

DEBT, MERIT, AND EQUITY IN HIGHER EDUCATION ACCESS

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I

INTRODUCTION

When President Lyndon Baines Johnson signed the Higher Education Act¹ (HEA) on November 8, 1965, he proclaimed that the law “means that a high school senior anywhere in this great land of ours can apply to any college or any university in any of the 50 States and not be turned away because his family is poor.”² And in the fifty years since the Act passed, nothing less than a revolution has occurred regarding college access. Colleges and universities in the United States are producing more than two-and-a-half times as many graduates as in the past: 2.8 million in the 2012–2013 academic year, compared to 1.1 million in 1970–1971.³ This 154% increase represents far more growth than can be accounted for by the 17% growth⁴ in the number of high school graduates; currently, about two-thirds of students who complete high school enroll in a two-year or four-year college program, up from about half.⁵ The increase reflects an ambitious and expensive effort to put college within reach of all aspiring students.

Yet President Johnson’s words remain aspirational. The distribution of this bounty of higher education has not evolved as President Johnson and other supporters of that landmark law might have hoped or envisioned. Although the Act created a regime to make college possible for poor students, it did not seek to address present and historical discrimination and exclusion on the basis of

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1. Higher Education Act of 1965, Pub L. 89-329, 79 Stat. 1219 (codified as amended in scattered sections of 20 U.S.C.) [hereinafter Higher Education Act].

2. President Lyndon B. Johnson, Remarks on Signing the Higher Education Act of 1965 at Southwest Texas State College (now Texas State University-San Marcos) (Nov. 8, 1965), <http://www.txstate.edu/commonexperience/pastsitearchives/2008-2009/lbjresources/higheredact.html>.

3. This figure includes recipients of bachelor’s degrees, master’s degrees, and doctorates. Institute of Education Sciences, Digest of Education Statistics, 2014 [hereinafter 2014 Digest] tbl. 318.20 (2014), http://nces.ed.gov/programs/digest/d14/tables/dt14_318.20.asp?current=yes.

4. In 1969 through 1970, 2.9 million students graduated from high school, while in 2014 through 2015, 3.4 million students graduated from high school, representing an increase of 17%. *Id.* at tbl. 219.10, http://nces.ed.gov/programs/digest/d14/tables/dt14_219.10.asp?current=yes.

5. *Id.* at tbl. 302.10, http://nces.ed.gov/programs/digest/d14/tables/dt14_302.10.asp?current=yes.

race or class. For example, poorer students continue to be underrepresented at the nation's leading colleges and universities,⁶ African-American and Latino students disproportionately attend institutions associated with the worst education outcomes,⁷ and rates of student loan default among both African-American and Latino students are significantly higher than among other student groups.⁸ Addressing these disparities requires recognizing the narratives underlying political discourse around higher education—narratives that enable legislative inaction. According to one prevalent narrative strand, higher education is a private good that accrues to the benefit of the student rather than to the larger society, a view making it more difficult to justify public subsidization of access.⁹ According to another, admissions decisions at selective institutions are based on individual merit assessed largely through standardized tests, performance on which closely tracks the income of the test-taker's family¹⁰ and varies among racial groups.¹¹ The assessments are viewed as objective and consideration of other student characteristics may be controversial because it is seen as inconsistent with commitment to meritocracy.¹²

Although higher education is available on a more equitable basis now than it has been in the past, less inequity in the distribution of higher education opportunity is not the same as equity. Advancing the cause of access, a touchstone of the civil rights movement in the era of the HEA, requires attention to this difference. Further advancement of opportunity for students who belong to groups historically excluded from college campuses will turn on arguments informed by sophisticated evaluation of the moments that determine

6. ANTHONY P. CARNEVALE & STEPHEN J. ROSE, SOCIOECONOMIC STATUS, RACE/ETHNICITY, AND SELECTIVE COLLEGE ADMISSIONS 11 (2003), http://www.immagic.com/eLibrary/ARCHIVES/GENERAL/TCF_US/C030320C.pdf.

7. See INSTITUTE OF EDUCATION SCIENCES, STUDENTS ATTENDING FOR-PROFIT POSTSECONDARY INSTITUTIONS: DEMOGRAPHICS, ENROLLMENT CHARACTERISTICS, AND 6-YEAR OUTCOMES tbls.1 & 5 (2011) (reporting that nearly 17% of black undergraduates and more than 14% of Latino undergraduates attend for-profit institutions (tbl. 1), at which just over 44% of students achieve a degree (tbl. 5)). Students at for-profit institutions are also far more likely to default on student loans. Press Release, Inst. for College Access & Success, Default Rate Declines, Yet 611,000 Defaulted on Federal Student Loans (Sept. 30, 2015), http://ticas.org/sites/default/files/pub_files/cdr_2015_nr.pdf.

8. Jacob P.K. Gross, Osman Cekic, Don Hossler & Nick Hillman, *What Matters in Student Loan Default: A Review of the Research Literature*, 39 J. STUDENT FIN. AID, no. 1, 2010, at 19, 21; see also J. Fredericks Volkwein, Bruce P. Szelest, Alberto F. Cabrera & Michelle R. Napierski-Pranel, *Factors Associated with Student Loan Default Among Different Racial and Ethnic Groups*, 69 J. HIGHER EDUC. 206, 224–25 (1998) (noting that African-American borrowers have the highest default rates, but that similar factors—sex and marital status—affect the likelihood of default within distinct populations, suggesting that “dominant factors that contribute to loan default among Whites and minority groups differ more in degree than in kind.”).

9. See *infra* Section III.C.

10. College Board, 2015 COLLEGE-BOUND SENIORS TOTAL GROUP PROFILE REPORT 4 (tbl. 10) (reporting student SAT scores by income bracket).

11. *Id.* at 3 (tbl. 7).

12. Lani Guinier, THE TYRANNY OF THE MERITOCRACY: DEMOCRATIZING HIGHER EDUCATION IN AMERICA 29 (2015) (calling for consideration of student characteristics other than “abstractly measured ‘talent’” in allocating educational opportunity).

who enjoys *meaningful* access, rather than mere access, to higher education. Access is meaningful when education opportunity extends beyond enabling matriculation to encompass the chance both to excel while enrolled and to pursue a career unburdened by excessive debt. This conception of access includes and goes beyond the admissions decision to recognize the importance of cost, of the experience while enrolled, and of the steps that must be taken to help students achieve graduation. Evaluation of the moments that shape students' higher education experience requires study of both the principles justifying the HEA and the results of its implementation in order to see whether the practices that determine who goes to college promote equity in access. Lessons learned should guide legislative and institutional reforms that improve opportunities for students of all backgrounds.

The discussion in this article has four parts. Part II provides an explanation of the goals of the HEA, followed by analysis of current challenges to higher education access in the United States. Part III analyzes two critical moments in the complex system that regulates access: financial aid and the use of test scores in the admissions processes of selective colleges and universities. Part IV identifies possible reforms aimed at enhancing meaningful access for students of lesser means and students belonging to groups still underrepresented at institutions of higher education. Part V briefly concludes.

II

THE IDEALS OF THE PAST AND THE PROBLEMS OF THE PRESENT

The federal government has attempted to promote access to higher education in different ways and at different points in U.S. history, generally by providing financial resources to mitigate the cost to students. The roots of the modern financial aid system can be traced back to the Servicemen's Readjustment Act of 1944 (the G.I. Bill),¹³ which sought at once to help returning soldiers make the transition back to civilian life and to reward them for their service in World War II.¹⁴ Over the next twenty years, federal goals broadened and expanded in response to the Cold War, which lawmakers viewed as demanding broad investment in developing the human capital necessary to defeat the Soviet Union,¹⁵ and then to the civil rights movement, which prompted a reconsideration and expansion of the national commitment to higher education opportunity.¹⁶

13. Serviceman's Readjustment Act of 1944, P.L. 78-346, 58 Stat. 284.

14. CHRISTOPHER P. LOSS, *BETWEEN CITIZENS AND THE STATE: THE POLITICS OF AMERICAN HIGHER EDUCATION IN THE 20TH CENTURY* 9, 116 (2012).

15. The signature legislation pursuing this goal was the National Defense Education Act of 1958. Jonathan D. Glater, *The Other Big Test: Why Congress Should Allow College Students to Borrow More Through Federal Aid Programs*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 11, 37 (2011).

16. *Id.* at 35-36.

