/default/files/publications/2013/8/presentation-apac-2013-first-generation-college-aspirations-preparedness-challenges.pdf>. For brief mentions of first-generation students in law reviews, see Rachel Moran, Of Doubt and Diversity: The Future of Affirmative Action in Higher Education, 67 Ohio St L J 201, 241 (2006); Aaron Taylor, Reimaging Merit as Achievement, 44 NM L Rev 1, 38 (2014).

This Article’s overall contribution lies at the intersection of law and policy. It suggests a path of return and recommitment to the national commitment to social mobility originally embraced by the CRA, the EOA, and early iterations of affirmative action. Going forward, policymakers should prioritize affordable access to selective colleges by students in underserved and disadvantaged communities nationwide, regardless of racial background. Favorable treatment of first-generation, Pell Grant-eligible status in three areas—admissions, financial aid, and institutional outreach—can facilitate this policy goal. Through initiatives focused on this group, colleges can simultaneously tackle social problems related to income, race, and place, advance equal educational opportunity, and pursue the national interest in social mobility.

This Article unfolds as follows. Parts I through III provide context for the policy interventions made in Parts IV and V. These initial parts offer accounts of history and constitutional law that explore the theme of departure; these parts explain the drift in law and policy away from the original purposes of the landmark Civil Rights Act. Part I describes the trio of super statutes, including the Civil Rights Act, which created a new social order in America. This part emphasizes that the laws did not merely ban discrimination but also aspired to facilitate social mobility. Parts II and III identify doctrinal developments that eroded the civil rights laws’ social mobility impact in education. Part II focuses on enforcement of Title VI by the Executive Branch and the federal courts. Part III examines how the Supreme Court’s turn to –diversity as a justification for affirmative action helped to sever these policies from a necessary concern for disadvantage.

The Article’s higher education reform arguments unfold in Parts IV and V. These parts make policy arguments and compromise the Article’s main contribution to the literature on access and opportunity in higher education. Part IV discusses the opportunity structure in higher education today; it considers factors internal and external to colleges and universities that impede access for truly impoverished students. Part V offers a new way of thinking about access to selective higher education for disadvantaged students. This Part argues for special consideration for first-generation, Pell-Grant-eligible students in admissions, financial aid, and institutional outreach. It explains how targeting needy, first-generation students can advance social mobility.

I. AN ORIGIN STORY: THE CORRECTIVE JUSTICE AND SOCIAL MOBILITY IMPERATIVES OF THE CRA, THE EOA, AND AFFIRMATIVE ACTION

This Part offers an account of the origins of the Civil Rights Act (CRA). It emphasizes the CRA’s twin purposes of antidiscrimination and social mobility.

A. Civil Rights-Era Super Statutes

The Civil Rights Act, along with the Economic Opportunity Act, and the Voting Rights Act, rightly are understood as –super statutes.¶⁴ With the enactment of these laws, Congress transformed American law and society, inscribing a new legal and social contract.⁵

In the wake of the assassination of President John F. Kennedy, President Lyndon Johnson spearheaded the passage of the CRA, the omnibus antidiscrimination law. Congress enacted the legislation in July of 1964, following cataclysmic violence in the South⁶ and the civil rights movement’s demands for –Jobs and Freedom¶ during the March on Washington.⁷

Just one month later, Congress passed the Economic Opportunity Act (EOA),⁸ the central legislative component of President Johnson’s –War on Poverty.¶⁹ The EOA expanded the reach and fulfilled the promise of the CRA.¹⁰ The CRA had banned discrimination, but did not address the disproportionate poverty caused by slavery and Jim Crow or the effects of discrimination in the labor market and in education.¹¹ Dr.

⁴ These public norm—and institution—changing laws are –super-statutes.¶ See William N. Eskridge Jr and John A. Ferejohn, Super-Statutes, 50 Duke L J 1215, 1276 (2001).

⁵ Title VI of the Civil Rights Act of 1964 provides: –No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.¶ 42 USC § 2000d. Agencies promulgate rules to enforce the statute and may withhold federal funds to accomplish its objectives.

⁶ See Glenn Eskew, But for Birmingham: The Local and National Movements in the Civil Rights Struggle 299, 310–12 (University of North Carolina 1997).

⁷ See Thomas F. Jackson, From Civil Rights to Human Rights: Martin Luther King, Jr., and the Struggle for Economic Justice 171–87 (Pennsylvania 2007).

⁸ 42 USC § 2711 et seq.

⁹ See Nick Kotz, Judgment Days: Lyndon Baines Johnson, Martin Luther King Jr., and the Laws That Changed America 182–84 (Houghton Mifflin 2005); Robert F. Clark, The War on Poverty: History, Selected Programs and Ongoing Impact 1 (America 2002).

¹⁰ See 42 USC § 2711 et seq; Kotz, Judgment Days at 182–84 (cited in note 9); Clark The War on Poverty at 4–5 (cited in note 9).

¹¹ See generally The Civil Rights Act of 1964, Pub L No 88-352, 78 Stat 241, codified at 42 USC § 151 et seq. On labor market discrimination, see Nancy MacLean, Freedom is Not Enough: The Opening of the American Workplace 55 (Harvard 2006); Risa L. Goluboff, The Lost Promise of Civil Rights (Harvard 2007); Michael Honey, Black Workers Remember:

Martin Luther King Jr. eloquently described why Congress needed to supplement the antidiscrimination law with new programs. –Even if the Civil Rights Act ended all discrimination, he said, –Black poverty, the historic and institutionalized consequences of color, would continue.¹²

By championing the EOA, President Johnson partially answered activists' call for corrective justice—remediating past discrimination and its present effects¹³—and their particular demand for attention to black joblessness.¹⁴ The EOA's job training programs and job corps, its legal services and social welfare programs, layered on top of the CRA, began to do the work of preparing working-class and poor black Americans to join the mainstream of American life.¹⁵

Political power came next. Congress enacted the Voting Rights Act (VRA), which banned racial discrimination in the electoral process, in August of 1965, following the violent Selma to Montgomery March.¹⁶ The political rights conferred by the VRA further advanced the goal of opening up American society, already begun by the CRA and EOA.

B. Affirmative Action as a Tool of Social Mobility in the Workplace

An Oral History of Segregation, Unionism, and the Freedom Struggle (University of California 1999). On educational discrimination, see James D. Anderson, The Education of Blacks in the South, 1860–1935 1–3, 79–237 (University of North Carolina 1988); Adam Fairclough, A Class of Their Own: Black Teachers in the Segregated South 4, 9, 10, 108–09, 116, 131, 190, 367–68 (Harvard 2007).

¹² See Jackson, From Civil Rights to Human Rights at 204 (cited in note 7).

¹³ On corrective justice, see Paul Gewirtz, Choice in the Transition: School Desegregation and the Corrective Ideal, 86 Colum L Rev 728, 731–36 (1986) (exploring –corrective aspiration in the context of the Reagan Administration school desegregation policy and stating that corrective justice –requires significant measures to eliminate the ongoing effects of discrimination; it requires remedial intervention that goes beyond the prohibitions of the antidiscrimination principle itself, since merely assuring prospective adherence to that principle will not undo continuing effects of past violations).

¹⁴ See Clark, The War on Poverty at 7, 25–26 (cited in note 9).

¹⁵ See *id.* Of course not all African-Americans were poor; some had attained middle-class and professional status. See, for example, Tomiko Brown-Nagin, Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement 31–33 (Oxford 2011); E. Franklin Frazier, Black Bourgeoisie (Free 1st ed 1997).

¹⁶ See Jackson, The Education of Blacks at 219–23 (cited in note).

Affirmative action, as originally conceived, complemented the CRA, EOA, and VRA in aim and effect.¹⁷ In the spring of 1965, a month after the Senate passed the VRA,¹⁸ President Johnson began touting the set of ideas that spawned affirmative action policies. In a June 1965 address on the campus of Howard University, President Johnson called for the —next and the more profound stage in the battle for civil rights.¹⁹ That new stage required government employers to take special steps to create real opportunity for blacks in the workplace.²⁰ —[I]t is not enough just to open the gates of opportunity,²¹ Johnson explained. —All our citizens must have the ability to walk through those gates.²¹ Affirmative action would close the gap between the principles of formal equality— now enshrined in the signature civil rights, economic opportunity, and voting rights laws—and tangible opportunity.²²

Upward social mobility animated the design of these first affirmative action policies: ideally, members of the working class would ascend into the middle class as a result of the opportunities opened up by the law.²³ Workers without college degrees benefited tremendously from efforts to end racial discrimination in industrial sectors, often union shops.²⁴ At the urging of civil rights lawyers and activists,²⁵ the Johnson

¹⁷ President John F. Kennedy first implemented Executive Order 11144 requiring —affirmative action¹¹ after protests in Philadelphia about racial discrimination in the construction industry. See Matthew Countryman, Up South: Civil Rights and Black Power in Philadelphia 123 (University of Pennsylvania 2007).

¹⁸ The VRA was introduced in March 1965, passed by the Senate on May 26, 1965, passed by the House on July 9, 1965, and signed into law by the President on August 6, 1965. See Gary May, Bending Toward Justice: The Voting Rights Act and the Transformation of American Democracy 165–68 (Basic Books 2013).

¹⁹ See Lyndon B. Johnson, To Fulfill These Rights, in John Hope Franklin and Isidore Starr, eds, The Negro in Twentieth Century America: A Reader on the Struggle for Civil Rights 225, 226 (Random House 1967).

²⁰ See John W. Johnson and Robert P. Green Jr, Affirmative Action 43 (Greenwood 2009).

²¹ See Johnson, To Fulfill These Rights at 226 (cited in note 19).

²² See Kotz, Judgment Days at 334 (cited in note 9); Johnson and Green, Affirmative Action at 43 (cited in note 20).

²³ On social mobility, see Christopher Phelan, Opportunity and Social Mobility, 73 Rev of Econ Studies 487,504 (2006).

²⁴ See Paul Frymer, Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party 1–3, 70–71 (Princeton 2008) (discussing the growth in black membership in unions during the 1970s as a result of federal government intervention and civil

administration implemented affirmative action policies that compelled federal contractors in the building trades and the auto and steel industries, among others, to end the wholesale exclusion of black workers from the workplace, and thus, from the American middle class.²⁶

The Nixon administration initially buttressed the Johnson administration's affirmative action efforts by imposing specific timetables and goals for compliance in the building trades.²⁷ Although President Nixon's commitment to affirmative action did not last,²⁸ the complexion of the American workforce changed by the mid-1970s.²⁹ The combined efforts of Executive Branch agencies, civil rights lawyers and activists, and the U.S. Supreme Court, which, for a time, expansively interpreted the Civil Rights Act,³⁰ propelled changed. Industries adopted

rights litigation). See also William H. Harris, The Harder We Run: Black Workers Since the Civil War 45–47, 156–57 (Oxford 1982).

²⁵ Civil rights activists staged protests to secure jobs on worksites before passage of the Civil Rights Act. See Rubio, History of Affirmative Action at 152 (cited in note) (noting the claim that between 1959 and 1963 protests in Philadelphia opened 2,000 jobs to blacks workers). See also MacLean, Freedom is Not Enough at 42, 54–55, 57 (cited in note). On the Philadelphia protests, see Countryman, Up South at 123, 147–48, 283, 329 (cited in note 17).

²⁶ See David Hamilton Golland, Constructing Affirmative Action: the Struggle for Equal Employment Opportunity 79, 103–04, 114 (Kentucky 2011). The Labor Department's Office of Federal Contract Compliance, established by the Johnson administration in 1965, took the lead in efforts to implement affirmative action.

²⁷ See Rubio, History of Affirmative Action at 154–55 (cited in note 26). See also Frymer, Black and Blue at 37–38 (cited in note 24).

²⁸ See Frymer, Black and Blue at 37–38 (cited in note 24).

²⁹ See *id.* at 68–89.

³⁰ See Griggs v Duke Power, 401 US 424, 436 (1971) (holding that job requirements unrelated to successful performance that disproportionately disadvantaged one race could establish a violation of CRA). On various presidents' views about how widely the Griggs standard applied, see Brian K. Landsberg, Enforcing Civil Rights: Race Discrimination and the Department of Justice 134–35 (Kansas 1997). The Court also advanced the project of workplace integration by declining to hear a challenge to a lower court decision affirming the Philadelphia Plan, and implemented pursuant to Title VI of the CRA, which required all applicants for federal contracts to pledge support for nondiscrimination and affirmative action employment practices. See Golland, Constructing Affirmative Action at 131, 158 (cited in note 26), citing Contractors' Association of Eastern Pennsylvania v Secretary of Labor, 442 F2d 159 (3d Cir 1971). The Supreme Court denied a Petition

affirmative action hiring policies as a consequence of CRA lawsuits, the threat of such suits, and after administrative enforcement actions.³¹ For the first time in American history, black workers gained appreciable access to traditionally white occupations.³² Latinos, other racial and ethnic minority groups, and women also entered occupations from which they had been excluded on the strength of the CRA's antidiscrimination provisions.³³ The small numbers of black Americans already in the middle class experienced even greater strides.³⁴

C. Affirmative Action as a Tool of Social Mobility in Education

In the realm of education, a similar pattern ensued. Demands for inclusion in higher education arose during protests for racial equality—including on college campuses³⁵—and after the passage of the landmark civil rights laws. The Office of Civil Rights of the Department of Health, Education, and Welfare (HEW), later the Office of Civil Rights (OCR) of the Department of Education, relied on Title VI of the Civil Rights Act to desegregate education in the South.³⁶ Secondary schools and institutions of higher education opened to black students as a result of the authority granted the Executive Branch to withhold funds for noncompliance with the statute's antidiscrimination principles.³⁷

for Certiorari on the matter. See generally Contractors Assoc of Eastern Pa v Hodgson, 404 US 854 (1971).

³¹ See Frymer, Black and Blue at 70–71 (cited in note 24). See also Harris, The Harder We Run at 159–60 (cited in note 24). For a description of the tools used to enforce the CRA, see Landsberg, Enforcing Civil Rights at 14–15 (cited in note 30).

³² See Frymer, Black and Blue at 1, 70–72 (cited in note 24); Countryman, Up South at 123 (cited in note 17).

³³ See MacLean, at (cited in note 11) ; See Serena Mayeri, Reasoning from Race: Feminism, Law and the Civil Rights Revolution (2011).

³⁴ See Hugh Davis Graham, The Origins of Affirmative Action: Civil Rights and the Regulatory State, 523 *Annals of Am AcadPol & Soc Sci* 50, 61 (1992).

³⁵ On the role of protests on college campuses, see generally Martha Biondi, The Black Revolution on Campus (University of California 2012).

³⁶ See Landsberg, Enforcing Civil Rights at 123, 142–44 (cited in note 30).

³⁷ See Gavin Wright, Sharing the Prize: The Economics of the Civil Rights Revolution in the American South 156–58 (Belknap 2013) (discussing the role of federal funds as an incentive to school districts to desegregate). See also Lia Epperson, Undercover Power: Examining the Role of the Executive Branch in Determining the Meaning and Scope of School Integration Jurisprudence, 10 *Berkeley J African-Am L & Pol* 146, 146–49 (2008); Chinh Q. Le, Racially Integrated Education and the Role of the Federal Government, 88 *NC L Rev* 725, 731–47 (2010).

As a result of the federal government's power to enforce Title VI of the Civil Rights Act, black students who hailed from families that previously had been excluded from higher education gained a foothold in numerous colleges and universities, mostly in formerly segregated southern and border states. OCR developed affirmative action programs that resulted in the recruitment and retention of students of color across these regions during the 1970s and 1980s.³⁸ Adams v Richardson,³⁹ a successful suit to force a reluctant Nixon administration to enforce the Act, proved a catalyst for change.⁴⁰ Following Adams, colleges and universities in Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Pennsylvania, and Virginia developed plans to ensure access and equity.⁴¹ Litigation under Title VI also increased funding and programming at historically black institutions during the 1980s and 1990s.⁴²

These early affirmative action efforts in education, like the initial efforts in employment, partly served the goal of social mobility. Whites who hailed from upper-class households had long leveraged their social status for special consideration in the admissions process at selective institutions.⁴³ Now the civil rights laws allowed black students—including the most disadvantaged ones—to enjoy the American ideal of achieving success through higher education.

The historic and demographic context ensured that the most disadvantaged students benefited from early affirmative action policies.⁴⁴

³⁸ See Landsberg, CITE CORRECTLY (cited in note 31).

³⁹ 356 F Supp 92 (DDC 1972).

⁴⁰ Adams v Richardson, 356 F Supp at 100, affd 480 F2d 1159 (DC Cir 1973) (en banc) (per curiam).

⁴¹ See Epperson, 10 Berkeley J African-Am L & Pol at 158–61 (cited in note 37).

⁴² See, for example, United States v Fordice, 505 US 717, 717 (1992); Ayers v Fordice, 879 F Supp 1419, 1434 (ND Miss 1995), affd in part, revd in part 111 F3d 1183 (5th Cir 1997); Knight v Alabama, 787 F Supp 1030, 1396 (ND Ala 1991), affd in part, revd in part, vacd in part 14 F3d 1534 (11th Cir 1994); Geier v Alexander, 801 F2d 799, 810 (6th Cir 1986); Geier v University of Tennessee, 597 F2d 1056, 1071 (6th Cir 1979); United States v Louisiana, 811 F Supp 1151, 1173 (ED La 1992); Knight v Alabama, 900 F Supp 272, 385 (ND Ala 1995).

⁴³ See, for example, Jerome Karabel, The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton 13–14, 25, 39–76 (Houghton Mifflin 2005).

⁴⁴ See Colin S. Diver, From Equality to Diversity: The Detour from Brown to Grutter, 2004 U Ill L Rev 691, 694–96 (2004) (describing the remedial goals of early affirmative action programs); Kevin Brown and

In 1971, the overwhelming majority of blacks who matriculated to college entered as first-generation college students: 62.9 percent of black freshman were first-generation college students (as compared to 38.5 percent of freshman overall).⁴⁵ In that same year, an even larger share of Hispanics, 69.6 percent, were first-generation college students.⁴⁶ With the advent of laws mandating equal access, these students attended selective colleges and universities in appreciable numbers for the very first time.⁴⁷ The new collegians not only altered the aesthetic of higher education, but also successfully sought changes to campus culture, curriculum, and personnel.⁴⁸ Like the American workplace, the college campus shed its monochromatic hue for a multiracial identity during the 1970s.

II. THE DEPARTURE: THE DECLINING SIGNIFICANCE OF THE CIVIL RIGHTS ACT AND AFFIRMATIVE ACTION AS TOOLS OF SOCIAL MOBILITY THROUGH EDUCATION

Part II, which focuses exclusively on the educational context, explores the theme of departure. During the era of successful federal implementation of the Civil Rights Act (CRA) in education, the three branches of government worked synergistically to secure access of students of color to higher education. This part enumerates and analyzes

Jeannine Bell, Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions, 69 Ohio St L J 1229, 1230 (2008) (arguing that at the time early affirmative action programs were enacted, –the overwhelming majority of blacks who were of college age . . . were descendants of blacks originally brought to the United States as chattel slaves). See also William Bowen and Derek Bok, The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions 7 (Princeton 1998) (discussing how during late 1960s and early 1970s –many colleges place[d] an emphasis on recruiting truly disadvantaged students from ghettos).