The passage of the HEA represented a singular idealism,¹⁷ justifying federal programs to put college within reach, not just out of concern over national security but more out of a sense of national identity. The idea was that equity in opportunity is part of who we are. As articulated in the House of Representatives shortly before the Act's passage, "With this bill we proceed toward molding the myth of higher education for all into vivid, democratic reality."¹⁸ For a time, Congress proved willing to provide funds to try to realize this dream, but as national attention to access declined and a political ideology that viewed education as a private good gained ascendancy,¹⁹ the federal commitment to putting education within reach of all waned. This part briefly describes two critical tools of the HEA, federal grants and federal loans, and analyzes their effects in the ensuing decades.

A. Hopes for the Higher Education Act

Lofty indeed was the rhetoric describing the goals of the HEA, but its advocates consistently focused on a few concrete benefits of the law. President Johnson, in his remarks upon signing the HEA into law, cited goals such as providing economic opportunity: more educated workers enjoy higher wages and greater employment security, which not only promotes national economic competitiveness and national security, but also provides students a path to "deeper personal fulfillment, greater personal productivity, and increased personal reward."²⁰ Supporters of the legislation spoke of giving "wider educational horizons [to] today's students—the leaders of tomorrow,"²¹ nodding toward the potential for leadership that stems from higher education opportunity. They spoke of knowledge acquired in college as "our most treasured national asset,"²² suggesting that a better informed citizenry was a worthy goal in its own right. Further, they spoke of socioeconomic mobility—of enabling students to achieve a quality of life higher than that of their parents, and indirectly, of promoting societal stability.

Too often in our country the poverty and lack of education of parents is descended upon their children. The surest path of escape from this endless, relentless cycle lies through the proposed educational opportunity grants and through the other provisions

17. Jonathan D. Glater, *Student Debt and Higher Education Risk*, 103 CAL. L. REV. 1561, 1576 (2015).

18. 111 CONG. REC. 21,880 (1965) (statement of Rep. Powell).

19. For an analysis of this phenomenon, see, for example, David F. Labaree, *Public Goods, Private Goods: The American Struggle Over Educational Goals*, 34 AM. EDUC. RES. J. 39, 59 (1997) (describing the dominance in the United States of the view that education is a "consumer good that can provide individuals with social advantage").

20. Johnson, *supra* note 2; see also 111 CONG. REC. 21,897 (1965) (statement of Rep. Mink) ("Not only does the individual need all the education he can get to compete and fulfill his life, but the community, the Nation and the world need all the well-trained and well-grounded thinkers mankind can provide.").

21. 111 CONG. REC. 1644 (1965) (statement of Rep. Brademas).

22. *Id.* at 21,888 (1965) (statement of Rep. Gubser).

of title IV. The student assistance offered by this bill can open untold new horizons to hundreds of thousands of young people who otherwise might be completely isolated and alienated from our rapidly changing jet age society.²³

Lest these concerns appear too abstract, some lawmakers also focused on the material benefits to the federal government from the income taxes paid by higher-earning college graduates. As one lawmaker put it, “Investment in education by the Federal Government will be far more repaid, even if the cost is viewed in strictly economic terms.”²⁴

In their pursuit of greater accessibility of higher education, however, lawmakers did not focus on increasing the number of students of different racial backgrounds enrolling in and graduating from the nation’s colleges and universities. Rather, the specter of racial inclusiveness provoked tension in debate over the Act: a number of lawmakers worried that the law might limit the ability of fraternities and sororities to use criteria of their choice in deciding whom to admit.²⁵ The exchanges over this issue make apparent that although members of Congress saw the HEA as an effort to make college available to students who otherwise might not be able to attend, they understood the ambition of the law as limited and as distinct from the goals of legislation aimed explicitly at protecting civil rights. The HEA did not mandate affirmative action to increase the number of students of color on the nation’s campuses, for example; such initiatives spread instead as a result of executive action and college and university policy.²⁶

Indeed, race-conscious policies aimed at amelioration of the effects of centuries of exclusion on the basis of race have generated considerable controversy and the constitutionality of their use in the context of admissions decisions at selective institutions of higher education²⁷ has come before the U.S. Supreme Court more than once.²⁸ Resistance to policies that explicitly consider race in an effort to achieve greater diversity in higher education have generated a fierce backlash. In some states these policies have been curtailed by popular legislative action.²⁹ Federal legislators’ careful indifference to, if not avoidance of, race-conscious policies to increase the accessibility of college to students of

23. *Id.* at 21,892 (statement of Rep. Perkins).

24. *Id.* at 22,614–15 (1965) (statement of Sen. Hartke).

25. *See, e.g.*, 111 Cong. Rec. 22,667 (Sep. 2, 1965) (statement of Sen. Dirksen). Senator Dirksen spoke in support of an amendment “to insure the independence and freedom of our fraternal and social organizations.” There followed a lengthy discussion of the reach of the Civil Rights Act of 1964 onto college campuses and the authority of the federal government to intervene to require changes to fraternity and sorority admission processes. *See id.*

26. THOMAS FREEMAN, AFFIRMATIVE ACTION 1 (1975).

27. Not all of these cases have focused on undergraduate education. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), for example, involved a medical school.

28. A challenge to the consideration of race in the admissions process of the University of Texas at Austin was recently decided by the Court. *Fisher v. Univ. of Tex. at Austin*, No. 14-981 (June 23, 2016) (affirming the Fifth Circuit’s upholding of the University of Texas at Austin’s undergraduate admissions decisions under the Equal Protection Clause of the Fourteenth Amendment).

29. Such a move by voters prompted another challenge that ended up before the Supreme Court in *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623 (2014).

color highlights both the difficulty and the importance of recognizing the multidimensional nature of hurdles to higher education.

To make higher education more broadly available, the HEA established educational opportunity grants, available to poorer students to help pay tuition.³⁰ Unlike prior programs, it was limited neither to current and former members of the armed forces nor to students studying in fields that lawmakers deemed essential to national defense.³¹ Rather, financial need was the critical factor in determining eligibility.³² Through the 1970s Congress raised the size of this grant, which was renamed the Federal Pell Grant in honor of Senator Claiborne Pell in 1980,³³ so that before the end of the decade it covered most of the cost of attending a public, four-year college or university.³⁴

In the polarized political climate that has prevailed in the United States in the new millennium so far, the bipartisan consensus that favored the HEA may appear nothing less than astonishing. Not only did lawmakers reach agreement on the goal³⁵ of the Act, but they approved the means, drawing on both federal financial resources and on those of private entities operating in commercial markets, such as banks.³⁶ President Johnson championed the law, brought lawmakers along, and celebrated its achievement upon its signing, saying,

You are witnessing a historic moment. You should carry the memory and the meaning of this moment with you throughout your life. And when you look into the faces of your students and your children and your grandchildren, tell them that you were there when it began. Tell them that a promise has been made to them. Tell them that the leadership of your country believes it is the obligation of your Nation to provide and permit and assist every child born in these borders to receive all the education that he can take.³⁷

In the ensuing years, however, Congressional commitment to preserving the power of the law to promote access to higher education declined. Lawmakers failed to increase the maximum amount of money provided to each recipient of a Pell Grant while the cost of college steadily rose.³⁸

30. Higher Education Act, *supra* note 1, at § 401(a).

31. Glater, *supra* note 15, at 35 n.103, 37.

32. Higher Education Act, *supra* note 1, at § 404(b) (students are eligible for grant aid if they demonstrate “exceptional financial need; and . . . would not, but for an educational opportunity grant, be financially able to pursue a course of study at such institution of higher education”).

33. SUZANNE METTLER, *DEGREES OF INEQUALITY: HOW THE POLITICS OF HIGHER EDUCATION SABOTAGED THE AMERICAN DREAM* 59 (2014).

34. *Id.* at 53 fig. 2.1. The average grant actually exceeded tuition at a four-year public institution. *Id.*

35. In the House, the final vote on the conference committee report on the HEA was 313 to 63, with 75 Republicans in favor along with 238 Democrats. *Id.* at 63. The Senate passed the law by voice vote. *Id.* at 219 n.31.

36. Higher Education Act, *supra* note 1, at §§ 421 and 435(e) (respectively, creating a program of student loan insurance to protect private institutions that make loans to students and identifying which lenders are eligible to participate in the guaranteed loan program).

37. Johnson, *supra* note 2.

38. METTLER, *supra* note 33, at 53 (describing how Pell grants “stagnated in real terms; by 2011 they covered only 54 percent of the value of tuition, not including room and board” at a public, four-year university). Confronting this challenge, student borrowing increased. *Id.* at 53 fig. 2.1.