⁴⁵ See Victor B. Saenz, et al, First in my Family: A Profile of First-Generation College Students at Four-Year Institutions Since 1971 *10 (Cooperative Institutional Research Program May 2007), online at <http://www.heri.ucla.edu/PDFs/pubs/TFS/Special/Monographs/FirstInMyFamily.pdf> (visited Feb 7, 2014). (noting forty-four percent of Native Americans and 42 percent of Asian American freshmen were first-generation students).

⁴⁶ See id.

⁴⁷ See Bowen and Bok, The Shape of the River at 7–8 (cited in note 44).

⁴⁸ See Biondi, The Black Revolution on Campus at 115–17 (cited in note 35).

three factors that, over time, reduced the effectiveness and limited the reach of the CRA as a tool of social mobility.

These factors include variable enforcement of the CRA by executive branch agencies, narrow judicial interpretations of the CRA's scope, and the cordoning off of a corrective justice theory of constitutional remediation to a narrow category of cases relating to historically black colleges.

A. Variable Enforcement.

The roots of dilemmas that eventually overwhelmed efforts to promote social mobility for students of color through Executive Branch enforcement of the CRA emerged soon after the law's passage. The Executive himself turned out to be the primary impediment to the success of such efforts. Enforcement ebbed and flowed depending on the identity and party of the President. Presidents Richard Nixon, Ronald Reagan, George W. Bush, and George H.W. Bush reduced Title VI investigation and enforcement efforts designed to integrate both elementary and secondary schools and universities.⁴⁹ In the absence of Executive Branch enforcement efforts, it fell to private plaintiffs to enforce the statute.

B. Narrow judicial interpretation.

The federal courts, after playing a significant role in support of Executive Branch enforcement action,⁵⁰ later issued decisions that

⁴⁹ See Landsberg, Enforcing Civil Rights at 102, 120, 147, 168, 169, 181 (cited in note 30) (discussing the Reagan DOJ's express decisions to deemphasize school desegregation and affirmative action as enforcement priorities); *id.* at 104–13 (discussing the priority given to civil rights enforcement in education, voting rights, and other areas during the Johnson administration); Epperson, 10 Berkeley J African-Am L & Pol at 160 (cited in note 37) (describing precipitous decrease in Title VI enforcement under the Bush I administration); Le, 88 NC L Rev at 748 (cited in note 37) (noting that Bush II was criticized for aggressively oppos[ing] school desegregation efforts); William L. Taylor, et al, Declining Civil Rights Enforcement Under the Bush Administration *6 (Center for American Progress 2007), online at http://www.americanprogress.org/wp-content/uploads/issues/2007/03/pdf/civil_rights_report.pdf (visited Feb 7, 2014). The Nixon administration's reluctance to compel compliance with Title VI inspired plaintiffs to sue the federal government; the subsequent suit resulted in a landmark civil rights action that heralded substantial change in higher education. See Adams, 356 F Supp at 93–94.

⁵⁰ See cases cited *supra* notes 46, 48.

limited the scope of the CRA. The most significant recent cases relate to the ability of private parties to enforce Title VI of the CRA. In 2001, the U.S. Supreme Court held that no private right of action exists to enforce Title VI on a disparate impact theory of liability.⁵¹ Private plaintiffs can only sue for violations of intentional discrimination under Title VI, claims that are exceedingly difficult to prove.⁵² These interpretations of the law, in effect, consigned Title VI enforcement to the Executive Branch; OCR can investigate citizen complaints alleging disparate impact discrimination and take enforcement action where warranted.⁵³ In theory, this result is not averse to the interests of complainants.

In practice, enforcement by private parties, as well as by the Executive Branch, has been vital to citizens' ability to secure civil rights. History and experience show that multi-branch enforcement, including private attorney generals, is a superior enforcement model.⁵⁴ For, as explained,⁵⁵ political considerations often influence whether administrations are willing to wield the discretion to robustly enforce the law. On those occasions when plausible cases exist but the will to enforce the law does not, citizens' civil rights are entangled in a Gordian knot.

C. HBCs and Corrective Justice.

A third limitation on the Civil Rights Act relates to the doctrinal treatment of historically black colleges (HBCs). Students who attend HBCs—disproportionately from first-generation, low-income households⁵⁶—are precisely the kinds of individuals whom Congress

⁵¹ See Alexander v Sandoval, 532 US 275, 285 (2001).

⁵² See, for example, Washington v Davis, 426 US 229, 239–40 (1976) (holding that police department's employment test which excluded four times as many black applicants as white applicants did not demonstrate intentional discrimination). See also Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan L Rev 317, 319 (1987).

⁵³ The Department of Education's Office of Civil Rights retains the authority to investigate complaints alleging disparate impact. See Kimberly West-Faulcon, The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws, 157 U Pa L Rev 1075, 1123–24 (2009). Moreover, as Justice Stevens asserted in Sandoval, plaintiffs still may be able to assert a Title VI disparate impact theory by way of 42 USC § 1983. See Sandoval, 532 US at 300 (Stevens dissenting).

⁵⁴ See Landsberg, Enforcing Civil Rights (cited in note 30).

⁵⁵ See note 49.

⁵⁶ See Marybeth Gasman, The Changing Face of Historically Black Colleges and Universities 10 (Center for Minority Serving Institutions 2013) (arguing that "the majority, but certainly not all, of HBCU students are low-income, first-generation, and Pell-Grant-eligible"),

sought to aid with the passage of Title VI. These students figured prominently into the constitutional and policy conversation about access to selective higher education in the decade after the CRA's passage, in cases such as Adams v Richardson and its progeny.⁵⁷

Litigation over inclusion of these students in higher education is ongoing. Federal courts have intervened on a theory of corrective justice,⁵⁸ found significant constitutional violations, and ordered substantial changes to place black colleges on a more equal footing with historically white ones in recent years.⁵⁹

However, the doctrine on HBCs is more or less irrelevant to the rest of higher education law. More specifically, the law on HBCs is separate and distinct from the doctrine on access to selective institutions of higher education.⁶⁰ The two-track approach is counterproductive to the interests of students affected by discrimination. It precludes constitutional law from coming to terms with the full weight of the nation's history of discrimination in higher education, including at selective institutions that are untethered to HBCs but were historically and remain overwhelmingly white. Two cases illustrate the point.

1. United States v Fordice (1992).

citing Charmaine Jackson Mercer and James B. Stedman, Minority-Serving Institutions: Selected Institutional and Student Characteristics, 28–54 in Understanding Minority-Serving Institutions (State University of New York 2008) (Marybeth Gasman, Benjamin Baez, and Caroline Sotello Viernes Turner, eds).

⁵⁷ See generally Mercer and Stedman, Minority-Serving Institutions (cited in note _).

⁵⁸ This same theory had animated passage of the Civil Rights Act and robust federal intervention in the workplace and public education has given rise to federal intervention in this area. See Parts I and II.

⁵⁹ See Gewirtz, 86 Colum L Rev at 731–36 (cited in note 13).

⁶⁰ No historically black colleges appear on Barron's list of selective colleges. See Rankings by Selectivity (NY Times Apr 4, 2013), online at <http://www.nytimes.com/interactive/2013/04/04/business/economy/economy-mix-selectivity-table.html> (visited Feb 7, 2014). The US News and World Report, which also ranks colleges, publishes a separate list of historically black colleges. The institutions are compared only to each other. See Historically Black Colleges and Universities Ranking (US News and World Report 2014), online at <http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/hbcu> (visited Feb 7, 2014).

United States v Fordice⁶¹ is the leading higher education case that shows the limited utility of corrective justice as a conceptual framework in modern equality cases that do not pertain to HBCs.⁶² In Fordice, the Supreme Court held that Mississippi had not met its constitutional obligations under the Fourteenth Amendment and Title VI to remedy the effects of its former dual school system by merely adopting race-neutral policies.⁶³ Historically black and white colleges remained racially identifiable, and the policies in effect perpetuated a racially identifiable college system and influenced black and white students' college choices.⁶⁴ Admissions requirements, institutional classification, programming, and funding policies all contributed to the dual track system.⁶⁵ The Court remanded the case with instructions to the Fifth Circuit to consider whether the maintenance of eight institutions of higher education, including three historically black colleges, might itself perpetuate discrimination.⁶⁶

Subsequently, the Fifth Circuit upheld expansive remedial orders that required funding increases and programming changes for the college system (for example, uniform admissions standards, summer study, and retention initiatives), but preserved the two-track, racially separate university system.⁶⁷

This approach seldom is questioned. Many commentators hold the view that historically black colleges serve an important role in the higher education ecosystem.⁶⁸ The institutions are —educationally justifiable.¶⁶⁹ Therefore, black colleges should be preserved, advocates argue, even if the institutions undeniably are relics of Jim Crow.⁷⁰

⁶¹ 505 US 717 (1992).

⁶² See *id.* at 743.

⁶³ See Fordice, 505 US at 732–43.

⁶⁴ See *id.* at 734–35.

⁶⁵ See *id.* at 738–43.

⁶⁶ See *id.* at 719–20 (change pin cite).

⁶⁷ See Ayers v Fordice, 111 F3d 1183, 1228 (5th Cir 1997).

⁶⁸ See Fisher v University of Texas at Austin, 133 S Ct 2411, 2432 n 5 (2013) (Thomas dissenting); Grutter v Bollinger, 539 US 306, 364–66 (2003) (Thomas dissenting).

⁶⁹ See Fordice, 505 US at 742.

⁷⁰ See, for example, Alfreda A. Sellers Diamond, Black, White, Brown, Green, and Fordice: The Flavor of Higher Education in Louisiana and Mississippi, 5 *Hastings Race & Poverty L J* 57, 106–07 (2008) (arguing that under Fordice a —truly progressive and effective desegregation plan . . . should account[] for the successes the historically black institutions experienced despite the disparities in funding they lacked[]).

The problem with this doctrinal approach—presumably an unintended consequence—is that it removes historically disadvantaged communities, the discrimination they experienced, and its continuing impact from the analysis in the broader constitutional conversation about equity in higher education.⁷¹ Most notably, it removes these subjects from the decision-making calculus in cases about race-conscious affirmative action, as I shall explain below.⁷²

2. Wooden v Board of Regents (1999).

The practical consequences of the two-track approach are profound. Plaintiffs who allege reverse discrimination under the Civil Rights Act and the Equal Protection Clause routinely leverage the rhetoric of colorblindness acontextually.⁷³ They explicitly or implicitly rely on the history of pervasive race-based discrimination against African Americans to support admissions policies that disproportionately exclude African Americans and other students of color from campus.

Consider, as an example of this phenomenon, the result in Wooden v Board of Regents,⁷⁴ a challenge to the University of Georgia's (UGA) affirmative action policy.⁷⁵ White plaintiffs alleged that UGA's admissions program, which included a race-conscious element that benefitted underrepresented minorities, violated the rights of whites under the Constitution and Title VI; blacks with lower scores and grades had allegedly displaced whites with higher scores and grades.⁷⁶ In hopes of vindicating UGA's affirmative action program, the NAACP turned to Georgia's history of discrimination and its present effects on black applicants and matriculates to the university.⁷⁷ UGA's history of exclusion and discrimination against blacks undermined blacks' preparation for and even interest in the university, the NAACP argued, and justified special admissions and recruitment programs.⁷⁸ The

⁷¹ The Court's jurisprudence considers past discrimination and diversity rationales for affirmative action as distinct. See notes 67–69 and accompanying text. See also Tomiko Brown-Nagin, Elites, Social Movements, and the Law: The Case of Affirmative Action, 105 Colum L Rev 1436, 1478–85 (2005).

⁷² See notes 40–41 and accompanying text.

⁷³ See, for example, Grutter, 539 US, at 341 (discussing the law school's emphasis on admitting a critical mass of underrepresented minority students).

⁷⁴ Wooden v Board of Regents of University System of Georgia, 32 F Supp 2d 1370 (SD Ga 1999).

⁷⁵ See *id.* at 1372.

⁷⁶ See *id.* at 1382–84.

⁷⁷ See *id.* at 1383.

⁷⁸ See Wooden, 32 F Supp 2d at 1382–84.

District Court curtly rejected the claim that UGA's history of discrimination mattered, at least in the manner contemplated by the NAACP, stating -[e]ven if true, the fact that many black high school students choose, for some reason, not to apply to or attend UGA is not a reason for enacting a racially discriminatory admission policy. All such a statistic would show is black student disinterest for, or bias against, UGA.⁷⁹ The NAACP's argument had backfired. If discrimination was afoot, this judge concluded, white students and historically white institutions—not blacks—had suffered.⁸⁰

Georgia's historically black college system influenced the judge's point of view. Black students, he pointed out, attend Georgia's HBCs at a high rate.⁸¹ These students' attraction to HBCs explained their relative absence from UGA; by the court's logic, they freely and overwhelmingly choose the state's HBCs over the University of Georgia—the state's flagship institution and a nationally-ranked selective institution.⁸² The court ultimately dismissed claims related to the impact of the HBCs on the university system as a whole on grounds that these —analytically distinct claims must be addressed separately.⁸³

Wooden is just one of many suits in which judges pointedly and colorfully expressed the view that historic discrimination against underrepresented students of color and any ongoing effects on society are

⁷⁹ See *id.* at 1382 (emphasis added).

⁸⁰ The Court also opined:

Such disinterest and antipathy, the NAACP no doubt would argue, derives from UGA's history of past segregation. That cannot carry the day. -[M]ere knowledge of [and thus, minority group reaction to] a historical fact is not the kind of present effect that can justify a race exclusive remedy. If it were otherwise, as long as there are people who have access to history books, there will be programs such as this.

Id. at 1383, citing Podberesky v Kirwan, 38 F3d 147, 154 (4th Cir 1994).

⁸¹ See Wooden, 32 F Supp 2d at 1382–84.

⁸² See Most Selective Colleges List (Georgetown University 2009), online at <http://cew.georgetown.edu/separateandunequal/selective-colleges> (visited Feb 7, 2014), citing Rankings by Selectivity (NY Times Apr 4, 2013), online at

http://www.nytimes.com/interactive/2013/04/04/business/economy/economy-selectivity-table.html?_r=0 (visited Feb 7, 2014).

⁸³ See Wooden, 32 F Supp 2d at 1372, vac'd Tracy v Board of Regents of the University System, 208 F3d 1313 (11th Cir 2000). —The Court held that the HBI challengers lacked standing to pursue their claims because they suffered no 'injury in fact' and asserted only a 'generalized grievance.' See Tracy v Board of Regents of University System of Georgia, 2000 WL 1521555 (SD Ga July 24, 2000) (citation omitted).

unavailing—except to support -colorblind policies. Most famously, Chief Justice Roberts, in Parents Involved in Community Schools v Settle School District,⁸⁴ held that the country’s history of racial exclusion of blacks from public schools required the Court to void a voluntary policy of racial inclusion in the Louisville and Seattle public schools.⁸⁵ -History will be heard, Roberts said, in his ruling that racial classifications—here, school assignment policies that deprived white students of their first choice of school—presumptively violate the Constitution.⁸⁶

The Chief Justice’s reasoning about race in Parents Involved in 2007 reads much like the understanding of equality that became ascendant in the Supreme Court’s higher education jurisprudence during the 1970s, as the next part explains.⁸⁷

Part III. Limitations on Affirmative Action as a Tool of Social Mobility in Higher Education

This Part again explores the theme of departure, this time in the context of the Supreme Court’s jurisprudence in affirmative action cases. It argues that the Court’s embrace of the rhetoric of diversity, as opposed to corrective justice, for these policies had a variety of consequences, both positive and negative. The capacious rhetoric confers tremendous discretion on universities; under the rubric of -diversity, officials can choose to admit an array of worthy students and avoid explicit reasoning about race. That outcome is politically beneficial in the American context, where powerbrokers often avoid conversations about race.⁸⁸ Other benefits may flow from diversity-based reasoning that this part does not rehearse.

This part instead focuses on one particular disadvantage of the diversity-based justification for affirmative action as it is discussed by the Supreme Court and implemented by selective universities. Diversity-based reasoning disconnects affirmative action policies from an explicit conversation about disadvantage. Consequently, the outreach to truly disadvantaged students that characterized both early affirmative action

⁸⁴ 551 US 701 (2007).

⁸⁵ See Parents Involved, 551 US at 720–25. See also Ricci, 557 US at 584.

⁸⁶ Parents Involved, 551 US at 746.

⁸⁷ For a strongly critical take on Robert’s opinion, see Charles Lawrence III, Unconscious Racism Revisited: Reflections on Impact and Origins of the Id, the Ego, and Equal Protection, 40 Conn L Rev 931, 934–35 (2008).

⁸⁸ For commentary, see Ta-Neisha Coates, The Conversation on Race, The Atlantic, July 27, 2010; A.O. Scott, Never Ending Story: Conversation on Race Has Not Brought Cultural Consensus, NY Times, Sept. 27, 2013.

efforts and numerous civil rights-era laws over time fell away. Students from better-educated, wealthier homes now benefit disproportionately from affirmative action. It is a welcome development that those students have established a presence at selective institutions of higher education. However, the crowding out of disadvantage in conversations about opportunity in higher education is an undesirable development.

A. Bakke v California (1978): from corrective justice and social mobility to –diversity.¶

Some will be surprised that the Supreme Court’s decision in Bakke v California,⁸⁹ lately considered a landmark advancing equity in higher education, here is cited as a factor in the declining attention paid to the inclusion of poorer students, as a class, in higher education. Nevertheless, in my view, the Court’s decision narrowly upholding affirmative action policies, and on diversity grounds, constituted a short-term victory, but a long-term set back, to social mobility.⁹⁰

The diversity concept derives from Justice Powell’s opinion, which over time became the controlling authority on how admissions officials can take race into account. The pursuit of diversity rested on a university’s First Amendment rights. Powell explained that the –freedom of a university to make its own judgments as to education includes the selection of its student body.¶⁹¹ Universities could consider race a –plus¶ factor—one characteristic among other aspects of an applicant’s profile that might be deemed vital to assembling a heterogeneous student population.⁹² Institutions could seek to attain educational diversity so long as all candidates competed in a single admissions pool and officials did not resort to a quota-based selection system.⁹³

Justice Powell’s theory of diversity turned on racial universalism rather than group-based theories of racial difference. The racially-neutral text of the Constitution compelled this universalist approach, as Powell saw it. The Civil Rights Act’s antidiscrimination principle, derived from the Fourteenth Amendment,⁹⁴ must be applied in a

⁸⁹ Regents of Univ of California v Bakke, 438 US 265, 315 (1978) (–Bakke¶).

⁹⁰ See *id* at 315.

⁹¹ *Id* at 312.

⁹² *Id* at 314–17.

⁹³ The Court also cited –exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, [and] ability to communicate with the poor¶ as relevant –diversity¶ factors. See Bakke, 438 US at 317.

⁹⁴ See Bakke, 438 US at 290–92.

colorblind fashion because the Constitution contained colorblind language.⁹⁵ Neither the Equal Protection Clause nor the Civil Rights Act supported a theory of equality in which blacks' history (of racial subjugation) or whites' history (of racial domination) mattered.

Powell viewed his capacious concept of –diversity as an appropriate and practical response to polyglot America.⁹⁶ He claimed that the –United States had become a Nation of minorities composed of many ethnic, racial and religious, each of which has struggled to –overcome –prejudices.⁹⁷ Under his rubric, blacks descended from enslaved Americans had no special claim of entitlement to judicial deference or admissions preference.⁹⁸ Nor could any other racial or ethnic group claim special disadvantage under Powell's iteration of diversity.⁹⁹

In Powell's formulation, the recruitment of –diverse students could involve a consideration of race only to the extent that the student's racial background, or his –ethnic, geographic, culturally advantaged or disadvantaged background, contributed to the –robust exchange of ideas vital to advancing the mission of a university.¹⁰⁰ Powell explicitly endorsed the Harvard College program, which had long included attention to factors such as geography or special talents.¹⁰¹ Powell's description of how an admissions program of the variety that he found constitutionally permissible would work made clear that neither race nor disadvantage need carry any outcome determinative weight.¹⁰²

⁹⁵ See id at 293.

⁹⁶ –[T]he white _majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. See id at 295. The judiciary was not equipped to engage in the comparative weighing of claims of entitlement to remedial preferences. See id at 296–97.

⁹⁷ Id. at 292.

⁹⁸ Id at 292 (–Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white _majority, '... the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude).

⁹⁹ –The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity. See Bakke, 438 US at 315 (emphasis in the original).

¹⁰⁰ See id at 313 (emphasis added).

¹⁰¹ See id at 316.

¹⁰² See Bakke, 438 US at 313–16.

The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the mix both of the student body and the applicants for the incoming class.¹⁰³

In Powell's understanding—the conception of affirmative action that became entrenched in doctrine and policy—affirmative action had no fixed relationship to discrimination or disadvantage.¹⁰⁴ It might; or it might not. Universities would decide what diversity meant in practice.

1. Contemporary criticism of the diversity rationale.

During recent debates over the constitutionality of affirmative action, Bakke's diversity-based justification of race-conscious admissions received high praise, and its architect, Justice Powell, won plaudits as a

¹⁰³ See *id.* at 317.

¹⁰⁴ As a NY Times reporter explained, —Associate Justice Lewis F. Powell Jr . . . made it clear that special preference for blacks was not what the majority had in mind when it said race could be considered in an admissions policy. See John Herbers, A Plateau for Minorities: Most College Programs Expected to Continue, But Ruling is Seen as Brake on Rights Efforts, NY Times A1 (June 29, 1978). Ironically, the notion of recruiting students on the basis of —disadvantage, including —racial disadvantage, represented a consensus viewpoint. The paper noted that Richard Cohen, an associate executive director of the American Jewish Congress, opposed race as a selection criterion, but supported —programs to speed the entry of disadvantaged racial minorities into higher education. See Paul Delaney, US Brief to Support Minority Admissions: Bell to Act in Supreme Court on California College Quota Issue, NY Times A1, A12 (Aug 24, 1977).

judicial –statesman.¶¹⁰⁵ When the Justices decided Bakke, however, a host of commentators critiqued Powell’s opinion as conceptually limited.¹⁰⁶ Some argued that the opinion’s preference for reasoning in terms of an individual’s contributions to educational –diversity,¶ rather than about remedying status-based discrimination and disadvantage, derived less from law than from politics.¹⁰⁷

Criticism of Powell’s approach began on the Court. In a concurring and dissenting opinion, Justices Brennan, White, Marshall, and Blackmun disputed Powell’s claim that Title VI rested on a colorblind, universalist premise.¹⁰⁸ The Justices examined the history of Title VI of the Civil Rights Act and administrative regulations interpreting it and argued that Powell’s –colorblind¶ reading of the law’s remedial reach made little historical sense.¹⁰⁹ Congress had induced compliance with the Act by encouraging recipients of federal funds to implement race-conscious, affirmative action programs limited to blacks, Hispanics, and other under-represented minorities.¹¹⁰ Moreover, executive agencies enacted regulations that required recipients of federal funds, including educational institutions, to use race-conscious action to

¹⁰⁵ See Linda Greenhouse, Bell Hails Decision: Calls Ruling a Great Gain’ —Plaintiff Is Pleas ed’ and Others Express Relief, NY Times A1 (June 29, 1978). See also Paul R. Baier, Of Bakke’s Balance, Gratz, and Grutter: The Voice of Justice Powell, 78 Tulane L Rev 1955, 1964 (2004);

John C. Jeffries Jr, Bakke Revisited, 55 Sup Ct Rev 1, 18–25 (2003).

¹⁰⁶ See Vincent Blasi, Bakke As Precedent: Does Mr. Justice Powell Have a Theory?, 67 Cal Law Review 21, 21(1979)(questioning validity of Powell’s conclusion that race-based classifications can be used to encourage academic dialogue but not to counteract distributive injustices of past centuries); Robert M. O’Neil, Bakke in Balance: Some Preliminary Thoughts, 67 Cal. L. Rev. 143, 147 (1979). For more recent criticisms, see generally Charles Lawrence, Two Views of the River: A Critique of the Liberal Defense of Affirmative Action, 101 Columbia L Rev 2001; Gabriel Chin, Bakke to the Wall: The Crisis of Bakkean Diversity, 4 Wm & Mary Bill Rts J 881 (1996).

¹⁰⁷ See John C. Jeffries Jr, Justice Lewis F. Powell, Jr. 470–73 (Macmillan 1994).

¹⁰⁸ Bakke, 438 US at 325–421 (Brennan concurring and dissenting in part).

¹⁰⁹ See *id* (Brennan concurring and dissenting in part).

¹¹⁰ –It clearly desired to encourage all remedies, including the use of race, necessary to eliminate racial discrimination in violation of the Constitution rather than requiring the recipient to await a judicial adjudication of unconstitutionality and the judicial imposition of a racially oriented remedy.¶ *Id* at 337 (Brennan concurring and dissenting in part).

overcome the effects of discrimination.¹¹¹ Consequently, Title VI could support race-conscious programs designed to redress –discrimination‖ even in the absence of express findings against an institution, such as the University of California, that implemented a policy.¹¹²

Furthermore, in the view of these justices, the nation’s history revealed fundamental differences in the experiences of the under-represented minorities eligible for the university set-aside program and of whites.¹¹³ The beneficiaries of the programs had been chosen because they had been targets of rank discrimination.¹¹⁴ Employers and universities made special efforts to attract blacks because the forms of discrimination perpetrated against blacks had been different in kind and more recent in our national experience than that experienced by white ethnics.¹¹⁵ Employers and school districts had completely excluded blacks from certain employment sectors and schools, as we have seen.¹¹⁶ The black experience of discrimination had been totalizing and pervasive. Whites had not been subject to discriminatory treatment on that scale.¹¹⁷ Where pervasive discrimination had contributed to present patterns of racial disadvantage, Justice Marshall, along with Justices Brennan, White, and Blackmun asserted, institutions could take race into account to ameliorate disparate racial impact.¹¹⁸ Justice Blackmun pithily summed up this perspective: –In order to get beyond racism, we must first take account of race.‖¹¹⁹

¹¹¹ Id at 343–44 (Brennan concurring and dissenting in part).

¹¹² Bakke, 438 US at 336 (Brennan concurring and dissenting in part), citing 42 USC § 2000d–1 (stating that no funds shall be terminated unless and until it has been –determined that compliance cannot be secured by voluntary means‖).

¹¹³ See Bakke, 438 US at 357 (Brennan concurring and dissenting in part).

¹¹⁴ Id at 357–58 (Brennan concurring and dissenting in part).

¹¹⁵ See notes 19–22 and accompanying text.

¹¹⁶ See notes 11–13 and accompanying text.

¹¹⁷ Therefore, whites should not be considered –insular minorities‖ whose claims of unfair treatment merited special judicial concern. Bakke, 438 US at 288. Consideration of race to correct racial discrimination should be subjected to intermediate scrutiny. See id at 359 (Brennan concurring and dissenting in part).

¹¹⁸ Id at 369 (Brennan concurring and dissenting in part).

¹¹⁹ Id at 407 (Marshall concurring). In a separate opinion, Justice Thurgood Marshall recounted the uniquely insidious history of –the Negro’s‖ experience in America, founded on chattel slavery, a harm unknown to any other group, followed by slave codes, Black Codes, laws of segregation, and discrimination. Id at 387–94 (Marshall concurring). –The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any

Outside of the Court, among proponents of the affirmative action, Bakke's restrained endorsement of race consciousness also fell flat. Powell's opinion represented a plateau for affirmative action and a brake on efforts begun during the 1960s to bring blacks from the margins to the center of American life, some claimed.¹²⁰ After all, Powell had analogized the difference that race might make in a student's profile to being a high school quarterback.¹²¹ That modality of reasoning sorely misunderstood how race can shape a life and opportunity. However, Powell's insistence that admissions officials treat race just the same as any other characteristic reflected the ethos of 1970s—an era of racial retrenchment.¹²²

2. Universities as agenda-setters and decision-makers.

benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro. *Id.* at 395 (Marshall concurring).

¹²⁰ See Herbers, A Plateau for Minorities, NY Times at A1 (cited in note 104).

¹²¹ Some admissions officials even interpreted Powell's endorsement of multifactor, race-conscious review in admissions as a mandate to cease any policies and programs that could be viewed as favoring racial minorities. See Steven V. Roberts, Professional Schools Read Mixed Signs in Bakke Decision, NY Times A23 (Feb 14, 1979).

¹²² During the 1970s, large majorities of whites continued to oppose efforts to integrate elementary and secondary schools and housing, sometimes violently. Just as blacks gained formal political power, whites fled urban centers en masse, depriving black leaders who had gained access to municipal government the tax base and political partnerships needed to make government work. New Right politicians stoked racial resentment using crime and welfare as rallying cries. They championed free markets as an antidote to the social malaise reportedly caused by the excesses of the 1960s and liberalism. On these developments, see Matthew D. Lassiter, The Silent Majority: Suburban Politics in the Sunbelt South at 227, 273–74 (Princeton University Press 2007); Joseph Crespino, Strom Thurmond's America 204–05, 220–21, 244–45, 253–54 (Hill and Wang 2012); J. Anthony Lukas, Common Ground: A Turbulent Decade In the Lives of Three American Families 214, 241 257–58, 307, 455–56 532 (Knopf 1986); Daniel T. Rodgers, Age of Fracture 131 (Belknap 2011). Moreover, lawsuits filed by white male plaintiffs who alleged reverse discrimination when employers and universities hired or accepted people of color and women flooded the courts. See Steven V. Roberts, White Males Challenge Affirmative Action Programs: More White Males Are Challenging Affirmative Action Programs, NY Times A1 (Nov 24, 1977).

Proponents concerned about the fate of affirmative action after Bakke need not to have feared the end of efforts to include students of color in higher education. The choices for higher education officials going forward did not begin and end with the obvious ones: inclusion or exclusion. The key issue for the future concerned how universities would *exercise discretion* in the admissions process. Henceforth, many selective universities would include racial minorities in the course of seeking the –right mixl of students.¹²³ Officials at thousands of institutions nationwide would answer the question of whether racial minorities who might need a finger on the admissions scale received extra consideration—and which of those racial minorities received a boost.¹²⁴

As universities exercised discretion and dynamics in American higher education changed, affirmative action changed. The extent to which universities made the admission of students of color a priority varied over time. The calculus varied annually in relation to universities' changing agendas, as shaped and reconfigured by endowments, strategic plans, rankings, personnel shifts, and alumni preferences.¹²⁵ The identity of the beneficiaries changed over time as the pools of applicants became more competitive, particularly at the most selective institutions.¹²⁶ The shifting nature of affirmative action is lost in debates over the policies.

B. Grutter v Bollinger (2003): diversity and competing interests.

A close look at Justice O'Connor's majority opinion in Grutter v Bollinger¹²⁷ reveals the tension between higher education's interests in

¹²³ See Landsberg, Enforcing Civil Rights at 122–23 (cited in note 30).

¹²⁴ See Edward B. Fiske, Schools Seek Right Mix, NY Times A1 (June 30, 1971) (describing Harvard College's current interest in physical science majors, engineers, and a hockey goalie; Wesleyan University's search for the right balance of pre-professional students; and Dartmouth's interest in athletes and legacies). See also Landsberg, Enforcing Civil Rights at 120 (cited in note 30) (noting that –preference for some categories, such as alumni, is universal among private colleges)).

¹²⁵ See Scott Andrew Schulz and Jerome A. Lucido, Enrollment Management, Inc.: External Influences on Our Practice 5 (USC Center for Enrollment Research, Policy, and Practice Jan 2011), online at http://cerpp.usc.edu/files/2013/11/EnrollmentManagementInc.ReportFIN_AL_001.pdf (visited Feb 7, 2014) (arguing that admissions officers' decisions are increasingly influenced by institutional goals).

¹²⁶ See Bowen and Bok supra note __ at 7-9 (discussing transition from recruitment of disadvantaged blacks pre-Bakke to recruitment of black students more capable of competing with well-qualified white, Asian and Hispanic applicants).

¹²⁷ 539 US 306 (2003).

affirmative action and a focus on social mobility, as mediated by Bakke's diversity discourse.¹²⁸ The majority held that states have a compelling interest in pursuing the educational benefits of diverse student bodies.¹²⁹ Admissions officials may consider an applicant's race so long as it is just one factor in a holistic admissions process.¹³⁰

The Court's opinion reflected the themes that emerged in the course of the vigorous defense of its affirmative action policy that the University of Michigan waged.¹³¹ The school justified its programs in terms of its imperative to train socially literate citizens and workers.¹³² In other words, diverse learning environments help to build savvier participants in the global workforce. These obligations dovetailed with the interests expressed by Fortune 500 employers, military officers, and government officials, who supported the university's defense with a flood of amicus briefs.¹³³

Michigan argued that a -pool problem forced it to consider race as it sought to assemble a class of students that could advance these objectives.¹³⁴ Because of the limited number of students of color who posted competitive test scores and grades, the university found it necessary to consider race as a factor in its holistic admissions process.¹³⁵ Only by considering race and accepting candidates deep in the applicant pool could the university assemble a critical mass, or sizeable number, of diverse students.¹³⁶

The university's justificatory rhetoric only obliquely touched the theme of fundamental fairness that President Johnson and the social movements of the 1960s cited in defense of affirmative action.¹³⁷ In fact, it expressly disavowed disadvantage and discrimination as rationales for its policies when civil rights activists pressed those arguments.¹³⁸

¹²⁸ See Grutter, 539 US at 327–33.

¹²⁹ See *id.* at 328.

¹³⁰ See *id.* at 334.

¹³¹ See Brown-Nagin, 105 Colum L Rev at 1453 (cited in note 71).

¹³² See *id.*

¹³³ See *id.* at 1463–65.

¹³⁴ See *id.* at 1454

¹³⁵ See Brown-Nagin, 105 Colum L Rev at 1454 (cited in note 71).

¹³⁶ See *id.*

¹³⁷ *Id.* at 1484–85. The majority wrote that the -path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity if leaders are to have -legitimacy in the eyes of the citizenry. And it acknowledged that race still matters. Grutter, 539 US at 332–33.

¹³⁸ See Brown-Nagin, 105 Colum L Rev at 1453 (cited in note 71). A group of interveners did make arguments premised on historic and present discrimination and disadvantage. The interveners instead

Justice O'Connor followed the university's lead.¹³⁹ She acknowledged that race –still matters‖ in society.¹⁴⁰ But she curtly dismissed complaints from Justice Thomas, amici, and interveners¹⁴¹ that universities' own admissions criteria cause the –selectivity‖ problem that they then seek to ameliorate with racial classifications.¹⁴² Justice O'Connor simply –deferred to the law school's judgment about how best to assemble student bodies.‖¹⁴³

Diversity-based reasoning, tethered to a university's academic freedom, compelled an outcome that would be interrogated if the Court reasoned about access to selective higher education from a corrective justice standpoint.¹⁴⁴ The outcome might also be different if the Court included more robust reasoning about status-based discrimination in its diversity reasoning.¹⁴⁵

C. Fisher v Texas (2013): latest signals about diversity and social mobility.

If Grutter offered a less than compelling explanation for affirmative action, the Court's decision last term in Fisher v Texas¹⁴⁶ pushes the doctrine in a different direction altogether. Merely a decade after Justice O'Connor sought to ensure the long-term viability of affirmative action in education,¹⁴⁷ Fisher jeopardizes those practices.

claimed that Michigan's own choice to rely on admissions criteria known to favor wealthier, white students as a proxy for –selectivity‖ compelled the university to consider race in admissions. Race-conscious admissions merely corrected for known difficulties in predicting the academic performance of students of color. See Brown-Nagin, 105 Colum L Rev at 1454-58 (cited in note 71).

¹³⁹ See Grutter, 539 US at 348–49.

¹⁴⁰ Grutter, 539 US at 332–33.

¹⁴¹ See Brown-Nagin, 105 Colum L Rev at 1454-58, 1462 (cited in note 71).

¹⁴² –[P]ublic universities in states with anti-affirmative action laws are under intense pressure to use admissions criteria that improve their prestige ranking and financial bond rating.‖ See West-Faulcon, 157 U Pa L Rev at 1080 (cited in note 53). See also Bowen and Bok, The Shape of the River at 19–23 (cited in note 44).

¹⁴³ See Brown-Nagin, 105 Colum L Rev at 1484 (cited in note 71).

¹⁴⁴ See Fordice at 734–35 (discussing admissions requirements).

¹⁴⁵ I have argued that a remedial argument can supplement a diversity-based argument. See note 207.

¹⁴⁶ Fisher v University of Texas at Austin, 133 S Ct 2411 (2012).

¹⁴⁷ The majority opinion included a 25-year affirmative action sunset provision. See Grutter, 539 US at 343.

1. Downsizing diversity

Fisher did not dramatically change doctrine, but nevertheless signaled a shift in the Court's orientation toward race-conscious admissions in higher education (just as it has expressed disfavor of voluntary K–12 school desegregation¹⁴⁸ and of employers' preemptive efforts to comply with the Civil Rights Act's ban on employment discrimination).¹⁴⁹

In Fisher, for the first time, the Court—including Justices Sotomayor and Breyer, Democratic appointees thought to lean left on race-related issues—made clear that universities must surmount a substantial evidentiary burden before turning to race-conscious admissions policies.¹⁵⁰ Strict scrutiny requires universities to show and federal courts to determine that no workable race-neutral alternative to race-conscious policies would produce the educational benefits of diversity.¹⁵¹ Prior cases had merely required universities to engage in—good faith consideration of race-neutral alternatives.¹⁵²

The new stress on race-neutral alternatives surely is meant to nudge universities away from the explicit consideration of race in admissions. Instead of defending race-specific policies, some universities can be expected to respond to Fisher by embracing proxies that can yield racial diversity.¹⁵³ Lawsuits challenging affirmative action policies, likely to proliferate in Fisher's wake, may accelerate the transition away from explicitly race-conscious admissions.