As a result, more students and families took advantage of another program under the 1965 law, a guaranteed loan program that enabled students to borrow at rates lower than commercial lenders would otherwise charge.³⁹ Initially the loan program was not the centerpiece of Title IV, the section of the HEA that dealt with student financial assistance and created the grant program, but its significance grew over time. Modest changes that made federally guaranteed loans accessible even to wealthier students and families increased the popularity of the loans.⁴⁰ According to the College Board, which tracks students' financing of higher education, undergraduate students in 2013 through 2014 borrowed in the aggregate nearly \$63 billion and received \$33.7 billion in Pell grants.⁴¹ Although the Obama Administration oversaw increases in the maximum amount provided to a student receiving a Pell grant, student borrowing has continued to increase. And even as it represents greater participation in higher education, growth in student indebtedness has simultaneously come to undermine the goals of federal student aid because the burden of debt constrains students who borrow.

B. The State of Access in the World Shaped by the HEA

Portraying the state of higher-education access is difficult. The student population is dynamic and trends take time to emerge. Further, the very notion of access is complicated by the diversity of higher educational experiences open to today's aspiring college students. They have the option to choose courses provided in a novel format as more institutions offer programs conducted entirely online, and to choose from a variety of institutional providers, from community colleges to for-profit and vocational schools, to traditional, residential public and private, nonprofit colleges and universities. The greater variety of postsecondary education institutions serving students, particularly the growth in popularity of for-profit institutions, is a relatively recent development.⁴² This section conveys the progress made in recent decades and analyzes the challenges that remain.

39. Higher Education Act, *supra* note 1, at §§ 421, 427.

40. Lawrence E. Gladieux, *Federal Student Aid Policy: A History and An Assessment*, in FINANCING POSTSECONDARY EDUCATION: THE FEDERAL ROLE 43, 46–47 (U.S. Dep't. of Educ., 1995) (describing legislative changes making student loans more accessible and subsequent increases in loan volume), <http://files.eric.ed.gov/fulltext/ED400775.pdf#page=45>.

41. COLLEGE BOARD, TRENDS IN STUDENT AID 2014 12 fig. 2A (2014), <http://trends.collegeboard.org/sites/default/files/2014-trends-student-aid-final-web.pdf>. Students also received another \$13.4 billion in other types of federal grants. *Id.*

42. In 1976 through 1977, there were fifty-five for-profit providers of higher education; in 2012 through 2013, there were more than 1,400, according to the federal Education Department. Institute of Education Sciences, Digest of Education Statistics, 2013 [hereinafter 2013 Digest] tbl. 317.10 (2013), http://nces.ed.gov/programs/digest/d13/tables/dt13_317.10.asp. In 1970, barely 18,000 students were enrolled at for-profit institutions, for example, while in 2012, more than 1.5 million were. *Id.* at tbl. 303.70, http://nces.ed.gov/programs/digest/d13/tables/dt13_303.70.asp. Over the same period, the number of students attending two-year programs, including community colleges, has increased sharply, rising from 2.3 million in 1970 to 7.2 million in 2012. *Id.* at tbl. 303.25, http://nces.ed.gov/programs/digest/d13/tables/dt13_303.25.asp.

The total number of students pursuing higher education has climbed for years. While in 1965, 5.9 million people were enrolled in a degree-granting postsecondary institution, in 2014, 20.2 million were.⁴³ The racial and ethnic diversity of the nation's postsecondary student population has increased dramatically and at every level. The number of black students enrolled in fall 2013 reached 2.9 million, from 1 million in 1976; Latino students totaled 3.1 million, up from barely 384,000 in 1976; and Asian-American students reached 1.3 million, from 198,000 in 1976.⁴⁴ This diversity persists across different levels of education programs, with more students than ever from historically marginalized groups receiving associate's degrees,⁴⁵ bachelor's degrees,⁴⁶ master's degrees,⁴⁷ and doctorates.⁴⁸ Among students of Asian descent, the number of degree recipients increased as much as tenfold in a period of roughly 35 years.⁴⁹

This diversity reflects changes in the demography of the United States population: In the United States in 2014, there were 197.9 million white people, 45.7 million black people, 20.3 million people of Asian descent, and 55.4 million people of Latinos⁵⁰—a population dramatically different from that in 1976, when there were 189 million white people, 25.2 million black people, and 3.8 million people the Census Bureau identified as belonging to “other races.”⁵¹

Despite the progress of students from groups historically excluded from and underrepresented in the nation's colleges and universities, in critical ways the diversity of the population of college graduations lags far behind that of the

43. 2014 Digest, *supra* note 3, at tbl. 303.10, http://nces.ed.gov/programs/digest/d14/tables/dt14_303.10.asp?current=yes. The Department estimates that in 2024, 23.1 million students will be enrolled. *Id.*

44. *Id.* at tbl. 306.10, http://nces.ed.gov/programs/digest/d14/tables/dt14_306.10.asp?current=yes. The trend has not been uniform; the total number of college students reached 21 million in fall 2010 and fell to 20.3 million in 2013. *Id.* Within particular racial and ethnic groups there have been fluctuations as well. The number of black college students reached a peak in fall 2010, when there were slightly more than 3 million enrolled. *Id.* The number of Asian-American college students in fall 2013 represented a decline from a peak achieved in 2009, when the total was 1.33 million. *Id.*

45. 2013 Digest, *supra* note 42, at tbl. 321.20, http://nces.ed.gov/programs/digest/d13/tables/dt13_321.20.asp.

46. 2014 Digest, *supra* note 3, at tbl. 322.20, http://nces.ed.gov/programs/digest/d14/tables/dt14_322.20.asp. There is diversity in the rates of growth: the number of white bachelor's degree recipients increased from 807,688 in 1976 through 1977 to 1.2 million in 2011 through 2012, an increase of 50%; the number of black recipients more than tripled in the same period, rising from 58,636 to 185,916; the number of Latinos rose more than nine-fold, rising from 18,743 to 169,736, and the number of Asians increased nearly ten times, rising from 13,793 to 126,177. *Id.*

47. 2013 Digest, *supra* note 42, at tbl. 323.20, http://nces.ed.gov/programs/digest/d13/tables/dt13_323.20.asp.

48. *Id.* at tbl. 324.20, http://nces.ed.gov/programs/digest/d13/tables/dt13_324.20.asp.

49. This is the case for Asian recipients of bachelor's, master's, and doctorates.

50. Census Bureau, Press Release: *Millennials Outnumber Baby Boomers and Are Far More Diverse*, *Census Bureau Reports*, June 25, 2015, Release Number CB15-113, <https://www.census.gov/newsroom/press-releases/2015/cb15-113.html>.

51. Census Bureau, Population Estimates—National Estimates by Age, Sex, Race—1900–1979, www.census.gov/popest/data/national/asrh/pre-1980/PE-11.html.

nation as a whole. While a greater share of high school graduates⁵²—in 2013, 66%⁵³—enroll in college now than at the Act’s passage, gaps persist across racial and ethnic groups. For example, in 2013, nearly 69% of white high school graduates and 80% of Asian high school graduates, but slightly less than 57% of black graduates and about 60% of Latinos, were enrolled in college.⁵⁴ Although the rate at which students of all backgrounds attend college has increased, the gaps across these different groups have persisted for decades.⁵⁵

Socioeconomic status correlates with college enrollment. Again, although 66% of high school graduates enrolled in college overall in 2013, only 46% of low-income graduates were enrolled, compared to 64% of middle-income students and nearly 79% of high-income students.⁵⁶ At selective institutions, especially private, nonprofit institutions, the student population is disproportionately well-off.⁵⁷ This is not to argue that selective institutions provide the only pathway to advancement⁵⁸—and it is a good thing that they do not, because these colleges and universities educate less than 20% of undergraduates.⁵⁹ Higher education generally, whether provided by an elite institution or not, correlates with many benefits, including higher earnings, for example.⁶⁰ Yet it is the more selective institutions that seem to garner the most media attention, that disproportionately produce alumni who walk the corridors of power, and that wield outsized cultural influence.⁶¹ The most elite institutions work hard to protect their privileged place in society and other colleges and universities replicate their practices in an effort to become more like them.⁶²

52. Or recipients of a GED. 2014 Digest, *supra* note 3, at tbl. 302.10 n.1, https://nces.ed.gov/programs/digest/d14/tables/dt14_302.10.asp.

53. *Id.* at tbl. 302.10, https://nces.ed.gov/programs/digest/d14/tables/dt14_302.10.asp.

54. *Id.* at tbl. 302.20, http://nces.ed.gov/programs/digest/d14/tables/dt14_302.20.asp?current=yes.

55. *Id.* The conclusion about the gap is based on three-year moving averages, to mitigate variability in the annual figures. *Id.* n.3.

56. *Id.* at tbl. 302.30, http://nces.ed.gov/programs/digest/d14/tables/dt14_302.30.asp?current=yes.

57. James C. Hearn & Kelly Ochs Rosinger, *Socioeconomic Diversity in Selective Private Colleges: An Organizational Analysis*, 38 REV. HIGHER EDUC. 71, 73 (2014).