2. Distinguishing diversity from disadvantage

Fisher also is important for what it suggested about the distance between diversity-based affirmative action plans and the national interest in social mobility. For purposes of this article, this aspect of the

¹⁴⁸ Parents Involved in Community School v Seattle School District No 1, 551 US 701, 747–48 (2007) (striking down school assignment policy designed to ensure racially diverse schools).

¹⁴⁹ Ricci, 557 US at 563 (2009).

¹⁵⁰ Fisher, 133 S Ct at 2420–22.

¹⁵¹ See id at 2420.

¹⁵² Compare Fisher, 133 S Ct at 2420, with Grutter, 539 US at 339.

¹⁵³ See Devon W. Carbado and Cheryl I. Harris, The New Racial Preferences, 96 Cal L Rev 1139, 1148 (2008) (noting that an applicant's life experience is often inextricably intertwined with their race). Within this changing legal context, courts may scrutinize the concept of race-neutrality in unexpected ways. See generally Michelle Adams, Is Integration a Discriminatory Purpose?, 96 Iowa L Rev 837 (2011).

case is most vital. The oral arguments in Fisher reveal how far removed the constitutional frameworks for analyzing affirmative action are from a conversation about the most disadvantaged students.

Fisher involved a race-sensitive policy so subtly executed that its impact on admissions rates could barely be measured. Only 33 of more than 6,000 students may have gained admission after officials at the University of Texas (UT) considered race.¹⁵⁴ The overwhelmingly majority of blacks and Hispanics admitted to UT, like the overwhelming majority of whites, gained entry through an automatic admission policy for Texas residents who graduate at the top of their high school classes (the Top Ten Percent Program).¹⁵⁵ The Top Ten Percent Program, the pathway for admissions for 85 percent of students during the year in question, is facially race neutral.¹⁵⁶

These statistics raised a question. If the Top Ten Percent Program had increased UT's percentage of students of color, particularly Latinos, why had the university gone to the trouble of layering a race-conscious policy on top of it? It turned out that the thirty-three students for whom race may have been a factor in admissions differed from the students admitted through the percentage program in a significant way. The thirty-three—so-called —bridge# minorities—could be counted on to counter stereotypes and make positive contributions at UT. Here is how UT's counsel explained the special contributions of these students:

[T]he minorities who are admitted [under 10% plan] tend to come from segregated, racially-identifiable schools. . . . [T]aking the top 10 percent of a racially identifiable high school may get you diversity that looks okay on paper, but it doesn't guarantee you diversity that produces educational benefits on campus. And that's one of the considerations that the university took into account as well. . . . [T]he minority candidate who has . . . succeeded in an integrated environment, has shown leadership, community service . . . is precisely the kind of candidate that's going to . . . help break down racial barriers.¹⁵⁷

Justice Kennedy and others decoded the counsel's statement and made the implied connection between segregated schools, class

¹⁵⁴ See Brief for Petitioner, Bert W. Rein, et al, Fisher v University of Texas at Austin, Civil Action No 11-345, *9–10 (US filed May 21, 2012).

¹⁵⁵ See *id.*

¹⁵⁶ See Fisher, 133 S Ct at 2416.

¹⁵⁷ Transcript of Oral Argument, Fisher v University of Texas at Austin, Civil Action No 11-345, *41–43 (Oct 10, 2012), online at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-345.pdf (visited Feb 7, 2014).

background, and racial stereotypes. –So what you’re saying is that what counts is race above all? . . . You want underprivileged of a certain race and privileged of a certain race,¶ Kennedy noted.¹⁵⁸

The exchange revealed the severed tie between race-conscious affirmative action and disadvantage. UT’s counsel had expressed an unfavorable judgment about the likely educational benefits of recruiting students who attend the schools and reside in the neighborhoods most obviously scarred by Jim Crow and present inequality.¹⁵⁹ The segregated, racially identifiable schools that the lawyer mentioned are located in districts, including Houston, Corpus Christi, Austin, and Dallas, where inequities have been documented in lawsuit after lawsuit.¹⁶⁰ State and federal courts repeatedly have intervened in many of these districts to mandate improvements. Some courts maintain jurisdictions in education reform lawsuits in these areas to this very day.¹⁶¹ The issue of school equity in the state’s deeply racially-polarized school system also remains alive in the Texas legislature. Controversies over how to allocate funding to poor, minority districts are ubiquitous.¹⁶² Middle and upper-income whites have fled residential areas and schools where blacks and Latinos live, leaving behind numerous impoverished, majority-minority districts—deeply stigmatized on account of race, poverty, and place.¹⁶³

¹⁵⁸ See *id.* at 45.

¹⁵⁹ See *id.* at 45–47.

¹⁶⁰ See Ross v Houston Independent School District, 699 F2d 218, 220–25 (5th Cir 1983); Cisneros v Corpus Christi Independent School District, 467 F2d 142, 144–47 (5th Cir 1972); United States v Texas Education Agency, 467 F2d 848, 855–56 (5th Cir 1972); Tasby v Wright, 520 F Supp 683, 690–701 (ND Tex 1981), *affd in part, revd in part* Tasby and NAACP v Wright, 713 F2d 90 (5th Cir 1983).

¹⁶¹ See Brief of the Advancement Project as Amicus Curiae Supporting Respondents, Tomiko Brown-Nagin and Lani Guinier, Fisher v University of Texas at Austin, Civil Action No 11-345, *18–19 (US filed Aug 13, 2012) (–Brown-Nagin Brief¶).

¹⁶² See Tovia Smith, Judge Rules Texas’ School-Funding Method Unconstitutional (NPR Feb 4, 2013), online at <http://www.npr.org/2013/02/04/171113168/judge-rules-texas-school-funding-method-unconstitutional> (visited Feb 7, 2014).

¹⁶³ See Ana Campoy, Newscomers Test Schools: In Plano, Texas, Population Shift Prompts Rezoning That Angers Many Parents (Wall St J Jan 28, 2010), online at <http://online.wsj.com/article/SB10001424052748704905604575027320022719844.html> (visited Feb 7, 2014); Matthew Haag, Diversity at Core of Plano ISD Boundary Debate (The Dallas Morning News Nov 26, 2010), online at <http://www.dallasnews.com/news/education/headlines/20091117-Diversity-at-core-of-Plano-ISD-1078.ece> (visited Feb 7, 2014); Yvonne

To be sure, legal strategy drove counsel's assertion in open court that students of color who arrive at UT from Texas's segregated and inferior schools cannot be expected to counter stereotypes, provide campus leadership, or make positive contributions. That this legal strategy is necessary exposes a little-acknowledged reality in affirmative action programs today. Affirmative action programs, as currently conceived and implemented, are loosely tethered to the social mobility mission for the truly disadvantaged that once motivated them. The policies touch on structural, embedded, and intergenerational inequality in only indirect, and as witnessed in Fisher, even perverse ways.¹⁶⁴

The exchange in UT likely pulled the curtain back on a wider phenomenon: at selective universities nationwide, students from the poorest neighborhoods are hard to find, notwithstanding affirmative action.¹⁶⁵ Recent studies have shown that immigrants, multiracial students, and Hispanics from more affluent backgrounds are particularly likely to be beneficiaries of race-conscious affirmative action.¹⁶⁶ Black

Marquez and Luke Winkie, Explosive Growth of Hispanics in Texas Bring Dramatic Changes to Schools (The Dallas Morning News May 3, 2013), online at <http://www.dallasnews.com/news/education/headlines/20130503-explosive-growth-of-hispanics-in-texas-bring-dramatic-changes-to-schools.ece> (visited Feb 7, 2014).

¹⁶⁴ I co-wrote a Friend of the Court Brief with Professor Lani Guinier, in Fisher v Texas supporting UT's affirmative action policy on social justice grounds. Texas's egregious history of discrimination and the continuing effects of that history, coupled with the diversity-based rationale for affirmative action upheld in Grutter v Bollinger, justified the policies. In other words, the brief made a "diversity-plus" argument that sought to tether concerns about visible diversity, now fashionable in many quarters, to substantive matters of equal justice. See generally Advancement Project Brief (cited in note). This type of argument sounded in the same register as President Johnson's 1965 address. But it runs counter to UT's idea that the applications of assimilated students of color merit special consideration precisely because these students already have lived in the "mainstream" and therefore are more likely to be successful at UT (as compared to blacks and Hispanics who hail from majority-minority communities).

¹⁶⁵ See *id.* at 18–29.

¹⁶⁶ See Thomas J. Espenshade and Alexandria Walton Radford, No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life, 299 (Princeton 2009) (describing results of a study of selective universities and finding that different levels of consideration are given to different underrepresented minority groups); Bowen and Bok, The Shape of the River at 291–334 (cited in note 44)

Americans, particularly those who are economically disadvantaged, are less likely to benefit from the policies.¹⁶⁷ One study showed that 86 percent of African American students at 28 elite colleges surveyed hailed from the middle or upper classes (and whites came from even more privileged households).¹⁶⁸

The discussion in oral argument at Fisher suggested the mindset behind these demographic results. Even if disadvantaged students meet

(describing College and Beyond surveys, the Cooperative Institutional Research Program questionnaire, and the College Entrance Examination Board's questionnaire showing that black graduates likely have gained substantially from the time they spent in selective colleges and universities); Lani Guinier, Our Preference for the Privileged A13 (Boston Globe July 9, 2004), online at <http://www.law.harvard.edu/faculty/guinier/publications/preference.pdf> (visited Feb 7, 2014) (observing that many top universities pursue black racial diversity primarily by admitting first-generation immigrants of African and Caribbean descent); Brown and Bell, 69 Ohio St L J at 1233–42 (cited in note 44) (describing the increasing representation of certain groups of black students, at the expense of —ascendant black students— those whose ancestry has the most direct link to slavery and segregation in the United States); Angela Onwuachi-Willig, The Admission of Legacy Blacks, 60 Vand L Rev 1141, 1173 (2007) (—[M]ixed-race students and first- and second-generation Blacks may be better positioned to be admitted to and survive elite college and university environments because of the relative ease (compared to legacy Blacks) with which they can integrate and assimilate into white circles.); Douglas S. Massey, et al, Black Immigrants and Black Natives Attending Selective Colleges and Universities in the United States 113 Am J Educ 243, 245 (2007) (describing the overrepresentation of black immigrants among the black student population at elite universities).

¹⁶⁷ See Brown and Bell, Demise of the Talented Tenth at 1230 (cited in note 44); Richard D. Kahlenberg, Style, Not Substance: Affirmative action is not as liberal as you think 2 (Wash Monthly Nov 1998), online at <http://www.unz.org/Pub/WashingtonMonthly-1998nov-00045> (visited Feb 7, 2014). (reporting a study that showed 86 percent of African American students at twenty-eight elite colleges were middle or upper class).

¹⁶⁸ See Kahlenberg, cited in note 161; see also Hugh Davis Graham, The Origins of Affirmative Action: Civil Rights and the Regulatory State, 523 Annals of American Academy of Political Science 50–62, 61 (1992) (noting that the —chief beneficiaries of affirmative action in employment are members of the black middle class, which expanded from 10 to 30 percent of black families between 1964 and 1992).

admissions thresholds,¹⁶⁹ they may not be perceived as fitting seamlessly into the environment of the typical selective university. Officials may instead perceive disadvantaged students of color as “second-best” candidates for admissions: “good on paper” but uncertain to yield the “benefits” of higher-income peers.

D. The Compelling Purpose of Race-Based Affirmative Action

The primary purpose of affirmative action today is to enhance visible diversity on college campuses. The policies are not designed to address inequities related to family wealth, education, and social and cultural capital benefits that confer advantages on wealthier students of all races each admissions cycle.

The more racially diverse college campuses that largely are the result of modern affirmative action programs are a vast improvement over the past. Selective universities today—multiracial, predominantly upper- and middle-class—are welcome departures from the predominantly white and predominantly upper-class campuses typical of the pre-Civil Rights Act era.¹⁷⁰ The racial integration of elite institutions by middle and upper class students of color is invaluable. It creates wealth and social capital and may diminish racial stereotypes.¹⁷¹ These are compelling purposes. Communities of color consolidate their still tenuous hold on the American middle class¹⁷² within the context of persistent racial inequality that touches even well-off individuals.¹⁷³

¹⁶⁹ See note 166 on the challenges of finding black and Hispanic applicants who are high achieving and poor.

¹⁷⁰ See Jerome Karabel, The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton (Houghton Mifflin Harcourt 2005).

¹⁷¹ For discussions of both privilege and peril among middle and upper-class blacks, see Karyn R. Lacy, Blue-Chip Black: Race, Class and Status in the New Black Middle Class 114–49 (University of California 2007); Mary Patillo-McCoy, Black Picket Fences (University of Chicago 2000); Bart Landry, The New Black Middle Class (University of California 1988) .

¹⁷² For a classic explication that focuses on race-based wealth differentials, see Melvin L. Oliver and Thomas M. Shapiro, Black Wealth, White Wealth (Routledge 2d ed 2006) (noting that while there are greater numbers of black high wage-earners than ever before, blacks lag far behind whites in terms of wealth); Thomas M. Shapiro, The Hidden Cost of Being African American: How Wealth Perpetuates Inequality (Oxford 2005); Dalton Conley, Being Black, Living in the Red (University of California 10th ed 2009); see also Karyn R. Lacy, Blue-Chip Black: Race, Class and Status in the New Black Middle Class 114–49 (University of California 2007); Mary Patillo-McCoy, Black Picket

E. Conclusion

However, the achievements of these relatively privileged groups should not cause us to overlook the fates of students who have not experienced a significant lift from affirmative action. Universities need not choose between policies that ameliorate race disadvantage of policies that ameliorate class disadvantage.¹⁷⁴ They can embrace policies that address both.

IV. THE OPPORTUNITY STRUCTURE OF HIGHER EDUCATION TODAY

Universities that wish to promote social mobility and ameliorate educational disadvantage must do more than recruit a –diverse student body through affirmative action policies.¹⁷⁵ However, affirmative action is not the only policy that universities have employed to attract more diverse student bodies. In response to criticism, some universities have turned to class-based policies or financial aid policies targeted to –low-income or –needy students.

This Part examines and critiques universities' efforts to serve a more economically heterogeneous student population by embracing such policies. The analysis in this part first considers the opportunity

Fences 1–13 (University of Chicago 2000); Bart Landry, The New Black Middle Class (University of California 1988).

¹⁷³ See generally Jerry Kang, Trojan Horses of Race, 118 Harv L Rev 1489 (2005); Jerry Kang, Communications Law: Bits of Bias, in Implicit Racial Bias Across the Law 132–45 (Cambridge 2012); Mahzarin R. Banaji & Anthony G. Greenwald, Blindspot: Hidden Biases of Good People 169–88 (Delacorte 2013); Joe Faegin, Living with Racism: The Black Middle Class Experience (Beacon 1995); Ellis Cose, The Rage of a Privileged Class (Harper 1994); Landry, The New Black Middle Class; Claude Steele, Whistling Vivaldi: How Stereotypes Affect Us and What We Can Do 17–29, 153, 162–64 (WW Norton 2011).

¹⁷⁴ On this point, see David Wilkins, Race in Context, in Color Conscious: The Political Morality of Race (Appiah and Gutmann, eds, 1996); David Wilkins, Class Not Race in Legal Ethics: Or Why Hierarchy Makes Strange Bed Fellows, 20 Law & Hist Rev 147 (2002).

¹⁷⁵ A study on high-achieving, low-income students concludes that a –key takeaway . . . is that as student's being an underrepresented minority is not a good proxy for his or her being low-income. See Caroline Hoxby and Christopher Avery, The Missing One-Off: The Hidden Supply of High-Achieving, Low-Income Students 18 (Brookings Institution Study March 2013), online at http://www.brookings.edu/~media/projects/bpea/spring%202013/2013a_hoxby.pdf (visited Feb 7, 2014).

structure in higher education today; that structure provides invaluable context for understanding the variety of factors that affect whether truly disadvantaged students matriculate and find success on selective campuses. These factors concern dynamics internal and external to higher education.

A. Socio-Economic Disadvantage in Education

The affluent enjoy an outsized advantage in admission to the most prestigious colleges and universities,¹⁷⁶ and this advantage has only grown in recent years.¹⁷⁷ Our society is becoming more unequal, and the educational advantage that the wealthy enjoy in higher education contributes to declining economic mobility.¹⁷⁸

A few statistics illustrate the wealth gap in higher education. Students from affluent backgrounds graduate from college at six times the rate of children from low-income households.¹⁷⁹ For lower-income students, merely going to college is an achievement; fewer than 30 percent of these students enroll in a four-year college.¹⁸⁰ Of those who do matriculate, fewer than half graduate.¹⁸¹ The most damning statistics concern high-achieving students from low-income households. Even when students from low-income households outscore higher-income peers, they graduate from college at a lower rate.¹⁸² The poorest students with above-average test scores have a 26 percent college graduation rate compared to a 30 percent graduate rate for below-average scores from the wealthiest households.¹⁸³

A March 2013 study revealed significant —under-matching— the phenomenon of high-ability, low-income students not even bothering to

¹⁷⁶ See Espenshade, No Longer Separate at 326–27 (cited in note 166) (collecting studies showing that students high socioeconomic status backgrounds are disproportionately represented at the country's top colleges).

¹⁷⁷ See *id.* at 326 (noting that the proportion of students from middle class backgrounds has decreased in recent decades).

¹⁷⁸ See *id.* at 326–27 (arguing that selective colleges do not play a large role in enabling upward social mobility).

¹⁷⁹ See Jason DeParle, For Poor, Leap to College Often Ends in a Hard Fall (NY Times Dec 23, 2012), online at <http://www.nytimes.com/2012/12/23/education/poor-students-struggle-as-class-plays-a-greater-role-in-success.html> (visited Feb 7, 2014).

¹⁸⁰ See *id.*

¹⁸¹ See *id.*

¹⁸² See *id.*

¹⁸³ See DeParle, For Poor, Leap to College (cited in note 179).

apply to selective universities.¹⁸⁴ Fifty-three percent of high-achieving, low-income students examined did not apply to universities for which they were academically matched.¹⁸⁵ And only 8 percent of high-achieving students from low-income families applied to the range of safety, target, and reach colleges that college counselors advise (as compared to 64 percent of high-achieving students from high-income families and 35 percent of high-achieving students from middle-income families).¹⁸⁶ These statistics show that, far from serving as great equalizers, institutions of higher education too often serve to replicate the unequal structure of society.

B. How Socio-Economic Disadvantage Matters.

The categorical exclusion of the lower classes from higher education and open rule of the plutocracy passed into history long ago.¹⁸⁷ Yet the advantage of the affluent at selective educational institutions remains. Multiple factors contribute to the persistent affluent advantage.