58. *See, e.g., id.* at 71 (reviewing literature and concluding that “[a]lthough evidence of returns to attending a more selective institution is not uniformly positive, there is ample support” for the claim).

59. INSTITUTE OF EDUCATION SCIENCES, HIGHER EDUCATION: GAPS IN ACCESS AND PERSISTENCE STUDY 175 tbl. 34-3 (2012), <http://nces.ed.gov/pubs2012/2012046.pdf>. Highly selective institutions are defined as colleges and universities in which students in the twenty-fifth percentile earned a score greater than 21 on the ACT or an equivalent score on the SAT. *Id.* If a narrower but perhaps more intuitive definition is used, the percentage falls: about 5% of students in the United States attend colleges or universities that accept less than 25% of all applicants. 2014 Digest, *supra* note 3, at tbl. 305.4, http://nces.ed.gov/programs/digest/d14/tables/dt14_305.40.asp.

60. *See, e.g.,* David H. Autor, *Skills, Education, and the Rise of Earnings Inequality Among the “Other 99 Percent”*, 344 SCIENCE 843 (2014), <http://www.sciencemag.org/content/344/6186/843.full> (reporting on increasing financial returns to higher education).

61. For a more thorough, critical assessment of how higher education operates to protect the transmission of privilege from members of one generation to the next, see Rajani Naidoo, *Fields and institutional strategy: Bourdieu on the relationship between higher education, inequality and society*, 25 BRIT. J. SOC. EDUC. 457 (2004).

62. Leslie Killgore, *Merit and Competition in Selective College Admissions*, 32 REV. HIGHER EDUC. 469, 485 (2009).

Lower-income students, as well as black and Latino students, disproportionately enroll at for-profit colleges,⁶³ which report higher dropout rates,⁶⁴ higher debt burdens,⁶⁵ and higher student loan default rates.⁶⁶ One report found that 19% of poor students enroll at these institutions, as compared to approximately 5% of higher income students.⁶⁷ Attending a more selective institution does not necessarily produce a greater lifetime income effect than does attending a less selective one, but selectivity has important effects for poorer students. Research has found that poorer students are more likely to complete a course of study at a more selective institution.⁶⁸ This suggests, and it should not be a surprise, that what happens in college after admission matters.⁶⁹

The burdens of debt after graduation or, worse, after failure to graduate are also unevenly distributed across the student population. A greater share of lower-income students borrow, of course,⁷⁰ and racial and ethnic differences are evident here: about 52% of black, 42% of white, 36% of Latino, and 28% of Asian students borrow to fund their education and associated expenses.⁷¹ The differences likely reflect different levels of income or wealth, or both, and perhaps other factors, like willingness to borrow. Average loan amounts are higher for white students and black students than for Asians and Latinos;⁷² amounts are also higher for high-income students than for low-income students,⁷³ suggesting that perhaps, loans for students with greater financial resources are helping borrowers to finance attendance at more expensive

63. MAMIE LYNCH, JENNIFER ENGLE & JOSÉ L. CRUZ, THE EDUCATION TRUST, SUBPRIME OPPORTUNITY: THE UNFULFILLED PROMISE OF FOR-PROFIT COLLEGES AND UNIVERSITIES 2 (2010), <http://files.eric.ed.gov/fulltext/ED513339.pdf>; see 2014 Digest, *supra* note 3, at tbl. 306.50, http://nces.ed.gov/programs/digest/d14/tables/dt14_306.50.asp?current=yes. Of 2.9 million black students enrolled in any kind of degree-granting institution, 496,588—17%—attended for-profit institutions and of 3.1 million Latino students, 259,237, or slightly more than 8%, did; while of 11.6 million white students, 751,398 or slightly more than 6% and 53,414 or just over 4% of 1.2 million Asian students attended for-profits. 2014 Digest, *supra* note 3, at tbl. 306.50.

64. *Id.* at tbl. 326.20, http://nces.ed.gov/programs/digest/d14/tables/dt14_326.20.asp.

65. COLLEGE BOARD, *supra* note 41, at 23 fig. 14A (2014), <http://trends.collegeboard.org/sites/default/files/2014-trends-student-aid-final-web.pdf>.

66. U.S. DEP'T. OF EDUC., COMPARISON OF FY 2012 OFFICIAL NATIONAL COHORT DEFAULT RATES TO PRIOR TWO OFFICIAL COHORT DEFAULT RATES, <http://www2.ed.gov/offices/OSFAP/defaultmanagement/schooltyperates.pdf>.

67. INST. FOR HIGHER EDUC. POL'Y, INITIAL COLLEGE ATTENDANCE OF LOW-INCOME ADULTS 3 fig. 1 (2011), <http://www.ihep.org/research/publications/portraits-initial-college-attendance-low-income-young-adults?id=145>.

68. *Id.* at 1.

69. See, e.g., John Bound, Michael Lovenheim & Sarah Turner, *Why Have College Completion Rates Declined? An Analysis of Changing Student Preparation and Collegiate Resources* 5 (Nat'l Bureau of Econ. Research, Working Paper No. 15566, 2009), <http://www.nber.org/papers/w15566> (finding that college student preparation only partially explains different outcomes).

70. 2014 Digest, *supra* note 3, at tbl. 331.10, http://nces.ed.gov/programs/digest/d14/tables/dt14_331.10.asp?current=yes.

71. *Id.*

72. *Id.* at tbl. 331.35, http://nces.ed.gov/programs/digest/d14/tables/dt14_331.35.asp?current=yes.

73. *Id.*

institutions. Significantly, students with larger loan balances are not necessarily more likely to default; rather, borrowers with lower balances more often do so.⁷⁴

Default rates⁷⁵ also vary, although not necessarily as one might expect. Default rates are highest among students who attend for-profit institutions,⁷⁶ which account for 39% of all defaults.⁷⁷ Default rates are also higher at public, two-year institutions.⁷⁸ Graduation rates are lower at two-year public⁷⁹ and at four-year for-profit⁸⁰ institutions, and within each institution type, these default rates are lower for black and Latino students than for their white and Asian counterparts. These trends are almost certainly related: for-profit institutions and public two-year community colleges disproportionately serve poorer students and students who are African American or Latino.⁸¹

The challenge confronting students who belong to groups historically excluded from college is multidimensional, reflecting tangible, financial barriers as discussed above; implicit, and at times explicit, biases⁸²; and the impact of standardized tests on which wealthy students and white and Asian students tend to receive higher scores.⁸³ Poor students of color are vulnerable in multiple ways because they lack financial capital, cultural capital, and what might be called academic capital in the form of test scores. As Kimberlé Crenshaw observed in

74. Susan Dynarski, *Why Students with Smallest Debts Have the Larger Problem*, N.Y. TIMES (Aug. 31, 2015), http://www.nytimes.com/2015/09/01/upshot/why-students-with-smallest-debts-need-the-greatest-help.html?_r=0. This finding may relate to the higher default rates at public community colleges, which are typically less expensive than other types of institutions. Students who attend these colleges need to borrow smaller amounts, but if they fail to graduate or earn a high enough salary after completing a course of study, they will still face great difficulty in repayment. Further, it may be that those who borrow more are attending higher-cost programs that are associated with higher salaries, so repayment poses less of a burden and thus the likelihood of default is lower.

75. The default rate as reported by the federal Education Department reflects the share of borrowers in delinquency for 360 days or more, within three years of entering repayment. U.S. DEP'T OF EDUC., HOW THE COHORT DEFAULT RATES ARE CALCULATED 2.1-8, <http://ifap.ed.gov/DefaultManagement/guide/attachments/CDRGuideCh2Pt1CDRCalculation.pdf>.

76. This conclusion is based on the 2011 numbers, the most recent available from the federal Department of Education. 2014 Digest, *supra* note 3, at tbl. 332.50, http://nces.ed.gov/programs/digest/d14/tables/dt14_332.50.asp?current=yes.

77. Press Release, Inst. for College Access & Success, *supra* note 7.

78. *Id.*

79. At two-year, for-profit institutions, graduation rates are higher than at their public counterparts. 2014 Digest, *supra* note 3, at tbl. 326.20, http://nces.ed.gov/programs/digest/d14/tables/dt14_326.20.asp?current=yes. Within such institutions, black students experience lower graduation rates than white students and Asian students, while Latino students' graduation rates have improved and at times in recent years have exceeded those of white students. *Id.*

80. *Id.* at tbl. 326.10, http://nces.ed.gov/programs/digest/d14/tables/dt14_326.10.asp?current=yes.

81. *Id.* at tbl. 306.50, http://nces.ed.gov/programs/digest/d14/tables/dt14_306.50.asp?current=yes (calculations by author). Slightly more than one-third of white and Asian students did. *Id.*

82. See Devon Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130, 1134 & n.14 (2013) (discussing the role that implicit bias may play in the decisions of admissions officers at selective colleges weighing which African American applicants to admit).

83. See, e.g., COLLEGE BOARD, 2015 COLLEGE-BOUND SENIORS TOTAL GROUP PROFILE REPORT 4 tbl. 10, <https://secure-media.collegeboard.org/digitalServices/pdf/sat/total-group-2015.pdf>. The report shows that as family income rises, so do critical reading, mathematics, and writing test scores on the SAT. See *id.*

her classic articles on intersectionality, reform efforts must take into account the different dimensions in which the mechanisms of subordination operate.⁸⁴ This insight is particularly salient in the context of higher education access because of the various types of obstacles encountered by particular students pursuing college and also because of the conservative assault on race-conscious policies aimed at expanding access.⁸⁵ The failure to respond effectively to the all facets of the barriers students face, whether the result of policy myopia or adverse judicial action,⁸⁶ will correspondingly hinder efforts to help students overcome challenges, to matriculate, and to graduate.

Particular narratives around higher education have played a role in failure to take further steps to promote access. College has come to be perceived as a private good, a good that benefits the student who receives it rather than the wider society of which the student is a part.⁸⁷ This conception of education undermines arguments for public support of access: Why should anyone not directly benefitting from the education of another contribute to covering its costs? Next, it is accepted⁸⁸ that the allocation of educational resources should be governed by meritocratic principles, such that those with the highest levels of ability enjoy access to the highest quality education.⁸⁹ Merit trumps other values, such as equality of opportunity, that could justify a different allocation. Thus commitment to merit, conceived in terms of putatively objective assessments through standardized tests, poses a barrier to consideration of student characteristics, including race. Advocates for including race as a factor in allocation of opportunity must contend both with the argument that race should never be a factor in such decisions in order to remain committed to a “colorblind”⁹⁰ ideal, and with the argument that any link between assessed merit and race reflects characteristics of the assessed student that properly dictate who gets what. This reification of merit assessments has come under strong

84. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, in *CRITICAL RACE FEMINISM: A READER*, 23, 23–24 (Adrien K. Wing ed., 2d ed., 2003) (observing that “dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis,” such as race or sex, but not both).

85. The Supreme Court has weighed more than one challenge to the use of race in admissions at the University of Texas at Austin, for example. *See, e.g.*, *Fisher v. Univ. of Tex. at Austin*, No. 14-981 (June 23, 2016).

86. Courts and legislatures have accorded distinct doctrinal treatment to different types of difference in the context of education. Courts do not address race in the same way that they do disability, for example. These doctrinal differences, the premises that justify them, and their implications for advocates of progressive reform will be the subject of a future article.

87. David Labaree, *Public Goods, Private Goods: The American Struggle over Educational Goals*, 34 *AM EDUC. RES. J.* 39, 59 (1997) (describing the ascension of the view of education as a private good contributing to individual social mobility).

88. *See* Lani Guinier, *THE TYRANNY OF THE MERITOCRACY: DEMOCRATIZING HIGHER EDUCATION IN AMERICA* 17 (2015).

89. *Id.* at 56–57.

90. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

criticism⁹¹ but as of this writing remains a powerful determinant of higher education opportunity.

Socioeconomic status, race and ethnicity, and prior academic experiences affect higher education access and outcomes. The combination of trends, lagging racial and ethnic diversity and low socioeconomic diversity, suggests that a policy aimed at only one aspect of diversity is unlikely to address the other. If the mechanisms that determine access to college in the United States replicate preexisting, societal inequality along the lines of race and class, then successful reforms must change the ways those mechanisms use both of those student characteristics. The roles of two such mechanisms are the subject of part III.

III

TWO CRITICAL DETERMINANTS OF MEANINGFUL ACCESS

The interactions of a complex set of institutions that play a role in allocating higher education opportunity increasingly and disproportionately have come to serve students who are already privileged, not students who are poor, who are members of groups historically excluded from college campuses, or who are both. This trend presents a challenge: While the policies pursued through the HEA have enabled millions of students to reach college, growing reliance on debt to enable access at the same time limits opportunity and so undermines the achievement of the deeper goals federal aid programs pursue. This part provides an analysis of two critical mechanisms, debt and merit, that help determine higher education access.

A. Debt

More and more students borrow to pay for college⁹²—a result of increases in tuition that have exceeded students' family incomes⁹³ and of declines in grant aid provided.⁹⁴ Because debt has effects before, during, and after a student's higher education experience, admission, matriculation, and even graduation do not tell the whole story about access. Ex ante, the prospect of taking on debt may deter students from enrolling in college at all; if they do enroll, concern over and attempts to reduce cumulative indebtedness may adversely affect the

91. See, e.g., Lani Guinier, *THE TYRANNY OF THE MERITOCRACY: DEMOCRATIZING HIGHER EDUCATION IN AMERICA* (2015) (offering a critique of reliance on test scores in determining admission to selective colleges and universities).

92. This is well-documented, but a striking data point is included in a recent publication by the federal Department of Education, which reports that “more than half of first-time, full-time undergraduates borrow for college, compared with 40 percent in 2000.” U.S. DEP’T OF EDUC., *STRENGTHENING THE STUDENT LOAN SYSTEM TO BETTER PROTECT ALL BORROWERS 3* (2015), <http://www2.ed.gov/documents/press-releases/strengthening-student-loan-system.pdf>.

93. Adam Davidson, *Is College Tuition Really Too High?*, N.Y. TIMES MAG. (Sept. 13, 2015), <http://www.nytimes.com/2015/09/13/magazine/is-college-tuition-too-high.html>.

94. See, e.g., U.S. DEP’T OF EDUC., *supra* note 92, at 3 (describing “falling state investment in public higher education and rising costs at many institutions of higher education” as explanation of increasing student borrowing).

ability both to perform well academically and to take advantage of intangible benefits of a higher education experience. Ex post, indebted graduates face undesirable constraints in seeking careers and greater financial burdens as a result of repayment obligations. Indebted dropouts face the same burden but without the potential income-enhancing effect of a degree. These consequences of debt are addressed in the following paragraphs, in an order that tracks a student's decision-making process, from pre-admission to post-graduation.

First, prospective college students must decide whether to try to enroll. Some students do not want to borrow for college, and this debt aversion⁹⁵ may result in the decision not to pursue higher education. Assessing the prevalence of aversion is difficult because there may be other reasons that students do not use loans to pay for college. Students who have, or whose families have, lower incomes may be less likely to borrow, even if this means they cannot cover the costs of attendance.⁹⁶ Students of different racial or ethnic backgrounds borrow more: a greater share of black students borrows relative to white students, whereas a smaller share of Asian and Hispanic students borrows relative to white students.⁹⁷ If these borrowing patterns reflect an uneven distribution of debt aversion across the population of potential college students,⁹⁸ providing student loans to enable access is unlikely to be universally effective.

While enrolled, debt weighs on student borrowers and for some may have adverse effects both on academic performance and on likelihood of completion.⁹⁹ Working while enrolled, an intuitively appealing step to reduce eventual indebtedness, may affect academic performance.¹⁰⁰ Perhaps working

95. Although debt aversion has at least two distinct manifestations, related to the substantive terms of the obligation or the labeling of the debt as a loan, Gregory Caetano, Harry A. Patrinos & Miguel Palacios, *Measuring Aversion to Debt: An Experiment among Student Loan Candidates* 2–3 (World Bank Pol'y Res., Working Paper 5737, 2011), <http://papers.ssrn.com/sol3/Delivery.cfm/5737.pdf?abstractid=1895966&mirid=1>, that particular nuance does not affect the analysis here.

96. Sara Goldrick-Rab & Robert Kelchen, *Making Sense of Loan Aversion: Evidence from Wisconsin*, in *STUDENT LOANS AND THE DYNAMICS OF DEBT* 317, 323 (Brad Hershbein & Kevin M. Hollenbeck eds., 2014), <http://muse.jhu.edu/books/9780880994873/9780880994873-13.pdf>.

97. *Id.*; see also ALISA F. CUNNINGHAM & DEBORAH A. SANTIAGO, INST. FOR HIGHER EDUC. POL'Y, *STUDENT AVERSION TO BORROWING: WHO BORROWS AND WHO DOESN'T* 18 (2008), <http://www.ihep.org/sites/default/files/uploads/docs/pubs/studentaversiontoborrowing.pdf> (reporting that Asian and Latino students are less likely to borrow than African-American and white students even after taking into account such factors as institutional type).