1. Financial factors.

One critical factor is cost. In recent decades, the cost of tuition at American colleges and universities has risen annually by an average of 8 percent; these tuition increases have outstripped the general rate of inflation by 1.2 to 2.1 times.¹⁸⁸ In other words, there is little correlation between college and general inflation rates. The rising average costs translate into the following cold numbers:¹⁸⁹ for the 2010–2011 academic year, annual undergraduate tuition, room, and board costs averaged \$13,600 at public institutions, \$36,300 at private not-for-profit institutions, and \$23,500 at private for-profit institutions (in current dollars).¹⁹⁰ Tuition, room, and board surpassed \$50,000 annually at 123

¹⁸⁴ See Hoxby and Avery, The Missing Ones at 26-27 (cited in note 175). The authors defined an "academically matched" school as one whose median SAT or ACT test score was within fifteen percentiles of the student's own SAT or ACT test score. *Id.*

¹⁸⁵ See *id.* at 26.

¹⁸⁶ See Tiffany Lieu, Duke Struggles to Draw Low-Income Applicants, Paralleling National Trends, *Duke Chronicle*, Mar. 21, 2013 available at <http://www.dukechronicle.com/articles/2013/03/22/duke-struggles-draw-low-income-applicants-paralleling-national-trends>

¹⁸⁷ See Karabel, The Chosen at 13–35 (cited in note 43).

¹⁸⁸ See Tuition Inflation, Summary Statistics (Financial Aid.org Jan 9, 2014), online at <http://www.finaid.org/savings/tuition-inflation.phtml> (visited Feb 7, 2014).

¹⁸⁹ See *id.*

¹⁹⁰ See Fast Facts: Tuition costs of colleges and universities (US Department of Education, National Center for Education Statistics

universities in 2011–2012, including Harvard, Yale, Vassar, Williams, and Oberlin.¹⁹¹ Many students cover these costs by going into debt. In 2012–2013, 34 percent of undergraduates borrowed federal loans to subsidize their education—to the tune of thousands of dollars.¹⁹²

These costs drive students from middle-income and working-class families out of higher education.¹⁹³ Students from lower-income households are especially likely to become overwhelmed by the high costs of higher education.¹⁹⁴ They are unaware of the considerable difference that may exist between advertised and actual cost.¹⁹⁵ Given advertised or –sticker prices, higher education appears a luxury to many students—an unaffordable and unwise investment.¹⁹⁶ Overwhelmed by –sticker shock, these students discount the well-documented returns in the labor market of an investment in a college degree.¹⁹⁷

2012), online at <https://nces.ed.gov/fastfacts/display.asp?id=76> (visited Feb 7, 2014).

¹⁹¹ See Blake Ellis, More Colleges Charging \$50,000 or More a Year, CNN Money (CNN Oct 28, 2011), online at http://money.cnn.com/2011/10/28/pf/college_tuition/ (visited Feb 7, 2014).

¹⁹² See Percentage of Undergraduate Students Borrowing Stafford Loans Over Time (The College Board 2013), online at <https://trends.collegeboard.org/student-aid/figures-tables/fed-aid-percentage-undergraduate-students-borrowing-stafford-loans-over-time> (visited Jan 9, 2014).

¹⁹³ David Moltz, Why Some of the Best and Brightest Skip College, (Inside Higher Education Nov 14, 2008), online at <http://www.insidehighered.com/news/2008/11/14/ihep> (visited Feb 7, 2014) (discussing a study by the Institute for Higher Education documenting that the –steep price of college and shrinking availability of financial aid are the primary reasons that college-qualified students skip higher education).

¹⁹⁴ See id.

¹⁹⁵ See id.

¹⁹⁶ See id. See also Nicholas Hillman, Economic Diversity Among Selective Colleges: Measuring the Enrollment Impact of –No - Loan Programs 1–2 (Institute for Higher Education Aug 2012), online at [http://www.ihep.org/assets/files/publications/af/\(Brief\)_Economic_Diversity_Among_Selective_Colleges_August_2012.pdf](http://www.ihep.org/assets/files/publications/af/(Brief)_Economic_Diversity_Among_Selective_Colleges_August_2012.pdf) (visited Feb 7, 2014).

¹⁹⁷ See Alexandria Walton Radford, –No Point in Applying: Why Poor Students are Missing at Top Colleges (The Atlantic Sept 13, 2013), online at <http://www.theatlantic.com/education/archive/2013/09/no-point-in-applying-why-poor-students-are-missing-at-top-colleges/279699/> (visited Feb 7, 2014).

2. Socio-cultural factors.

Socio-cultural factors also contribute to the affluent advantage. Students who grow up in affluent and lower-income homes tend to be socialized differently regarding the cultural traits and linguistic skills required for success in secondary school and higher education.¹⁹⁸ Upper-class and even well-connected middle-class parents engage in concerted efforts to cultivate achievement in their children.¹⁹⁹ These strategies include organized leisure and cultural activities, conversations to teach comfortable interaction with authority figures, intervention in school placement and course selection decisions, and enrollment in after-school enrichment programs, among other efforts.²⁰⁰ By contrast, parents in lower-income homes nurture their children by emphasizing autonomy in play and in school.²⁰¹

Economic pressures shape these parenting styles. Upper- and middle-class parents have the leisure time to dote on children or the resources to hire others to do so.²⁰² Lower-income parents leave children to their own devices, in part because the parents must focus on the necessities of daily existence: work, shelter, and food.²⁰³

There is nothing inherently positive or negative about either approach to childrearing. However, in the context of the highly competitive American school system in which a more interactive approach is culturally dominant, the more autonomy-driven childrearing style can place the children of lower-income households at a disadvantage. Unwittingly, lower-income and less well-educated parents help to reproduce social and cultural hierarchies in which their children are marginalized.²⁰⁴

These differences in social class emerge before students matriculate to high school and have long-lasting effects on college readiness and students' ability to compete in the admissions process.²⁰⁵

¹⁹⁸ See Pierre Bourdieu, (arguing that individuals in different social positions are socialized differentially; differences are naturalized and turned into cultural, social and economic capital, which in turn replicate hierarchies).

¹⁹⁹ See Annette Lareau, Unequal Childhoods: Class, Race, and Family Life 2–3 (University of California 2d ed 2011).

²⁰⁰ See *id.*

²⁰¹ See *id.* at 5–6.

²⁰² *Id.* at 2–5.

²⁰³ See Lareau, Unequal Childhoods at 2–5 (cited in note 199).

²⁰⁴ See *id.*

²⁰⁵ See Sean F. Reardon, The Widening Income Achievement Gap, 70 *Faces of Poverty* 10, 12 (2013) (finding a significant income achievement

Most important, social class affects students' ability to accumulate the credentials—impressive grades from strong schools and high test scores—necessary to compete for admission to the selective schools.²⁰⁶ Lower-income students generally attend weaker schools than wealthier students.²⁰⁷ Scores on the Scholastic Admissions Test (SAT) also are correlated with socioeconomic status; wealthy students from higher income households boast higher scores.²⁰⁸

Even high-ability and well-credentialed students from lower-income backgrounds face social and cultural impediments that can hinder them in the competition for higher education admissions. Without the parental prodding, nurturance, and social networking typical in more affluent households, students from more modest backgrounds may not

gap by the time students enter kindergarten); Paul G. Fehrmann, Timothy Z. Keith, and Thomas M. Reimers, Home Influence on School Learning: Direct and Indirect Effects of Parent Involvement on High School Grades, 80 *J Educ Rsrch* 330, 333 (1987) (finding that increased parental involvement has a positive effect on high school grades); The Century Foundation, Left Behind: Unequal Opportunity in Higher Education 3 (The Century Foundation 2004), online at <http://tcf.org/assets/downloads/tcf-leftbehindrc.pdf> (visited Feb 7, 2014) (noting that low-income students enroll in college at much lower rates than other students and are less likely to graduate from college when they do enroll); Anthony P. Carnevale and Stephen J. Rose, Socioeconomic Status, Race/Ethnicity, and Selective College Admissions, in Richard D. Kahlenberg, ed, America's Untapped Resource: Low - Income Students in Higher Education 101, 106 (Century Foundation 2004) (finding that low-income students are particularly underrepresented at the most selective colleges).

²⁰⁶ See Reardon, The Widening Income Achievement Gap at 10 (cited in note 205) (noting that low-income students have historically received lower grades than high-income students); Cecilia Elena Rouse and Lisa Barrow, U.S. Elementary and Secondary Schools: Equalizing Opportunity or Replicating the Status Quo?, 15 *The Future of Children* 99, 101–102 (2006) (calculating higher average test scores and graduation rates among high school students from higher income families).

²⁰⁷ See Rouse and Barrow, 15 *Future Child* at 109–112 (cited in not 206).

²⁰⁸ See Valerie Strauss, The Bottom Line on SAT Scores in One Chart (Wash Post Oct 9, 2013), online at <http://www.washingtonpost.com/blogs/answer-sheet/wp/2013/10/09/the-bottom-line-on-sat-scores-in-one-chart/> (visited Feb 7, 2014); see also Appendix A.

even apply to college.²⁰⁹ Unfamiliar with the advantages conferred by selective colleges, these students might apply unwisely to college.²¹⁰

Once students arrive on campus, social class may continue to limit them. Students from affluent backgrounds maneuver more easily in the social environment on campus, an edge that can translate into greater ease in interacting with professors and in academic competition.²¹¹ Meanwhile, students from working-class backgrounds may experience social anxieties and create social silos as a result of cultural differences learned in family structures.²¹² The social distance can result in academic underperformance or even cause students to drop out of college.²¹³

C. Reform Efforts: -Low-Income and Need-Based Aid Policies

Faced with ongoing litigation over race-based affirmative action and with statistics showing how inaccessible higher education is for the poor, commentators have discussed inequality using new frameworks. Some have touted -class-based affirmative action as a way out of the political and legal controversies over race-conscious programs.²¹⁴ Others

²⁰⁹ See Hoxby and Avery, The Missing One-Ofs at 2 (cited in note 175).

²¹⁰ See, for example, Jackson, From Civil Rights to Human Rights at 94–95 (cited in note 7) (discussing characteristics of postsecondary students); Sara Goldrick-Rab, Following Their Every Move: An Investigation of Social-Class Differences in College Pathways, 79 Soc Educ 61, 62 (2006); Michael B. Paulsen and Edward P. St. John, Social Class and College Costs: Examining the Financial Nexus Between College Choice and Persistence, 73 J Higher Educ 189, 195 (2002); William E. Sedlacek, Issues in Predicting Black Student Success in Higher Education, 43 J Negro Educ 512, 513 (1974).

²¹¹ See Jenny M. Stuber, Inside the College Gates: How Class and Culture Matter in Higher Education 15 (Lexington Books 2011).

²¹² See *id.* at 52–53.

²¹³ See Daniel Golden, The Price of Admission: How America's Ruling Class Buys Its Way into Elite Colleges—And Who Gets Left Outside the Gates 10–11 (Crown 2006); Dorothy H. Evensen and Carla D. Pratt, The End of the Pipeline: A Journey of Recognition for African Americans Entering the Legal Profession 163–65 (Carolina Academic 2011); Stuber, Inside the College Gates at 15 (cited in note 210); Espenshade, No Longer Separate at 257 (cited in note 166); Goldrick-Rab, 79 Soc Educ at 64 (cited in note 210); Paulsen and St. John, 73 J Higher Educ at 226 (cited in note 210).

²¹⁴ See Richard D. Kahlenberg, A Better Affirmative Action: States Universities that Created Alternatives to Racial Preferences 12 (The Century Foundation 2012), online at <http://tcf.org/assets/downloads/tcf-abaa.pdf> (visited Feb 7, 2014).

have urged universities to recruit students from impoverished backgrounds.²¹⁵

Leaders in higher education have not been unresponsive to the commentary. Some selective universities—the only colleges to practice affirmative action in the first place—have reduced reliance on race-conscious admissions in recent years in favor of admission on the basis of class rank or other schemes that are facially race neutral.²¹⁶ And following unflattering reports about the abysmal numbers of poor students enrolled at elite colleges, some universities began touting outreach efforts to low-income students or broadly-inclusive need-based financial aid policies.²¹⁷

D. Problems with Low-income and Need-Based Aid policies.

Outreach to low-income or needy students on the basis of class may be well-intentioned,²¹⁸ but it likely does not constitute a comprehensive response to the structural crisis in higher education. Nor does it adequately promote social mobility. In fact, the low-income category is not necessarily a good proxy for disadvantaged students at all—when disadvantage is defined as impoverished. The concept of need likewise can be inadequate, depending on a university's overall resources and admissions strategy.

²¹⁵ See, for example, Richard Perez-Pena, Efforts to Recruit Poor Students Lag at Some Elite Colleges (NY Times July 30, 2013), online at <http://www.nytimes.com/2013/07/31/education/elite-colleges-differ-on-how-they-aid-poor.html> (discussing the percent of undergraduates at elite colleges who receive Pell grants, which go mostly to students whose families earn less than \$30,000 a year) (visited Feb 7, 2014).

²¹⁶ See Carnevale and Rose, Socioeconomic Status at 101, 146 (cited in note 205).

²¹⁷ See, for example, Matt Rocheleau, Harvard Launches Effort to Encourage More Low-Income High School Students to Apply to Elite Colleges (Boston Globe Oct 24, 2013), online at http://www.boston.com/yourcampus/news/harvard/2013/10/harvard_launches_effort_to_encourage_more_low-income_high_school_students_to_apply_to_elite_colleges.html (visited Feb 7, 2014) (discussing the Harvard Connection, which includes new social media efforts to recruit low-income students); Kelley Holland, Top Colleges to Low Income Students: We Want You (CNBC Oct 7, 2013), online at <http://www.cnbc.com/id/101064956> (visited Feb 7, 2014).

²¹⁸ It also likely is a part of a marketing strategy. See Stephen Burd, Undermining Pell: How College Compete for Wealthy Students and Leave the Low-Income Behind 3 (New America Foundation 2013).

1. Definitional ambiguity.

The “low-income” concept, it turns out, is strikingly imprecise terminology. When one looks beneath the surface, one finds that proposals for outreach on the basis of “class” or “low-income” are ill-defined by commentators and by universities that boast of the presence of “low-income” students on campus.²¹⁹

Consider these categories. A widely discussed study on the difficulties that “high-achieving, low-income” students encounter in higher education defined the relevant students as those from households making less than \$41,472 annually—the cut-off for the “bottom-quartile” of the income distribution.²²⁰ This figure is considerably lower than the median income for Americans—approximately \$50,000.²²¹ But it is considerably higher than the \$30,000 income cut-off to qualify for Pell Grants, federal awards to poor students to defray the costs of higher education.²²² The lower threshold, the Pell Grant eligibility cutoff, is favored by the federal government, many researchers who study access of the poor to higher education, and public universities that award financial aid to low-income students.²²³

Many reasonable people might agree, however, that the range of students from the aforementioned example—those from families that earn from about \$30,000 to \$41,000—are far from well off. Thus, one might conclude, definitional ambiguity in the “low-income” category is not that much of a problem.

²¹⁹ Kahlenberg touts plans like those used by the states of Texas, California and Florida, using economic disadvantage as a “leg up” just as race is conventionally used, dropping legacy preferences, expanding financial aid and recruitment, establishing better “pipelines” between secondary schools and higher education, and streamlining transfers between community colleges and four-year universities. See Kahlenberg, A Better Affirmative Action at 5–8 (cited in note 214).

²²⁰ See Hoxby and Avery, The Missing Ones at 13 (cited in note 175).

²²¹ Amanda Noss, Household Income: 2012, American Community Brief Surveys (US Census Bureau 2013), online at <http://www.census.gov/prod/2013pubs/acsbr12-02.pdf> (visited Feb 7, 2014).

²²² See Hoxby and Avery, The Missing Ones at 13 (cited in note 175) (citing American Community Survey of 2008 as source for quartile cutoff data). Moreover, this study predicts, through regression analysis, that students are low-income based on other data sources. See *id.*

²²³ See Hillman, Economic Diversity Among Selective Colleges at 7–9 (cited in note 196).

However, these two cut-off points, the bottom quartile of the income distribution and Pell Grant eligibility, hardly define the full spectrum of possible definitions of -low-income. The range of students who may benefit from admissions or financial aid policies that target students on the basis of -low-income, -class, or -need is considerably broader.

The term -low-income or concept of -need is defined broadly enough that households with quite high annual incomes may reap benefits. At many selective universities, the income range to qualify for financial aid is even higher—\$60,000–75,000 annual income.²²⁴ That baseline is widely used among members of the Consortium on Financing Higher Education, a group of selective institutions that includes Harvard, Yale, the Massachusetts Institute of Technology, Amherst and Williams, among other leading schools.²²⁵ This range suggests that universities admit students from families whose incomes place them well in the middle class and then award them subsidies under the -low-income or -need rubric.

In fact, many selective institutions have dispensed with a -low-income constraint on financial aid awards. At a select group of institutions, university policy covers student financial need with institutional aid rather than loans. At one time, these institutions imposed a -low-income requirement on the receipt of institutional aid.²²⁶ Now, 67 percent of these institutions no longer do.²²⁷ Princeton

²²⁴ See *id.* at 10 (cited in note 196). See also Consortium on Financing Higher Education, <http://web.mit.edu/cofhe/> (visited Feb 7, 2014).

²²⁵ See Hillman, Economic Diversity Among Selective Colleges at 10 (cited in note 196). See also Consortium on Financing Higher Education, <http://web.mit.edu/cofhe/> (visited Feb 7, 2014). See also Tiffany Lieu, Duke struggles to draw low-income applicants, paralleling national trends (The Chronicle Mar 22, 2013), online at <http://www.dukechronicle.com/articles/2013/03/22/duke-struggles-draw-low-income-applicants-paralleling-national-trends/print> (visited Feb 7, 2014) (discussing Duke outreach to families with an income of \$60,000 and below); Matt Rocheleau, Harvard Launches Effort to Encourage More Low-Income High School Students to Apply to Elite Colleges (Boston Globe, Oct 24, 2013), online at http://www.boston.com/yourcampus/news/harvard/2013/10/harvard_launches_effort_to_encourage_more_low-income_high_school_students_to_apply_to_elite_colleges.html (visited Feb 7, 2014) (discussing Harvard's outreach to families with an income of \$60,000 and below).

²²⁶ See Hillman, Economic Diversity Among Selective Colleges at 2 (cited in note 196).

²²⁷ See *id.* at 7.

University no longer requires students to identify as low-income to qualify for its no-loan financial aid policy, for example.²²⁸ At Harvard College, students from families with incomes that exceed the cut-off for the top quartile of income—as high as \$150,000—can take advantage of the college’s generous financial aid programs.²²⁹ Students from families with incomes up to \$150,000 pay 0 to 10 percent of annual income to support students’ education, and some who earn more than \$150,000 annually qualify for aid.²³⁰ Reed College assures students that they need not be poor to qualify for financial aid.²³¹ The median family income of a student awarded financial aid is \$74,000, the college’s website notes.²³² And, it continues: “That’s just the median. In some cases, the family income may be considerably higher. For example, a family earning \$270,000 with a second child in a private college could still be eligible for \$10,000 in aid from Reed.”²³³

On the one hand, these outcomes can be applauded. The costs of higher education are so extraordinary, one might conclude, that even quite well-off families legitimately benefit from the subsidies that at least a few well-endowed universities are able to pay.

On the other hand, the reality of need among the relatively wealthy only circles back to the question of why costs are so high.