98. And there is some evidence to support this. CUNNINGHAM & SANTIAGO, *supra* note 97.

99. See Brian K. Fitzgerald & Jennifer A. Delaney, *Educational Opportunity in America*, in *CONDITION OF ACCESS: HIGHER EDUCATION FOR LOWER INCOME STUDENTS* 3, 12–13 (Donald E. Heller ed., 2002) (“[R]esearchers have found that grants are more effective than loans at keeping students, particularly those from lower-income families, in college.”).

100. Todd R. Stinebrickner & Ralph Stinebrickner, *Working During School and Academic Performance* 1–3 (Univ. of Western Ontario, Dep't of Econ., Research Report No. 2000-9, 2000), <http://hdl.handle.net/10419/70361>. *But see* Rajeev Darolia, *Working (and Studying) Day and Night: Heterogeneous Effects of Working on the Academic Performance of Full-time and Part-time Students*, 38 *ECON. OF EDUC. REV.* 38, 47 (2014) (analyzing the relationship between hours worked by full-time and part-time college students and their grade point averages and credits completed, and finding that additional hours of work do not adversely affect academic performance). It may well be that different kinds of students are more or less able to juggle the demands of a job and college, making

consumes hours that would otherwise be available for study.¹⁰¹ On the other hand, if work takes the place of leisure activity rather than studying, it may not affect performance; and work experience may be valuable to students preparing to enter the full-time workforce after graduation.¹⁰² Debt may thus serve a disciplining function for some students under some conditions. One study found that borrowers were much less likely than nonborrowers to drop out of two-year colleges and slightly less likely to drop out of four-year programs.¹⁰³ Borrowers appear to be more likely than nonborrowers to enroll full-time and less likely to work full-time while enrolled—behaviors associated with graduation.¹⁰⁴

At the conclusion of borrowers' higher education experiences, debt affects students' options and how they perceive those options. Indebted graduates, to the extent that they have choices, may feel compelled to seek the highest-paying employment, rather than the most personally fulfilling or the most societally valuable one. Perhaps to some, this does not sound like a valid concern at all but rather is a mark of the success of the education received: students heed the messages of the job market as they should if education is all about tangible, financial returns. But there is some evidence that if students have the opportunity to pursue a different path, they will. A study of student behavior when a wealthy, highly selective, private, nonprofit university eliminated a loan component from its financial aid packages and instead offered grants, found that the debt-free, post-policy change students were more likely to take lower-paying jobs in public service.¹⁰⁵ How to use such a finding is unclear; there is no uncontroversial, normative guide. To those who believe that higher education should enable students to make decisions that realize their hopes and dreams, maybe the impact of debt on career choice is normatively undesirable. To those who believe that choosing a career path based on criteria other than remuneration is absurd, perhaps the finding strengthens the argument for requiring students to borrow, because debt encourages income-based decisionmaking. Either way, the effect is limited to those students carrying debt;

generalizations and conclusions about causation difficult.

101. See LAWRENCE GLADIEUX & LAURA PERNA, NAT'L CTR. FOR PUB. POL'Y & HIGHER EDUC., BORROWERS WHO DROP OUT: A NEGLECTED ASPECT OF THE COLLEGE STUDENT LOAN TREND 5 (2005), <http://files.eric.ed.gov/fulltext/ED508094.pdf> (concluding that working full-time while enrolled is "[a]mong the known risk factors for dropping out"). The authors suggest that delaying matriculation in order to reduce debt also is a risk factor for dropping out. *Id.* at 9.

102. Darolia, *supra* note 100, at 48. Working while enrolled may lower the later likelihood of student loan default. Volkwein et al., *supra* note 8, at 223.

103. GLADIEUX & PERNA, *supra* note 101, at 4–5.

104. *Id.* at 13.

105. Jesse Rothstein & Cecilia Elena Rouse, *Constrained After College: Student Loans and Early Career Occupational Choices* 34 (Nat'l Bureau of Econ. Research, Working Paper No. 13117, 2007), <http://www.nber.org/papers/w13117>. A study of law students at New York University receiving different financial aid packages reached a similar conclusion. Erica Field, *Educational Debt Burden and Career Choice: Evidence from a Financial Aid Experiment at NYU Law School* 14 (Nat'l Bureau of Econ. Research, Working Paper No. 12282 2006), <http://www.nber.org/papers/w12282.pdf>.

debt-free students are able to pursue the career of their choice. This is a subtler way in which debt is regressive in the context of higher education.

For those who do not complete a course of study, the constraints imposed by debt are worse. Dropouts face the obligation to repay without the benefit of a credential that could have boosted their income.¹⁰⁶ Not surprisingly, a review of scholarly literature on student loan default found that “completing a postsecondary program is the strongest single predictor of not defaulting regardless of institution type.”¹⁰⁷ The burden of repaying loans is more difficult for these students; debt has worsened the downside risk of borrowing to pay for college.¹⁰⁸ The impact of this repayment burden is regressive: students who drop out more often have low-income family backgrounds¹⁰⁹ and thus have fewer resources to cope with indebtedness and other life challenges that could interfere with the ability to make monthly loan payments.

B. Merit

In the context of the admissions process at more selective colleges and universities—and it bears repeating that a small fraction of the nation’s undergraduates attend such institutions—merit generally is assessed by reference to scores on standardized tests, grades in prior schooling, and applicants’ other experiences and activities.¹¹⁰ Although the early motivation for using such objective assessments of students might have been a laudable concern for more democratic access to higher education,¹¹¹ over time high test scores became an end in and of themselves, as markers of elite institutions and of the students who “deserved” to be there.¹¹² Today, beyond enabling admission, high scores and good grades may make students eligible to receive grants from their states of residence and non-need-based aid from colleges and universities; over the past two decades, a growing share of grant aid has been allocated on the basis of criteria other than financial need.¹¹³

Merit is such a powerful and compelling concept, especially at elite colleges and universities, that it has been recognized by Supreme Court doctrine. In upholding the consideration of race as a factor by the law school of the

106. GLADIEUX & PERNA, *supra* note 101, at 14.

107. Gross et al., *supra* note 8, at 25.

108. Glater, *supra* note 17, at 1581–83.

109. GLADIEUX & PERNA, *supra* note 101, at 6.

110. Killgore, *supra* note 62, at 471 (“Elite college admissions are typically described as concerned with the merit of the ‘whole’ person, which includes both academic and nonacademic characteristics.”).

111. Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 131 (2003).

112. *Id.* at 132.

113. COLLEGE BOARD, *supra* note 41, at 34 fig. 26A (2014) (reporting that in 2012 through 2013, twenty-five percent of the average state grant award was allocated on the basis of criteria other than financial need). If anything the College Board understates the amount of grant aid given on the basis of criteria other than financial need, because its report treats as “need-based” any aid for which financial circumstances contribute to eligibility. *Id.* Colleges and universities blend need-based and non-need-based aid awards.

University of Michigan when considering applicants, Justice O'Connor, writing for the majority, observed, "We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission."¹¹⁴ Thus, as the majority presented the argument, if the law school were to pursue diversity without considering race, it would have to reduce its academic selectivity. The Court considered alternative admissions regimes and found them wanting.

[A] lottery . . . would effectively sacrifice all other educational values, not to mention every other kind of diversity. So too with the suggestion that the Law School simply lower admissions standards for all students, a drastic remedy that would require the Law School to become a much different institution and sacrifice a vital component of its educational mission.¹¹⁵

"Academic selectivity" is so important an interest of the law school that it overcomes concern regarding the use of race. It is a legitimate interest, both in the sense that it is appropriate and in the sense that it is legally cognizable.

The justices find a conflict between merit and diversity, but they do not engage in as rigorous an analysis of merit as they undertake for diversity. If the Court were to take a closer look at merit, the justices just might be troubled that merit seems to correlate with wealth and privilege. Poorer students are dramatically underrepresented at selective institutions.¹¹⁶ Black students who take the standardized SAT tend to earn scores lower than those of white test takers¹¹⁷ and both black and Latino students have historically been underrepresented on the campuses of more-selective colleges and universities.¹¹⁸

These patterns mean, incidentally, that non-need-based grant aid mentioned above disproportionately goes to students whose families earn higher incomes—that is, to students who are less likely to need the money and who were more likely to go to college anyway.¹¹⁹ Perhaps standardized tests reflect

114. *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003).

115. *Id.*

116. CARNEVALE & ROSE, *supra* note 6, at 11.

117. WILLIAM G. BOWEN, MARTIN A. KURZWEIL & EUGENE M. TOBIN, *EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION* 156–57 (2005).

118. CARNEVALE & ROSE, *supra* note 6, at 10; *see also* David Leonhardt, *College Access Index, 2015: The Details*, N.Y. TIMES: THE UPSHOT (Sept. 16, 2015), <http://www.nytimes.com/2015/09/17/upshot/college-access-index-2015-the-details.html> (describing a ranking by the newspaper of socioeconomic diversity on college campuses and showing how many students from poorer backgrounds are enrolled). Graduation rates are also uneven across the population, with a smaller share of students from lower-income families receiving a degree and smaller shares of students who are African American or Latino completing courses of study than students who are white or Asian. 2014 Digest, *supra* note 3, tbl. 326.40, http://nces.ed.gov/programs/digest/d14/table_s/dt14_326.40.asp?current=yes; *see also* David Deming & Susan Dynarski, *Into College, Out of Poverty? Policies to Increase the Postsecondary Attainment of the Poor* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 15387, 2009), <http://www.nber.org/papers/w15387.pdf> (finding that African Americans are "about half as likely as non-Hispanic whites to earn a bachelor's degree . . . and Hispanics less than one-third as likely").

119. Donald E. Heller & Christopher J. Rasmussen, *Merit Scholarships: Evidence from Florida and Michigan, in WHO SHOULD WE HELP? THE NEGATIVE CONSEQUENCES OF MERIT SCHOLARSHIPS* 25, 35 (Donald E. Heller & Patricia Marin eds., 2002), <http://files.eric.ed.gov/fulltext/ED468845.pdf>; *see*

not just quality of primary and secondary institutions attended, but also enrichment opportunities enjoyed by students whose families have greater resources. Thus, these privileged students indeed have more of the skills that may be assessed, but to allocate opportunity on the basis of the assessment reinforces preexisting advantage—precisely what education could counter.¹²⁰ These findings should trouble anyone who believes that ability is not concentrated among the wealthy or otherwise privileged, such as the children of highly educated parents, or among particular racial or ethnic groups.

Research has found that there is an untapped pool of poor students with test scores high enough to enable them to gain admission at selective institutions, many of which would likely provide significant financial aid.¹²¹ One major study identified the racial and ethnic characteristics of the population of high-scoring students from low-income backgrounds, finding that 69% of such students were white, 15% were Asian, 8% were Latino, and 6% were black.¹²² The study estimated that there are “at least 25,000 and probably something like 35,000 low-income high achievers in the U.S.”¹²³ Unfortunately, even the enrollment of all those students at selective institutions would not correct racial and ethnic disparities in the student populations. Black students and Latino students are underrepresented in the pool of low-income, high-achieving students, while Asian students are overrepresented.¹²⁴

also Susan Dynarski, *The Consequences of Lowering the Cost of College: The Behavioral and Distributional Implications of Aid for College*, 92 AM. ECON. REV. 279, 281 (2002), <http://www.nber.org/~dynarski/2002%20Behavioral.pdf> (finding that the impact of the Georgia HOPE scholarship on increasing college attendance rates is “almost fully concentrated among white and upper-income youth”). These findings do not mean that non-need-based aid cannot have positive effects on enrollment by black students, for example. See Christopher Cornwell, David B. Mustard & Deepa J. Sridhar, *The Enrollment Effects of Merit-Based Financial Aid: Evidence from Georgia’s HOPE Program*, 24 J. LAB. ECON. 761, 781–82 (2006) (estimating that Georgia’s HOPE scholarship resulted in an increase in the number of black students enrolled in public and private institutions in the state).

120. And this is the rhetoric around education opportunity in popular, political discourse. See, e.g., Barack Obama, *Remarks of the President on Higher Education and the Economy at the University of Texas at Austin*, Aug. 9, 2010, www.whitehouse.gov/the-press-office/2010/08/09/remarks-president-higher-education-and-economy-university-texas-austin, (“[I]n this great country of ours, education and opportunity, they always go hand in hand.”).

121. SANDY BAUM, JENNIFER MA & KATHLEEN PAYEA, COLLEGE BOARD, *EDUCATION PAYS* 2013 38 (2013), <http://trends.collegeboard.org/sites/default/files/education-pays-2013-full-report-022714.pdf> (reporting that more than half of poorer students with the credentials to gain admission to highly selective institutions actually enroll at less selective colleges and universities).

122. Caroline M. Hoxby & Christopher Avery, *The Missing “One-Offs”: The Hidden Supply of High-Achieving, Low Income Students* 34 fig. 5 (Nat’l Bureau of Econ. Research, Working Paper No. 18586, 2012), <http://www.nber.org/papers/w18586>.

123. *Id.* at 11.

124. This conclusion is based simply on overall Census Bureau data (and may understate the issue, to the extent that black and Latino children make up a larger share of the younger population than blacks and Latinos overall do in the national population). According to the 2010 Census, of the 314.1 million people in the United States, 231.8 million or 74% are white, 39.6 million or 12.6% are black, and 15.7 million or 5% are Asian. U.S. CENSUS BUREAU, ACS DEMOGRAPHIC AND HOUSING ESTIMATES: 2010–2014 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_5YR_DP05&src=pt (percentage calculations by author). The table shows that there are 53.1 million residents of “Hispanic”

Policies aimed at promoting students with high scores on the basis of socioeconomic class may not simultaneously promote racial and ethnic diversity. It would be possible for selective institutions to admit thousands of high-scoring, poor, white students, achieving socioeconomic but not racial diversity. Likewise, policies aimed at promoting racial and ethnic diversity may not simultaneously enable socioeconomic diversity; some scholars have expressed concern that, for example, recent immigrants, rather than African Americans whose ancestors faced slavery and de jure segregation, constitute the majority of the black population at some of the nation's most elite colleges and universities.¹²⁵ Equity in higher education access will require innovative thinking not only about the criteria that should determine which students attend which institutions but also and more importantly about the values those criteria should endorse.¹²⁶

C. Present Challenges

This has been a cautionary tale about means and ends. The two mechanisms discussed above—financial aid policy's increased reliance on debt and selective institutions' overemphasis on a narrow definition of merit—have come to undermine the deep goals of the HEA. After all, credit is a tool that enables access, and merit ought to be a tool for discerning ability, or perhaps effort, or perhaps potential—all characteristics that need not work against equity in access. In theory, the availability of student loans enables access because poorer students can borrow to pay for college, can matriculate, and can graduate. Reliance on standardized tests to select those students to admit need not exclude those whose families have lower incomes or less wealth, or those who are members of minority groups. Both provision of credit and use of objective measures of merit could, again at least theoretically, promote meaningful access rather than limit it. But that is not what happens.

Although the HEA sought to enable and promote access, that goal was not an end in itself. Rather, advocates of an expanded federal role in higher education finance fifty years ago wanted to effect a broader diffusion of higher education through society in order to garner a variety of benefits. Meaningful access results in the realization of these benefits. Higher education access that does not achieve these other goals is less beneficial to the polity; to the extent that debt and merit fail, reform is appropriate.

descent (of various racial backgrounds), or 17% of the population, so Latinos appear to be underrepresented in the untapped pool of high-achieving, low-income students as well. *Id.*

125. Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, but Which Ones?*, N.Y. TIMES (June 24, 2004), <http://www.nytimes.com/2004/06/24/us/top-colleges-take-more-blacks-but-which-ones.html>.

126. It is beyond the scope of this article to explore the University of Colorado's effort to develop a set of admissions criteria aimed at identifying students who are outliers in their high schools and achieving both socioeconomic and racial diversity on campus. See Matthew N. Gaertner & Melissa Hart, *Considering Class: College Access and Diversity*, 7 HARV. L. & POL'Y REV. 367 (2013) (describing an initiative to develop an innovative admissions regime at the University of Colorado at Boulder).

The concept of meaningful access is not doctrinally novel, but it has not been applied in the fashion suggested here. Courts have used the phrase in analyzing the impact of interventions intended to make public school accessible to students with disabilities.¹²⁷ The context differs in that primary and secondary schooling is mandatory while higher education is not an entitlement. Yet there is benefit to mining the jurisprudence on access for students with disabilities because the oft-unspoken narratives that support affirmative steps to support these students differ from the narratives told in the context of other types of difference, especially race. Policy treatment of disabled students is also helpful because the law does not focus exclusively on the moment of admission but encompasses support provided while enrolled, to enable students to advance and graduate.