Moreover, one might also wonder if truly impoverished students are crowded out by generous financial aid policies for upper-middle-class and wealthy students. Marvelously, the crowding out effect should not occur at the wealthiest and most-selective universities—Harvard, Yale, Princeton, and Stanford, for example.²³⁴ However, crowding out does occur at less well-endowed private and public universities—the institutions most within reach of impoverished students. At the majority of these institutions the aid packages offered to the neediest students are

²²⁸ See *id.* at 6–7.

²²⁹ See No American College Is More Affordable (Harvard College, Admissions and Financial Aid), online at <https://college.harvard.edu/admissions/choosing-harvard/affordability> (visited Feb 7, 2014).

²³⁰ See *id.*

²³¹ See Chris Lydgate, Financial Aid: 13 Questions: Helping Families Pay for a Reed Education, (Reed Magazine Dec 2013), online at http://www.reed.edu/reed_magazine/december2013/articles/features/financialaid.html (visited Feb 7, 2014).

²³² See *id.*

²³³ See *id.*

²³⁴ See notes 223 to 228. If a truly impoverished student is admitted to these super-elite schools, she may be educated at virtually no cost.

not especially generous, or not generous enough to preclude substantial loan debt or even scare away potential applicants.²³⁵

Furthermore, the baselines for aid awards suggest that the student bodies at selective institutions are extraordinarily affluent, compared to most Americans.²³⁶ Harvard—the pinnacle of American higher education and market leader—provides a useful example of the affluence common on elite college campuses. In 2013, after an increase in the admission of low-income students, 20 percent of Harvard's freshman class hailed from those households.²³⁷ Yet, 53 percent of Harvard's freshman class came from families making at least \$125,000 a year, an income that places them in the highest income quartile in the nation.²³⁸ And 29 percent of Harvard's freshman class came from families making at least \$250,000.²³⁹ The demographic profiles of Harvard's peer schools are similar. At Yale University, 69 percent of the freshman class comes from families that earn more than \$120,000 annually.²⁴⁰ Sixteen percent are from families that earn between \$66,000 and \$120,000 annually.²⁴¹ These institutions, overwhelmingly populated by wealthy students, routinely serve extraordinarily small numbers of Pell Grant recipients—students from indisputably needy families.²⁴²

The range of definitions of economic disadvantage that universities employ demonstrates that recruitment on the basis of class or —low-income status is a comparative concept. —Low-income is not an absolute value and could even be a relatively meaningless concept. The same is true of —need-based institutional aid awards.

How universities use their discretion makes all the difference to what low-income or assessments of need means. As it now stands,

²³⁵ See notes 355, 394-397.

²³⁶ See notes 219-220 and accompanying text.

²³⁷ See Laya Anasu and Michael D. Ledecy, Freshman Survey II: An Uncommon App : The Crimson's Survey of Freshman Shines Light on Admissions, Financial Aid, and Recruiting (Harvard Crimson Sept 4, 2013), online at <http://www.thecrimson.com/article/2013/9/4/freshman-survey-admissions-aid/> (visited Feb 7, 2014).

²³⁸ See *id.*

²³⁹ See *id.*

²⁴⁰ David Zax, Wanted: Smart Students From Poor Families: The families of Yale College students, on average, are substantially richer than the American norm. How much can the university change this? How much should it? 46-52 (Yale Alumni Magazine Jan/Feb 2014), online at <http://www.yalealumnimagazine.com/articles/3801> (visited Feb 7, 2014).

²⁴¹ See *id.*

²⁴² See Hillman, Economic Diversity Among Selective Colleges at 16 (cited in note 196).

nothing prevents universities from conferring benefits in admissions and financial aid upon relatively wealthy students, although programs are targeted on the basis of need. Intentionally or not, elite institutions can reproduce the social structure in an Orwellian guise.

2. Income: an unstable category.

Even if universities accepted a common and reasonable definition of -low income or -need, a further problem would remain: variability. Income is not a stable category. It can vary widely over time, and it only attains meaning in relation to other variables such as region, family size, and the cost of goods and services, including education itself.²⁴³

For these reasons, the low-income label or concept of -need does not necessarily convey much information. -Low-income or -neediness might refer to students who truly are disadvantaged by most standards, or it might only capture relatively disadvantaged students. What the label actually means is critically important.

3. Variable Admissions Rates.

A third problem concerns the wide variation among selective universities in admission rates of -low-income students, however defined, and certainly when defined as Pell Grant-eligible students.²⁴⁴ Even universities with large endowments educate relatively few truly impoverished students.²⁴⁵ The relative absence of poorer students from selective institutions is clear, despite some institutions' loudly-stated interest in -low-income students.

²⁴³ See Lewis Warne and Marcelo Ostria, How Differences in the Cost of Living Affect Low-Income Families (National Center for Policy Analysis 2013), online at <http://www.ncpa.org/pdfs/ib133.pdf> (visited Feb 7, 2014) (demonstrating how differences in cost of income across regions affects relative income).

²⁴⁴ See Perez-Pena, Efforts to Recruit Poor Students Lag at Some Elite Colleges (cited in note 215) (-Top colleges differ markedly in how aggressively they hunt for qualified teenagers from poorer families, how they access applicants who need aid, and how they distribute aid dollars.).

²⁴⁵ Id (noting that there is no correlation between endorsement with and support for students who receive Pell grants, a proxy for impoverished students).

The gap between rhetoric and reality is not difficult to explain. First, selectivity undermines economic diversity.²⁴⁶ Admissions committees continue to rely on criteria—particularly scores on standardized tests—that favor students from wealthier households.²⁴⁷ The commitment to recruiting poorer students itself is selective. Universities are interested in poorer students who can gain entry without significant relaxation of admissions requirements or need for academic support.²⁴⁸ In other words, colleges prefer, quite understandably, to admit the students perceived as the easiest to educate.

Second, the overwhelming majority of universities practice —strategic enrollment,²⁴⁹ and —need-sensitive admissions is an element of strategic planning²⁵⁰ In 2012, only 46 of 1,130 colleges and universities claimed to be need-blind; that is, admissions officials are attentive to ability to pay in making admissions decisions.²⁵¹ As between similarly

²⁴⁶ See Jerome Karabel, The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale and Princeton 537 (Houghton Mifflin Harcourt 2005) (noting claim by Ivy League presidents that the dearth of poor and working-class students able to meet -high academic qualifications justifies dearth of economic diversity at Ivies).

²⁴⁷ See Hillman, Economic Diversity Among Selective Colleges at 10–11 (cited in note 196).

²⁴⁸ See Carnevale and Rose, Socioeconomic Status at 121 (cited in note 205).

²⁴⁹ See Michael Dolence, Strategic Enrollment Management, in Handbook for the College Admissions Professional (Henderson et al, eds, Greenwood 1998) (discussing optimum student recruitment and enrollment strategies, including fiscal implications and balance of fiscal stability and optimal qualifications); see also Douglas Lederman, Enrollment Managers Struggle with Image, Inside Higher Education.com, Mar 27, 2008 (discusses how enrollment managers balance goals of increasing net revenue by recruiting full pay students and providing greater access to financially needy students), available at <http://www.insidehighered.com/news/2008/03/27/enroll> . ,

²⁵⁰ See Kim Clark, Chart: Generous Colleges That Claim To Admit Only on Merit: Forty-s ix s chools that s ay they are —need blind in adm is s ions and give enough aid to -meet full need (US News & World Report Mar 22, 2010), online at <http://www.usnews.com/education/articles/2010/03/22/chart-generous-colleges-that-claim-to-admit-only-on-merit> (visited Feb 7, 2014).

²⁵¹ See Kim Clark, Do Colleges Prefer Rich Applicants (US News Mar 22, 2010), online at <http://www.usnews.com/education/articles/2010/03/22/do-colleges-prefer-rich-applicants> (visited Feb 7, 2014). See also Ry Rivard, Using FAFSA Against Students (Inside Higher Education Oct 28, 2013), online at <http://www.insidehighered.com/news/2013/10/28/colleges-use->

qualified applicants, these universities hope to attract students who can both meet admissions criteria and afford to pay at least some of the costs of attendance.²⁵² Because the admission of truly impoverished students is costly, these individuals are less attractive candidates to many institutions. Consequently, many selective universities tend not to admit many truly poor students.²⁵³ The trend toward need-aware admissions has only increased in recent years as the value of college endowments has declined.²⁵⁴

E. Conclusion

For all of the foregoing reasons, universities that wish to attract a student body that better reflects the American socioeconomic spectrum must consider different policies. They must better identify talented and truly disadvantaged students and better support them if they matriculate.

Part V.

THE RETURN: SOCIAL MOBILITY AND DISADVANTAGE AS FRAMEWORKS FOR HIGHER EDUCATION TODAY

With greater analytical precision, universities can promote broader access to higher education for talented, truly disadvantaged students. Instead of falling back on —diversity‖ or turning to nebulously-defined —low-income‖ or —neediness‖ status as proxies for disadvantage, universities must attack disadvantage at its roots. Selective institutions can directly address disadvantage by prioritizing first-generation, Pell Grant-eligible status in admissions, financial aid, and institutional

fafsa-information-reject-students-and-potentially-lower-financial-aid (visited Feb 7, 2014).

²⁵² See Clark, Chart: Generous Colleges (cited in note 250) (noting that some colleges argue that they —do not have the resources‖ to provide necessary financial support for poor students).

²⁵³ See Bowen and Bok, The Shape of the River at 270 (cited in note 44) (noting that admission of —genuinely poor students‖ is —very costly‖ and —most selective institutions could not find enough additional financial aid to increase the number of poor students by more than a limited amount‖).

²⁵⁴ See, for example, Sarah Ferris, Across the U.S., Colleges Turn Toward Need-Aware Policies to Manage Financial Shortcomings (GW Hatchet Oct 24, 2013), online at <http://www.gwhatchet.com/2013/10/24/across-u-s-colleges-turn-toward-need-aware-policies-to-manage-financial-shortcomings/> (visited Feb 7, 2014); Kevin Kiley, Need Too Much (Inside Higher Education June 1, 2012), online at <http://www.insidehighered.com/news/2012/06/01/wesleyan-shifts-away-need-blind-policy-citing-financial-and-ethical-concerns> (visited Feb 7, 2014) (discussing Wesleyan’s shift away from need-blind admissions).

outreach. First-generation, Pell-Grant-eligible status is an analytically precise proxy for truly needy students. It avoids much, if not all, of the subjectivity associated with holistic, diversity-based admissions and need-based policies deployed as proxies for disadvantage. Moreover, a shift of focus to first-generation college students has the virtue of reinforcing the idea of social mobility through education—a cherished element of America’s national identity. By facilitating greater upward social mobility, such policies also would enhance fairness and efficiency in higher education.

A. How first-generation status matters.

First-generation, Pell Grant-eligible students constitute a unique—and uniquely needy—pool of applicants. Unlike students recruited on grounds of –diversity,|| –low-income,|| or –need,|| these students are educationally disadvantaged by definition. In contrast to the –low-income|| label, which can be ambiguous in the ways described above, or need-based categories, the meaning of first-generation status is more concrete. A first-generation collegian is a student whose parents did not pursue postsecondary education; the student is the first in her immediate family to matriculate to college.²⁵⁵ The federal government and a broad range of institutions and researchers define first-generation student consistently, with only minor differences.²⁵⁶ When first-

²⁵⁵ See National Center for Education Statistics, *First-Generation Students: Undergraduates Whose Parents Never Enrolled in Postsecondary Education* (1998) (defining first-generation students as those who parents did not pursue postsecondary education, a bachelor’s degree, in particular), online at <http://nces.ed.gov/pubs98/98082.pdf>; Higher Education Act of 1965, SEC. 402A, 20 USC 1070a–11 (defining first-generation student as an individual whose parents did not complete a bachelor’s degree); Jennifer Engle and Vincent Tinto, *Moving Beyond Access: College Success For Low Income, First-Generation Students* 20 (The Pell Institute 2008), online at <http://files.eric.ed.gov/fulltext/ED504448.pdf> (visited Feb 7, 2014) (describing first-generation as students whose parents do not have a bachelor’s degree); Saenz, et al, *First in my Family* at vi (cited in note 45).

²⁵⁶ To the extent that there is variation in definition, it concerns how to treat students whose parents may have some college experiences. See Carmen Tym, Robin McMillion, Sandra Barone and Jeff Webster, *First-Generation College Students: A Literature Review* 1 (2001) online at http://www.tgslc.org/pdf/first_generation.pdf. Another potential source of variation relates to treatment of siblings and degrees from two-year colleges. Most institutions include all siblings in a family unit where parents did not attend college as –first-generation.|| See Michele Hernandez, *Tips for First-Generation College Students* (NY Times Feb

generation status is combined with Pell Grant eligibility, it is a highly reliable indicator of difficulties along multiple dimensions that affect success in higher education.²⁵⁷

Reams of data show that first-generation students who also are poor (that is, Pell-Grant eligible) face numerous disadvantages in higher education. These constraints fall into three main categories: financial, socio-cultural, and academic. These students lack parental financial support for educational pursuits²⁵⁸ and do not benefit from parental guidance about postsecondary education, including the college application and financial aid processes.²⁵⁹ They typically attend secondary schools in smaller towns or rural communities, where they are less likely to have access to a rigorous high school curriculum.²⁶⁰ They garner less impressive scores on standardized admissions tests²⁶¹ and disproportionately are members of racial and ethnic minorities.²⁶² None of these factors position these students well in higher education.

Despite these disadvantages, some of these students also possess traits that, if nurtured, can facilitate success: intelligence, ambition,

11, 2013), online at http://thechoice.blogs.nytimes.com/2013/02/11/tips-for-first-generation-college-applicants/?_php=true&_type=blogs&_r=0. —First-generation college status, as used here, is not to be confused with first-generation immigrants, although such immigrants are overrepresented among first-generation students. See Saenz, et al, *First in my Family* at vi (cited in note 45).

²⁵⁷ Seventy-five percent of first-generation college students are from families with annual incomes below \$50,000. See National Center for Education Statistics, *First-Generation Students in Postsecondary Education* 7 (2005) online at <http://nces.ed.gov/pubs2005/2005171.pdf>; 74.3% of federal Pell Grants are awarded to families with incomes below \$50,000. See Federal Pell Grant Data Annual Reports (2011-12), online at <http://www2.ed.gov/finaid/prof/resources/data/pell-2011-12/pell-eoy-2011-12.html>. See also notes 254 to 255 and accompanying text.

²⁵⁸ See Saenz, et al, *First in my Family* at 3 (cited in note 45).

²⁵⁹ See Cornelia T. Splichal, *The Effects of First-Generation Status and Race: Ethnicity on Students' Adjustment to College* 1 (Open Access Dissertations, Paper No 320, 2009), online at http://scholarlyrepository.miami.edu/cgi/viewcontent.cgi?article=1319&context=oa_dissertations (visited Feb 7, 2014).

²⁶⁰ See Saenz, et al, *First in my Family* at 3–4 (cited in note 45); Engle and Tinto, *Moving Beyond Access: College Success For Low Income, First-Generation Students* 20 (cited in note 255).

²⁶¹ See Saenz, et al, *First in my Family* at 4 (cited in note 45).

²⁶² See Saenz, et al, *First in my Family* at 4 (cited in note 45).

discipline, perseverance, and passion—or grit.²⁶³ We can look to Howard Schultz, Starbucks CEO;²⁶⁴ Michelle Obama, First Lady of the United States;²⁶⁵ and Sonia Sotomayor, Associate Supreme Court Justice,²⁶⁶ as examples of the serious challenges and tremendous possibility that live within these students.

B. First-generation status and educational disadvantage.

First-generation, low-income students start life far behind peers who grow up in homes with well-educated parents. Unlike upper-class peers, they typically are not groomed for success from extraordinarily young ages.²⁶⁷ They are not enrolled in choice preschools or admitted to high schools considered “feeders” to selective universities.²⁶⁸

If children from first-generation backgrounds do develop an interest in higher education, parents may not support the pursuit.²⁶⁹ Having not pursued postsecondary education themselves, these parents may resist their offspring’s interest in a different—and alien—way of life.²⁷⁰ Some prefer that students immediately enter the workforce rather than matriculate to college.²⁷¹ Even if parents want to be

²⁶³ On the relevance of “grit,” see Angela Duckworth, *Perseverance and Passion for Long-Term Goals*, 92 *J. of Personality & Soc. Psy.* 1097-1101 (2007).

²⁶⁴ On Howard Schultz’s family and educational backgrounds, see Melissa Thompson, Starbucks Howard Schultz on How He Became Coffee King (UK Mirror Aug 5, 2010), online at <http://www.mirror.co.uk/news/uk-news/starbucks-howard-schultz-on-how-he-became-239790> (visited Feb 7, 2014) (describing growing up in housing project with father, an Army veteran and truck driver, and homemaker mother, and its impact on his life).

²⁶⁵ On Michelle Obama’s family and educational background, which she has invoked to promote an educational initiative to increase the number of low-income students in college, see Krissah Thompson and Zachary Goldfarb, Michelle Obama Uses Life Story to Promote Education Initiative (Wash Post Jan 17, 2014), online at http://www.washingtonpost.com/politics/michelle-obama-uses-life-story-to-promote-education-initiative/2014/01/17/bb4f27f6-7eb4-11e3-93c1-0e88170b723_story.html (visited Feb 7, 2014).

²⁶⁶ See generally Sonia Sotomayor, My Beloved World 117, 126, 127-28 130, 135 (Knopf 2013).

²⁶⁷ See notes 257–261 and accompanying text.

²⁶⁸ See notes 205–206 and accompanying text.

²⁶⁹ See Jennifer Engle, Postsecondary Access and Success for First-Generation College Students 3 *American Academic* 25, 30 (2007).

²⁷⁰ See *id.*

²⁷¹ See *id.*

supportive, they do not possess the insider knowledge about college life that could help their children plan for and negotiate the application process.²⁷² School counselors underestimate the talents and ambition of these students and often do not step into the breach; guidance counselors provide less—not more—support with college applications for first-generation college students.²⁷³ First-generation students often must negotiate the path to college on their own.

Due in part to a lack of understanding about higher education and associated costs, first-generation students often make unwise enrollment choices. The overwhelming majority of undergraduate students from this demographic—65 percent—enroll in two-year colleges or for-profit institutions.²⁷⁴ This choice is unwise because resources per student are much lower and drop-out rates much higher at two-year institutions than at four-year colleges and universities.²⁷⁵ Moreover, the return on investment and occupational mobility is greater for graduates from four-year colleges.²⁷⁶ An informed decision maker would opt for the four-year college.

C. First-generation status and economic hardship.

First-generation students from impoverished background confront pervasive economic hardships that present especially dire challenges in an era of rapidly-rising college costs. These students lack parents or other family members who can afford to provide financial support for full-time study.²⁷⁷ Consequently, these students frequently make a logical but educationally ill-advised choice: they enroll in college on a part-time basis and work to support themselves.²⁷⁸ The obligation to work undermines students' ability to focus on academics and is a risk factor in the failure to graduate from college.²⁷⁹

The financial aid process also poses complex challenges for needy first-generation students. Without access to significant parental financial support, they can demonstrate greater financial need than other students²⁸⁰ and pay less at some high-cost institutions.²⁸¹ However, many high-cost universities award more non-need-based than need-based

²⁷² See *id.* at 30–31.

²⁷³ See Engle, Postsecondary Access at 31 (cited in note 268).

²⁷⁴ See Engle and Tito, Moving Beyond Access at 10 (cited in note 260).

²⁷⁵ See *id.* at 12, 13, 17.

²⁷⁶ See *id.* at 16.

²⁷⁷ See *id.* at 22.

²⁷⁸ See Engle and Tito, Moving Beyond Access at 8 (cited in note 260).

²⁷⁹ See *id.*

²⁸⁰ See *id.* at 22.

²⁸¹ See notes 243–251 and accompanying text.

aid.²⁸² This policy drives first-generation students to federal sources of aid—the lion’s share of which takes the form of student loans.²⁸³ Moreover, most of these students attend two-year and for-profit institutions that offer little financial aid.²⁸⁴ In these institutional contexts, students must incur significant student loan debt.²⁸⁵ The need to borrow large sums to attend college diminishes the likelihood that the students who have the most to gain from attaining a bachelor’s degree ever matriculate, or if they do matriculate, ever graduate.²⁸⁶

D. First-generation status and race/ethnicity.

Disproportionate numbers of first-generation, low-income students are triply-disadvantaged on account of their parents’ educational status, income, and race/ethnicity. Racial minorities are over-represented among first-generation students: 38 percent of Latinos, 22.6 percent of African-Americans, 16.8 percent of Native Americans, 19 percent of Asians, and 13.2 percent of whites are first-generation college students.²⁸⁷ Immigrants also are disproportionately represented.²⁸⁸ Consequently, recruitment on the basis of first-generation status ameliorates race- and ethnicity-based disadvantage, but does so while specifically targeting students who are economically disadvantaged. To that extent, first-generation, Pell Grant-eligible recruitment is more

²⁸² See Burd, Undermining Pell, at 1-3(cited in note 217).

²⁸³ See Engle and Tito, Moving Beyond Access at 23–24 (cited in note 260).

²⁸⁴ See *id.* at 23.

²⁸⁵ See *id.*

²⁸⁶ See notes 179–181 and accompanying text.

²⁸⁷ See Saenz, et al, First in my Family at 11–13 (cited in note 45). The proportion of blacks among first-generation college students has declined more rapidly over thirty years than the proportion of black adults without college degrees. This statistic raises the prospect that blacks are having an especially difficult time matriculating to college. *Id.* at 13. Racial minorities also figure significantly among students who are high-ability, low-income students. See *id.* Unfortunately, the researchers did not carefully consider to what extent these students also had first-generation status, although the students do not appear overwhelmingly to be first-generation students (FGS). High-achieving, low-income students by race are: 69.4 percent White; 7.6 percent Hispanic; 5.7 percent Black; 15.2 percent Asian; 0.7 percent Native American; 1.4 percent mixed. See *id.* 15.4 percent are underrepresented minorities. See Hoxby and Avery, The Missing One-Ofs at 18, 37 (cited in note 175) (showing 16 and 16.7 years as parents’ educational years for the data set).

²⁸⁸ See Saenz, et al, First in my Family at 11 (cited in note 45).

narrowly targeted than the race-based –diversity‖ initiatives embraced after Bakke v California.²⁸⁹

It is important to note, however, that whites outnumber all other groups of first-generation applicants who meet threshold admission requirements to selective universities.²⁹⁰ Therefore, a policy that privileges first-generation status will disproportionately benefit whites (who are disproportionately qualified by traditional selection criteria). Thus, the focus on first-generation status will advance collective interests by addressing disadvantage across all demographic categories.

E. First-generation status and place.

First-generation students of ability exist in all communities, urban and rural, suburban and exurban. Nevertheless, students in rural areas deserve special concern in any effort to recruit the disadvantaged. The problems of first-generation, impoverished students are, to a large extent, the problems of people who live outside of urban areas.

The relationship between residence in rural areas and disadvantage animated President Johnson’s landmark civil rights initiatives as much as his awareness of racial injustice.²⁹¹ In the years since passage of the CRA and EOA, urbanormativity²⁹² has captured the public and scholarly imaginations.²⁹³ The resulting inattention to rural disadvantage, and its relationship to racial and educational disadvantage, has not undermined the stubborn fact that place is highly salient to life chances.

For several decades, proportionately fewer adults in rural areas have enrolled in postsecondary education than their urban counterparts. Whereas 30 percent of adults who live in urban areas attain bachelor’s degrees,²⁹⁴ only 13 percent of adults in rural areas do.²⁹⁵ The populations in rural areas suffer from significant economic disadvantage, but it is

²⁸⁹ See Section III.A of this paper for an in-depth discussion on Bakke.

²⁹⁰ See Bowen and Bok, The Shape of the River at 271 (cited in note 44).

²⁹¹ See Clark, The War on Poverty at 50 (cited in note 9).

²⁹² See Alexander R. Thomas, et al, Rural Theory: Structure, Space, Culture 151 (Lexington Books 2011) (defining urbanormativity as the –assumption that the conditions of urbanism found in metropolitan areas are normative; a corollary is that a departure from an urban lifestyle is deviant‖).

²⁹³ *Id.*

²⁹⁴ See David L. Brown and Kai A. Schafft, Rural People and Communities in the 21st Century: Resilience and Transformation 63 (Polity 2011).

²⁹⁵ See *id.* at 108.

often disregarded. In policy circles and on television, poverty is urban; however, the reality is different. For years, poverty rates in non-metropolitan areas have outstripped those in metropolitan areas.²⁹⁶ Disadvantage in rural areas encompasses multiracial populations, although rural areas are white in the popular image.²⁹⁷ Thirty-five percent of African-Americans and 34 percent of Native Americans who live in rural areas are poor.²⁹⁸ Economic disadvantage in these populations is influenced, in turn, by historic economic and educational inequalities.²⁹⁹

When students from smaller towns and rural areas manage to attend college, they are far less likely to attend the selective institutions that offer the greatest return on investment than peers in metropolitan areas.³⁰⁰ The difference in life outcomes results, in part, from the stronghold of geography and kinship ties on rural people, particularly those who live in areas that support major industries sustained by local people.³⁰¹ Isolation from the social networks that provide knowledge about the value of higher education and the college admission process also influences the rural-urban gap in college matriculation.³⁰² Whatever the cause of the comparative deficits, the differences limit the earnings capacity of rural students and make a college education particularly useful.³⁰³

F. First-generation students' academic profile.

Given all of the factors cited above, it should come as no surprise that first-generation, impoverished students start from a different

²⁹⁶ See Brown and Schafft, Rural People and Communities in the 21st Century at 193 (cited in note 294).

²⁹⁷ This is true although -rural often is defined as -white in the popular imagination. See *id.* at 194.

²⁹⁸ See *id.* at 195.

²⁹⁹ *Id.* at 194–95.

³⁰⁰ Most of the high-achieving, low-income students who manage to attend selective institutions hail from metropolitan areas. See Hoxby and Avery, The Missing One-Ofs at 39 (cited in note 175) (—70 percent of the achievement-typical students come from just 15 metropolitan areas (out of 334 nationwide): San Francisco, Oakland, Los Angeles, San Diego, Dallas, Houston, Chicago, Cleveland, Pittsburgh, Portland (Maine), Boston, Providence, New York, Philadelphia, and Baltimore.)).

³⁰¹ See Brown and Schafft, Rural People and Communities in the 21st Century at 64 (cited in note 294).

³⁰² See Hoxby and Avery, The Missing One-Ofs at 45 (cited in note 175).

³⁰³ See Brown and Schafft, Rural People and Communities in the 21st Century at 108 (cited in note 294).

academic baseline than others. Most, though by no means all, of these students tend to be less prepared for college than more affluent peers.³⁰⁴ The relative under-preparedness stems from lack of opportunity. First-generation students lack access to, and therefore tend not to enroll in, the rigorous high-school courses considered gateways to college.³⁰⁵ These students also generally post less impressive scores on standardized tests than students from households with more affluent, better-educated parents.³⁰⁶ According to the College Board, for every year between 2005 and 2010, results on the SAT have marched in lock step with family income and education.³⁰⁷ Because scores on these tests influence the admissions process at selective institutions, these students tend to look less impressive, as an empirical matter, than students from households with more affluent, better-educated parents.³⁰⁸

G. First-generation status and culture.

Bundled together, all of the aforementioned factors translate into significant cultural challenges for poor, first-generation students in higher education. In essence, the students face a difficulty inherent in navigating two different worlds—the familiar home environment versus the alien campus environment. The experience of being torn between worlds and identities can leave these students feeling adrift, without validation of their presence on campus and without confidence.³⁰⁹ Emotional distress can result from this internal war and struggle to belong.³¹⁰ If universities want to attract and retain these students, intervention is required.

G. Three Pillars of Intervention

The financial, academic, and socio-cultural challenges that first-generation, Pell-Grant-eligible students face are substantial, but not insurmountable, difficulties.³¹¹ Intervention can increase the odds of

³⁰⁴ See Engle and Tinto, Moving Beyond Access at 3 (cited in note 260).

³⁰⁵ See *id.* at 3, 20.

³⁰⁶ See Appendix.

³⁰⁷ See Appendix for 2010 data. Remaining data on file with author.

³⁰⁸ See Saenz, et al, First in my Family at 2–3 (cited in note 45). These students are distinct from the population of —high-ability, low-income students— discussed by some scholars. See *id.*

³⁰⁹ See Engle, 3 *American Academic* at 33 (cited in note 269).

³¹⁰ See Splichal, The Effects of First-Generation Status and Race at 9–10 (cited in note 259).

³¹¹ See Joanna Chau, The Biggest Obstacle For First Generation College Students (Chronicle Apr 25, 2010), online at <http://chronicle.com/blogs/headcount/the-biggest-obstacle-for-first-generation-college-students/30126> (discussing financial struggles);

success in higher education. Some programs geared to this demographic, including federally-financed ones, already exist. However, the majority of these programs tend to funnel first-generation students into two-year colleges.³¹² These institutions often are dead ends.³¹³

This section proposes a first-generation project that focuses on three pillars of intervention: concrete admission goals, financial aid and counseling, and institutional outreach. Each element is discussed below.

1. Concrete admissions goals.

First-generation college students benefit greatly from access to selective institutions of higher education.³¹⁴ A degree from a selective

DeParle, For Poor, Leap to College (cited in note 179) (discussing financial struggles, cultural alienation, difficulties balancing work and school, and fraught social relationships of first-generation college students); Mark P. Orbe, Negotiating Multiple Identities Within Multiple Frames: An Analysis of First-Generation Students, 2 *Communication Educ* 131, 132–133 (Apr 2004) (discussing how salience of FGS varies by race and income); Nicole M. Stephens, et al, Unseen Disadvantage: How American Universities' Focus on Independence Undermines the Academic Performance of First-Generation College Students 102 *J Personality & Soc Psych* 1178, 1178 (2012) (discussing cultural mismatch); Regina Deil-Amen and James E. Rosenbaum, The Social Prerequisites of Success: Can College Structure Reduce the Need for Social Know-How? 586 *Annals Am Academy Polit & Soc Sci* 120, 121 (2003).

³¹² The federal TRIO programs, authorized by the Higher Education Opportunity Act, provide financial support for low-income, first-generation students. Higher Education Opportunity Act, Pub L No 102-325, 106 Stat 482 (2008), codified at 20 USC § 402(a)(2), (4). See also Federal TRIO Programs (Office of Post-Secondary Education Jan 31, 2014), online at http://www2.ed.gov/about/offices/list/ope/trio/index.html?utm_source=Publicaster&utm_medium=email&utm_campaign=President%20to%20President,%20Vol (visited Feb 7, 2014).

³¹³ See notes 274–276 and accompanying text.

³¹⁴ Selective institutions are those to which so many students apply that the admissions process is highly competitive. Between 200 and 250 U.S. colleges and universities are considered selective. See David Leonhardt, What makes a College Selective' and Why it Matters (NY Times Apr 4, 2013), online at <http://economix.blogs.nytimes.com/2013/04/04/what-makes-a-college-selective-and-why-it-matters/> (visited Feb 7, 2014). See also Rankings by Selectivity (NY Times Apr 4, 2013), online at http://www.nytimes.com/interactive/2013/04/04/business/economy/economix-selectivity-table.html?_r=0 (visited Feb 7, 2014).

institution can lift such an individual into the middle class or beyond and into a whole new way of life. The return on investment in education at a selective institution of higher education is fundamental to the transition.³¹⁵ Graduation rates are higher at selective institutions, as are the wages of students who obtain degrees from them.³¹⁶

Presently, a few selective colleges do a fine job of recruiting and retaining these students.³¹⁷ However, great disparity exists among colleges in the rates at which first-generation, poor students attend.³¹⁸ More can be done to increase access.³¹⁹

The admissions office can play a critical role in promoting social mobility in our nation. Officials can make this contribution by selecting for first-generation, impoverished status in the admissions process.³²⁰ It is a criterion that has the virtue of being race-neutral, and, by definition, an indicator of a student in need and one who has a potentially life-changing experience to gain from access to selective colleges. Many

³¹⁵ Selective, as used here, is not a synonym for exclusive or Ivy League; the list of selective colleges and universities includes a wide variety of institutions. The pecking order includes the most competitive research universities, familiar names such as Harvard, Yale, and Princeton, as well as renowned liberal arts colleges, such as Amherst and Williams. Less familiar, highly competitive private colleges such as Skidmore, Grinnell, and Trinity, where students benefit from a low faculty-student ratio and a small environment, also number among selective institutions. Large universities—Syracuse, Clemson, and Georgia—also make the list. All of these institutions admit students across a range of test scores and grades. See Rankings by Selectivity (cited in note 314).

³¹⁶ Anthony P. Carnevale and Jeff Strohl, How Increasing College Access is Increasing Inequality, and What to Do about it, in Richard D. Kahlenberg, ed, Rewarding Strivers: Helping Low-Income Students Success in College 71, 111–112 (Century Foundation 2010).

³¹⁷ See note 240.

³¹⁸ See Appendix for a comparison of reported matriculation rates of underrepresented minorities and first-generation students at some selective universities. The data are extraordinarily difficult to access. Universities either do not maintain or release figures on first-generation students.

³¹⁹ See note 240–244 and accompanying notes.

³²⁰ During the initial stages of the admissions process, colleges and universities know that students intend to apply for financial aid and have a good idea whether students are eligible for Pell Grants. Actual Pell Grant eligibility determinations are made during the financial aid applicable process. On Pell Grant timetables, see ___

universities already proclaim an interest in needy students; what is needed is a mechanism to transform aspirations into commitments.

Because many universities have not fundamentally changed when left to their own devices, policies that nudge them toward action are in order. Concrete goals may help to increase the presence of first-generation, impoverished students on campus. In much the same way that colleges in the past set recruitment goals for women and minorities, universities should be encouraged to set targets for the recruitment of first-generation students.³²¹ (But unlike in the context of gender or race goal, admission targets for first-generation students would not be mandatory.) At a selective institution, a reasonable target for a substantial percentage of truly disadvantaged students might be at least 20 percent first-generation, Pell-Grant eligible.³²²

Universities must weigh standardized test scores less heavily in admissions decisions in order to recruit a sizeable number of first-generation, Pell Grant-eligible students.³²³ For, as both the College Board and universities well know, test scores correlate with family wealth; the scores of first-generation students from poorer households typically are less impressive than those of wealthier students.³²⁴

Many selective universities already disclaim overreliance on test scores,³²⁵ but aggregate evidence suggests otherwise. Low admission

³²¹ See Seth A. Goldberg, A Proposal for Reconciling Affirmative Action with Nondiscrimination Under the Contractor Antidiscrimination Program, 30 Stan L Rev 803, 806–08 & n 2 (1978) (describing Executive Order 11,246 requiring government contractors to develop numerical goals and timetables for hiring of women and minorities and its effectiveness). See also Exec Order No 11246 (1965).

³²² Selective institutions that have managed to achieve at least 20 percent Pell Grant recipients are MIT, Grinnell, Vassar, Wellesley, and Williams College. See Stephen Burd, Undermining Pell: How College Compete for Wealthy Students and Leave the Low-Income Behind 8–9 (New America Foundation 2013).

³²³ For an astute discussion of how admissions criteria figure into the debate over access to higher education, see Lani Guinier, Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals, 117 Harv L Rev 113, 123 (Nov 2003).

³²⁴ See Saenz, et al, First in my Family at 4 (cited in note 45). See also Strauss, The Bottom Line on the SAT in One Chart (cited in note 208).

³²⁵ See, for example, Scott Jashkik, How They Really Get In (Inside High Education Apr 9, 2012), online at <http://www.insidehighered.com/news/2012/04/09/new-research-how-elite-colleges-make-admissions-decisions> (visited Feb 7, 2014) (noting that while selective institutions all claim to practice holistic admissions, 76

rates of lower-income students who actually manage to meet test score means (the so-called –high-ability, low-income| students) cast doubt on the notion that most selective institutions deviate substantially from reported median scores.³²⁶ So does a 2012 study that found that although selective institutions all claim to practice –holistic| admissions, 76 percent of surveyed institutions begin the admissions process by winnowing applicants by grades, test scores, and other conventional factors.³²⁷

These institutions cannot credibly cite an ironclad commitment to rigorous standards as a rationale for excluding needy students. Deviations from the –standards| are commonplace—for wealthy students, in particular. Admissions officials at 20 percent of private liberal arts colleges –admit| full-pay students with lower grades and test scores than other applicants.³²⁸ Institutions that routinely practice affirmative action for the wealthy should be amenable to admitting competitive first-generation students in larger numbers.³²⁹

Bakke, long viewed as a precedent supportive of race-conscious affirmative action, also could support a thumb on the scale for Pell Grant-eligible students. Admissions officials could choose to define –educational benefits| of diversity in a way that values socioeconomic differences and the ability to interact with students across socioeconomic lines. Nothing about the Supreme Court’s reasoning in affirmative action cases requires such a definition of diversity. But nothing prevents it either.

2. Financial aid and counseling.

percent of surveyed institutions winnow applicants using factors such as grades or test scores).

³²⁶ See *id.* See also note 316 and accompanying text.

³²⁷ See Jashkik, How They Really Get In (cited in note).

³²⁸ *Id.* at 4.

³²⁹ Amherst College has been a leader among selective institutions in recruiting Pell Grant eligible students. Anthony Marx, the former president of the college, catalyzed change at the elite liberal arts college by arguing that the exclusion of able but poor students undermined meritocracy. In 2011, the year Marx resigned for a new position, 22 percent of Amherst’s student body received Pell Grants—whereas in 2005, only 13 percent of the student body qualified for the grants; these students paid an average net price of \$448. See Burd, Undermining Pell at 8 (cited in note 322). See David Leonhardt, Top Colleges, Largely for the Elite (NY Times May 24, 2011), online at <http://www.nytimes.com/2011/05/25/business/economy/25leonhardt.html?pagewanted=all> (visited Feb 7, 2014).

In response to concern about rising costs in higher education,³³⁰ selective universities have enacted reforms, but the changes fall short for many students in the target population discussed here. The turn to no-loan aid policies by a group of highly selective universities made the biggest splash. Between 1998 and 2011, a group of sixty-five selective institutions, led by Princeton University,³³¹ eliminated loans from many students' aid packages; the colleges replaced loans with scholarships and grants awarded from the institutions' own budgets.³³² As a result of these policies, many students who attend these universities graduate debt-free or substantially free of debt.³³³

Despite all of the attention to the initiatives, it is not at all clear that these policies have measurably increased access to the lowest-income students.³³⁴ Instead of fundamentally altering the economic make-up of these institutions,³³⁵ the programs have inspired only modest changes in the enrollment of this group of students.³³⁶ Other factors that impede access—including lack of access to quality secondary education, credentials, social and cultural factors, and sticker shock—continue to suppress the numbers of poor students on campus.³³⁷ Because no parallel effort has been taken to identify, admit, and matriculate truly poor students, elite institutions are deploying their generous financial aid policies to subsidize solidly middle-class or even well-off students.³³⁸

Moreover, the no-loan institutions, which have declined from a high of 65 to 46, are outliers.³³⁹ The quality of financial aid provided to

³³⁰ An investigation into spending by university endowments by the U.S. Senate Committee on Finance in which Senator Charles Grassley explicitly mentioned rising tuition costs garnered considerable attention. See Financial Affairs: Why the Endowment-Spending Debate Matters Now More Than Ever (Chronicle of High Education Mar 7, 2010), online at <http://chronicle.com/article/Why-the-Endowment-Debate/64527/> (visited Feb 7, 2014).

³³¹ See Hillman, Economic Diversity Among Selective Colleges at 2 (cited in note 196).

³³² See *id.*

³³³ See *id.*

³³⁴ See *id.* at 8.

³³⁵ See Hillman, Economic Diversity Among Selective Colleges at 8 (cited in note 196).

³³⁶ See *id.*

³³⁷ See *id.* at 5. See also notes 196–197 and **Error! Bookmark not defined.** and accompanying text.

³³⁸ See notes 229–233.

³³⁹ See Kelsey Sheehy, Colleges That Claim to Meet Full Need, US News & World Report, Sept. 18, 2013, online at

poorer students at the overwhelming majority of institutions remains a significant problem. Most institutions of higher education have not made a significant commitment to the financial support of students for whom cost is truly a major factor affecting enrollment.³⁴⁰ The majority of institutions of higher education (as distinguished from the few no-loan universities) do not offer especially generous aid packages to needy students. Two-thirds of private colleges and one-third of public colleges engage in the practice of “gapping”—making financial aid awards that do not come close to meeting financial need.³⁴¹ As a result of this practice, students are required to take out educational loans if they hope to enroll in college, a policy that, in turn, discourages enrollment.³⁴²

Many colleges and universities can afford to award more generous financial aid packages to truly needy students, but do not.³⁴³ They instead have made strategic decisions to favor wealthier families by awarding more than various kinds of tuition discounts.³⁴⁴ In an era of declining endowments and budget tightening,³⁴⁵ a commitment to financial support of first-generation, impoverished students may imply a recalibration of aid policies away from policies that favor those with higher incomes.

Currently, no comprehensive database documents what proportion of first-generation students colleges and universities admit and financially support through their own institutional aid coffers.

<http://www.usnews.com/education/best-colleges/paying-for-college/articles/2013/09/18/colleges-that-claim-to-meet-full-financial-need-2014> (visited 3/21/14).

³⁴⁰ See Saenz, et al, First in my Family at 23 (cited in note 45).

³⁴¹ See Burd, Undermining Pell at 4 (cited in note 322).

³⁴² See id.

³⁴³ See id at 1.

³⁴⁴ On this point, Burd writes:

Some of the country’s most prosperous private colleges are, in fact, the stingiest with need-based aid. These institutions tend to use their institutional financial aid as a competitive tool to reel in the top students, as well as the most affluent, to help them climb in the US News & World Report rankings and maximize their revenue.

Id at 1, 5–6, 11 (discussing the impact of award of merit aid instead of need-based aid).

³⁴⁵ See James B. Stewart, A Hard Landing for Many University Endowments (NY Times Oct 12, 2012), online at <http://www.nytimes.com/2012/10/13/business/colleges-and-universities-invest-in-unconventional-ways.html> (visited Feb 7, 2014) (discussing underperformance of college endowments).

Universities are not eager to share these figures; in fact, they seem to be closely guarded secrets.

The Department of Education can promote better outcomes for the disadvantaged in admissions and financial aid through its data collection, monitoring, investigatory, and powers to suspend federal funding. The Department can nudge institutions in the preferred direction by mandating that they make publicly available records showing how many first-generation, Pell Grant-eligible students are admitted and financially supported.³⁴⁶

The basis for oversight exists in the Higher Education Opportunity Act (HEOA).³⁴⁷ Originally enacted as a part of President Johnson's Great Society programs, the HEOA authorizes funding to universities to support education for disadvantaged students.³⁴⁸ President Johnson urged passage of the law to –extend the opportunity for higher education more broadly among lower and middle income families and to –draw upon the unique and invaluable resources of our great universities to deal with national problems of poverty and community development.³⁴⁹ Pell Grants are authorized pursuant to the HEOA.³⁵⁰ The Department of Education monitors and enforces the HEOA³⁵¹ and already mandates reporting of many kinds of data

³⁴⁶ The President has proposed a new college rating system designed to make college more affordable in which average tuition, share of low-income students served, and effectiveness in ensuring students graduate with manageable debt levels are factors in determining an institution's rating. See Nick Anderson and Philip Rucker, Obama Proposes College Rating System That Could Increase Affordability (Wash Post Aug 22, 2013), online at http://www.washingtonpost.com/politics/obama-to-propose-college-ranking-system-that-could-increase-affordability/2013/08/22/73e674c0-0b17-11e3-b87c-476db8ac34cd_story.html (visited Feb 7, 2014). Highly ranked colleges might merit more federal student aid. *Id.* Colleges have cried foul, claiming that the ranking system would harm students. *Id.*

³⁴⁷ Pub L 110-315, 122 Stat 3078 (2008), codified at 20 USC § 1101 et seq. Because first-generation students are not a legally protected class, Congress cannot use its powers under Title VI to mandate change as it has in the past. See notes 49–53 and accompanying text.

³⁴⁸ See *id.*

³⁴⁹ See Higher Education Act of 1965, House of Representatives Report No. 621 at 3 (July 14, 1965).

³⁵⁰ See Pub L 110-315, 122 Stat 3078 (2008), codified at 20 USC § 1101 et seq

³⁵¹ There is no private right of action to enforce the statute or implementing regulations. See, for example, Gibbs v SLM Corp., 336 F Supp 2d 1, 14 (D Mass 2004).

pursuant to its HEOA authority.³⁵² It collects admissions data, test score and demographic information, including race, graduation rates, and average net price paid per student.³⁵³

Mandatory reporting about first-generation students as a condition of receipt of full HEOA funding would complement but not unduly expand existing obligations.³⁵⁴ The Department of Education already possesses authority to use negative publicity as an enforcement stick against institutions that fail to comply with HEOA.³⁵⁵ Disclosures about limited access to first-generation students, when publicized and subjected to scrutiny, should also promote greater equity.

3. Institutional outreach.

First-generation, Pell Grant-eligible students require special efforts to address social and cultural factors that can undermine access to and success in college. Recent initiatives have focused on identifying and recruiting students who show unusual talent and determination to excel. Organizations such as Questbridge³⁵⁶ and Posse Foundation,³⁵⁷ which link disadvantaged students with selective institutions on a fee-for-service basis, are one avenue for recruitment. However, the fees universities must pay to participate in the organizations' matching services and the constraints on college choice and early admission deadlines associated with the matching process are drawbacks to these models.³⁵⁸

³⁵² See College Navigator (National Center for Education Statistics), online at <http://nces.ed.gov/collegenavigator/> (visited Feb 7, 2014).

³⁵³ See IPEDS Data Center, online at <http://nces.ed.gov/ipeds/datacenter/SelectVariables.aspx?stepId=1> (visited Feb 7, 2014).

³⁵⁴ —The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; . . . US Const Art I, § 8, cl 1.

³⁵⁵ See 20 USC 1101 § 493(a)(24).

³⁵⁶ See Quest Bridge, online at <http://www.questbridge.org/> (visited Feb 7, 2014).

³⁵⁷ See Posse Is Not a Program. It's a Movement (Posse Foundation), online at <http://www.possefoundation.org/our-university-partners/> (visited Feb 7, 2014).

³⁵⁸ On fees, see Lingbo Li, Overlooking Questbridge Applicants (Harvard Crimson Oct 15, 2008), online at <http://www.thecrimson.com/article/2008/10/15/overlooking-questbridge-applicants-merema-m-ahmed/> (visited Feb 7, 2014). On early decision

My suggestion is at once more ambitious and potentially more edifying: universities can create pipelines of their own. They can do so by committing significant institutional dollars to community-based collaborations with local organizations. These collaborations might be called —university-school-community partnerships (USCs).

Partners might and should include schools in neighborhoods where the target population of first-generation, poor students reside. One can imagine a university establishing a partnership with local middle schools or charter schools. A goal of such a partnership would be to ensure that students in partner schools are introduced to rigorous academic programs, study and time management skills, collegiate culture, and forms of social capital valued in higher education.³⁵⁹

Universities that house schools of education are ideally situated to establish such partnerships. Preexisting expertise and interest in education theory and practice create the groundwork for successful endeavors. The University of California, San Diego's (UCSD) partnership with the Preuss School is a terrific example of the kind of socially transformative projects that universities can undertake.³⁶⁰ Preuss is a local charter middle and high school for low-income and highly motivated students who hope to be the first in their families to graduate from college.³⁶¹ The school is situated on UCSD's campus and is operated by the university. Chartered by the local school district, Preuss is supported by private funds.³⁶² The culturally and racially diverse students who attend Preuss have achieved tremendous academic success in recent

deadlines and constraints imposed on choices, see National College Match Flowchart (Quest Bridge), online at <http://www.questbridge.org/for-students/ncm-flowchart> (visited Feb 7, 2014) (requiring ranking of college choices by early November and commitment by early December if chosen); Quick Facts (Posse Foundation), online at <http://www.possefoundation.org/quick-facts#whopaysfor> (visited Feb 7, 2014) (noting that it is an early decision program).

³⁵⁹ See Lareau, Unequal Childhoods at 7 (cited in note 199); Stuber, Inside the College Gates at 15 (cited in note); Omari Scott Simmons, Lost in Transition: The Implications of Social Capital for Higher Education Access, 87 Notre Dame L Rev 205, 206 (2011) (arguing the need to focus on social capital deficits in access to higher education programs).

³⁶⁰ See Preuss School, online at <http://preuss.ucsd.edu> (visited Feb 7, 2014).

³⁶¹ See *id.*

³⁶² The Preuss School at a Glance (The Preuss School), online at <http://preuss.ucsd.edu/about-preuss/preuss-at-a-glance.html> (visited Feb 7, 2014).

years, measured in terms of college acceptance and matriculation rates.³⁶³ The key to success has been intervention in students' lives along all of the critical dimensions discussed above that so deeply influence whether potential is nurtured and matures.

If several other universities established USCs that included rigorous college preparatory schools, social supports, and exposure to college that talented first-generation students need, the result could be socially transformative.

After first-generation students matriculate to college, institutional initiatives are necessary to create a welcoming and supportive campus environment. Just as universities offer campus centers and special services to support other students, they can make services available to these students to ease the transition to college life. The creation of institutional spaces for these purposes and the provision of financial support for programs that provide mentoring, encourage social engagement, teach effective study skills, and offer academic support are vital.³⁶⁴

CONCLUSION

Instead of representing a slide toward retrenchment on equal opportunity, the changing legal environment for race-conscious affirmative action can herald a new era of opportunity for students in all of America's forgotten communities. Selective universities can play a significant role in this new environment. These universities are recipients of significant amounts of federal funding,³⁶⁵ and as such, are obligated to contribute to the nation-state and to their surrounding communities for collective good.

Already universities make invaluable contributions through faculty research and student service projects. Whole universities, such as Stanford in California and MIT in Cambridge, are well known for the

³⁶³ See Preussline 1 (UC San Diego Fall 2013), online at <http://preuss.ucsd.edu/about-preuss/preuss-at-a-glance.html> (visited Feb 7, 2014).

³⁶⁴ See Engle and Tinto, Moving Beyond Access at 27–29 (cited in note 260).

³⁶⁵ The federal government provides universities with about \$30 billion annually in research and development funding alone. See Nick Anderson, Sequester Cuts University Research Funds (Wash. Post. Mar 16, 2013), online at http://www.washingtonpost.com/local/education/sequester-cuts-university-research-funds/2013/03/16/08e9cc24-877a-11e2-9d71-f0feafdd1394_story.html (visited Feb 7, 2014).

value they added to their communities through entrepreneurship.³⁶⁶ Faculty and students at these universities have created products, applications, and other inventions that have generated tremendous wealth, both for individuals and for the nation's economy.

In this anniversary year of the Civil Rights Act, I propose that universities can make a different kind of contribution to the nation-state, local communities, and ultimately, the citizenry. Universities can engage in social entrepreneurship. Institutions of higher education are ideally situated to promote social mobility by expanding efforts to recruit first-generation, truly impoverished students.

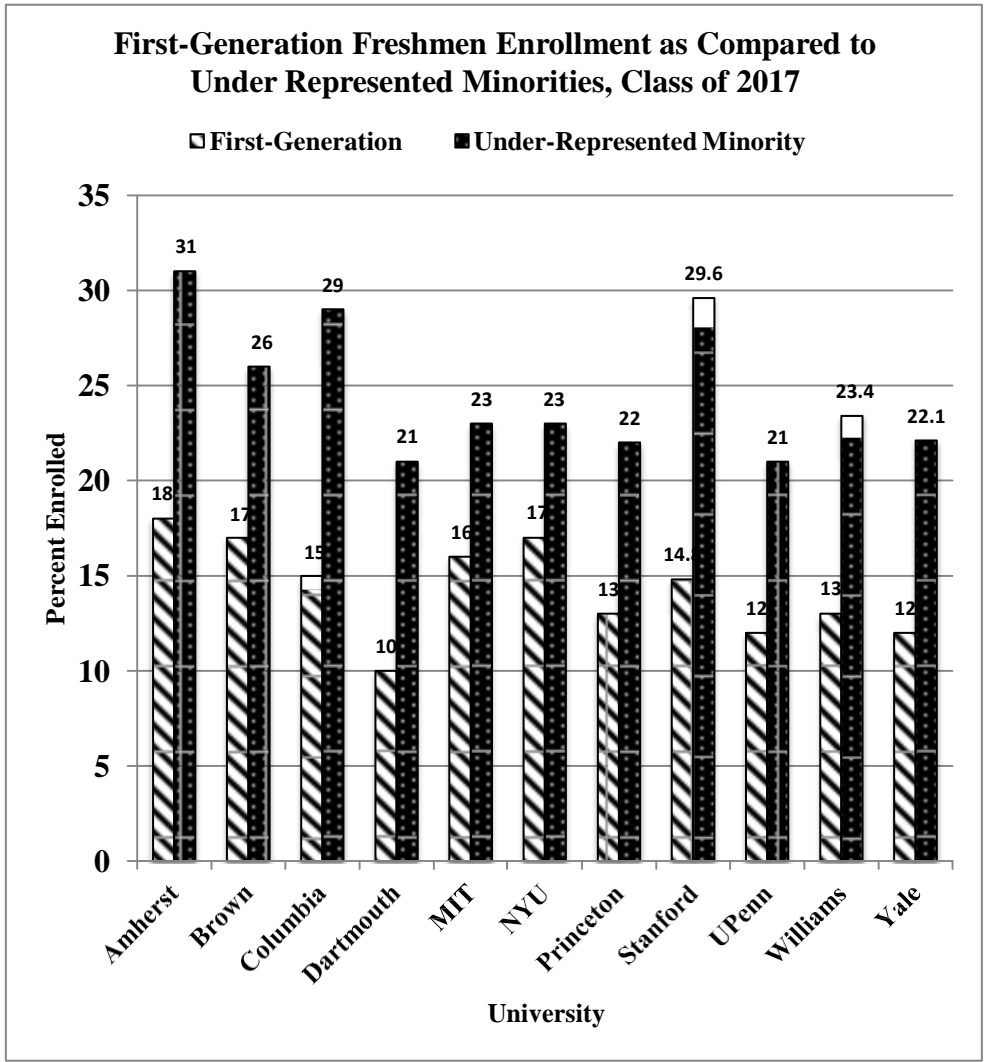
A concerted effort to raise up first-generation college students can address the social and economic stagnation that Americans fear, and tackle inequality of opportunity. The resolve to ensure the welfare of these students is a part of the unfinished agenda of the freedom struggle that President Johnson so eloquently endorsed in 1965. Tangible commitment to disadvantaged students—through dollars, cents, visions, institutional plans, and partnerships—would have the virtue of more profoundly engaging structural inequality.

³⁶⁶ See John Hennessy, [Doing Well by Doing Good: Non-profit Start-ups Harness Energy and Idealism to Make Positive Change](http://alumni.stanford.edu/get/page/magazine/article/?article_id=64324), President's Column (Stanford Alumni Magazine Sept/Oct 2013), online at http://alumni.stanford.edu/get/page/magazine/article/?article_id=64324 (visited Feb 7, 2014); [Venture Mentoring Service Wins Award: MIT Program Harnesses Knowledge and Experience of Volunteer Alumni and Business Leaders to Help Prospective Entrepreneurs](http://web.mit.edu/newsoffice/2010/vms-award.html) (MIT News Apr 26, 2010), online at <http://web.mit.edu/newsoffice/2010/vms-award.html> (visited Feb 7, 2014).

APPENDIX

**2010 DISTRIBUTION OF MEAN SAT SCORE BY PARENT INCOME AND
EDUCATION LEVEL**

	Test- takers	(%)	Critic al Readi ng	Math	Writin g
<u>Family Income</u>					
\$0-\$20,000	109,651	11	437	460	432
\$20,000-\$40,000	150,390	16	465	479	455
40,000- \$60,000	141,307	15	490	500	478
\$60,000 - \$80,000	135,872	14	504	514	492
\$80,000-\$100,000	119,051	12	518	529	505
\$100,000-\$120,000	100,383	10	528	541	518
\$120,000-\$140,000	51,194	5	533	546	523
\$140,000-\$160,000	38,997	4	540	554	531
\$160,000-\$200,000	45,567	5	547	561	540
More than \$200,000	69,907	7	568	586	567
<u>Education Level</u>					
No H.S Diploma	73865	5	422	446	419
H.S. Diploma	427004	31	464	475	453
Associate Degree	119817	9	482	491	469
Bachelor's Degree	415900	30	521	536	512
Graduate Degree	358717	26	561	575	554
 Total mean SAT Score:			501	516	492



Under Represented Minority: any student belonging to one or more of the following categories: African American, Native-American, Hispanic/Latino and Multiracial.

Average First-Generation Freshmen Enrollment as Compared to Under Represented Minorities, Class of 2015-2017