To provide access that is meaningful, schools must make “reasonable accommodations” for students with disabilities.¹²⁸ The critical question, nicely framed by a panel of the U.S. Court of Appeals of the Second Circuit, is “whether those [students] with disabilities are as a practical matter able to access benefits to which they are legally entitled.”¹²⁹

A critical difference in the analysis of meaningful access in this context is that courts evaluate the student experience in both absolute and relative terms. A school is *both* “prohibited from affording to persons with disabilities services that are ‘not equal to that afforded others,’ . . . [and] cannot prevent a qualified individual with a disability from enjoying ‘any aid, benefit, or service,’ . . . regardless of whether other individuals are granted access.”¹³⁰ Contemplating such a prohibition in the context of higher education cost and selection criteria may yield useful insights for reformers seeking to broaden college access. The narrative around students with disabilities challenges the presumption that a form of difference should not, or indeed may not, be accommodated by an educational institution. The burden is on the state to assist the disabled student, so that the student can develop and demonstrate skills learned, or merit. In this context neither policy nor doctrine addresses the concern that the education received by the student is a private good, no doubt because the education is an entitlement. Yet the conception of policy treatment of students with disabilities as affording proper accommodation that is consistent with meritocratic ideals

127. Interestingly, however, the case that courts often cite for the principle that access must be meaningful is *Alexander v. Choate*, which involved a challenge to a reduction in the number of days in the hospital that the state of Tennessee would pay for under Medicaid. *See generally* 469 U.S. 287 (1985). The plaintiffs argued unsuccessfully that the reduction discriminated against the disabled in violation of the federal Rehabilitation Act of 1973. *Id.* at 289. The Act in § 504 mandates that “[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .” *Id.* at 290 (quoting 29 U.S.C. §794, as amended, at the time of the case). The plaintiffs’ challenge was unsuccessful before the Supreme Court.

128. *Henrietta D. v. Bloomberg*, 331 F.3d 261, 273 (2d Cir. 2003).

129. *Id.*

130. *Id.* at 274.

rather than as special treatment that violates these ideals offers a template for other reforms—those aimed at widening higher education access.

IV

NAVIGATING THE RIVER

By the time students apply to college, they have already had a variety of educational experiences. Some have benefited from high school programs featuring advanced classes, deep support of their academic and personal growth, personal security, and an atmosphere of high expectations. Many have not, and they are disproportionately poor and African American or Latino.¹³¹ Any scheme to make college access more equitable confronts the diversity of primary and secondary schooling. Wholesale reform of the preschool, primary, and secondary educational experiences of youth in the United States would certainly promote higher education access. Although such wholesale reforms are regularly attempted, gaps in access persist.

Still, efforts at the postsecondary level are worth pursuing. There are various turning points on the pathways that lead to college, but the two identified in the preceding pages are the focus of this article because each alone can be dispositive. For students without adequate financial resources, college is out of reach. Without a favorable admission decision, college is out of reach. Consequently, reforms aimed at those two particular moments represent potentially meaningful interventions. Very briefly, here are a few such possible reforms, first related to managing the cost of college, then related to the meaning and measurement of merit in the admissions process:

Increase need-based grant aid at the state and federal levels. The Obama Administration oversaw an increase in the maximum size of Pell Grants, which are awarded to students who most need financial assistance, yet the purchasing power of the grants remains below both the level necessary to cover the cost of attendance and the level it reached at its peak, forty years ago. This will be costly but worthwhile, and enabling poorer students to attend college is politically appealing.

Expand income-based repayment programs to help student borrowers manage their education debts. Currently, students contemplating repayment of their federal loans after completing or dropping out of a course of study face a bewildering array of repayment plans. A subset of these plans limits the monthly payment obligation to a fraction of the borrower's income, and these programs should be consolidated and made the default option for all borrowers.¹³² Because these programs forgive student loans after a repayment

131. The United States is an outlier among nations, in that more advantaged students enjoy greater investment in their educational experiences. Eduardo Porter, *In Public Education, Edge Still Goes to Rich*, N.Y. TIMES (Nov. 5, 2013), <http://www.nytimes.com/2013/11/06/business/a-rich-childs-edge-in-public-education.html>.

132. Others have proposed this eminently sensible move. See, e.g., SUSAN M. DYNARSKI & DANIEL KREISMAN, THE HAMILTON PROJECT, LOANS FOR EDUCATIONAL OPPORTUNITY: MAKING

period of twenty years (or twenty-five years, depending on the program),¹³³ they provide a subsidy ex post, complementing the subsidy directed to the poorest students ex ante. The two approaches make sense: if debt deters poorer students from enrolling, then expanded grant aid gets them on campus; if debt affects student life choices in undesirable ways, then helping them to manage their obligations in a way that frees them to exploit the opportunities that their education affords makes sense.¹³⁴

Expand government support of public colleges and universities. The goal of this is not so much to limit tuition increases or even to reduce tuition—though sufficient support could achieve those goals—but to ensure that the quality of the education at the nation’s public institutions, which enroll the vast majority of students and in particular serve its poorer students, is high. Achieving this goal across different states would face serious political challenges given the cost. In the 2016 Democratic primary election, presidential candidates Hillary Clinton¹³⁵ and Bernie Sanders¹³⁶ both proposed a system of federal support that could achieve this goal. An expanded grant program that can decrease students’ cost close to zero could, too. But to the extent that either direct funding to institutions or grants to students is limited to public colleges and universities, the private, nonprofit institutions, many of which depend on tuition revenue to cover their costs and would not be able to match the resources or prices of bolstered public universities, would operate at a considerable disadvantage. Whether this is acceptable is a question beyond the scope of this article, but certainly the extent to which public resources should go to private nonprofit and private, for-profit institutions should be a subject of study and debate.

Reward colleges and universities that enroll a diverse student body by giving them—or their students—greater financial aid resources. The Obama Administration proposed and abandoned creating its own college evaluation system, which would have recognized institutions’ success in enrolling and graduating poorer students.¹³⁷ The ranking would have competed with other rankings¹³⁸ and was intended to provide an incentive for institutions to try

BORROWING WORK FOR TODAY’S STUDENTS (2013), http://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/THP_DynarskiDiscPaper_Final.pdf.

133. U.S. DEP’T OF EDUC., INCOME-DRIVEN PLANS, <https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven> (last visited Dec. 28, 2015).

134. In addition to repayment programs, repayment insurance could protect student borrowers from financial distress, without imposing the additional burden of paying a fraction of their income for 20 years. Glater, *supra* note 17, at 1605–06.

135. Hillary Clinton, *Hillary Clinton’s New College Compact Factsheet*, HILLARY FOR AMERICA: THE BRIEFING, <https://www.hillaryclinton.com/briefing/factsheets/2015/08/10/college-compact> (last visited Mar. 8, 2016).

136. Senator Sanders outlined his vision of federal role to expand higher education act in draft legislation. College for All Act, S. 1373, 114th Cong. (2015).

137. Michael D. Shear, *With Website to Research Colleges, Obama Abandons Ranking System*, N.Y. TIMES (Sept. 13, 2015), <http://www.nytimes.com/2015/09/13/us/with-website-to-research-colleges-obama-abandons-ranking-system.html>.

138. Most notably the rankings maintained by *U.S. News & World Report*. See Robert Morse & Diane Tolis, *Analyzing Colleges’ Graduation Rates for Low-Income Students*, U.S. NEWS & WORLD

harder to enroll a more socioeconomically diverse student body. Another approach would be to provide greater financial resources for student aid to those institutions that already have shown ability and willingness to enroll, support, and graduate students of diverse backgrounds. By directing support to financial aid in particular, this regime would not necessarily penalize institutions that need more financial resources in order to serve what might be a high-need student population—that is, it would not reward those that already have significant resources while penalizing those with less.¹³⁹

Support, recognize, and reward development and adoption of measures of merit that do not have disparate and adverse impacts based on wealth or race. This is related to the immediately previous proposal yet differs in focus, for it addresses the admissions process directly. Reforms in pursuit of this goal have often been defensive, adopted in response to actual or threatened limits on race-conscious admissions practices, but such reforms could also be adopted proactively and alongside, rather than instead of, consideration of race. More modern efforts to promote access need not adopt the single-issue focus undergirding prior legislative efforts. So institutions could, for example, de-emphasize test scores that are relatively weak predictors of undergraduate performance but have high disparate impact,¹⁴⁰ or could emphasize different criteria, like geography. Perhaps the most famous example of an attempt to do this is the Texas “top ten percent” plan, which “grants automatic admission to any public state college . . . to all students in the top 10% of their class at high schools in Texas that comply with certain standards.”¹⁴¹ This scheme had a positive effect on the representation of minority students at the state’s public, flagship university,¹⁴² but it is important to remember that the university has maintained a race-conscious admissions scheme alongside the ten-percent plan.¹⁴³ Other institutions have begun to experiment with different approaches

REPORT (Dec. 18, 2014, 9:30 AM), <http://www.usnews.com/education/blogs/college-rankings-blog/2014/12/18/analyzing-colleges-graduation-rates-for-low-income-students>.

139. It is possible that colleges and universities might respond strategically to the larger amounts of federal funding available, consistent with the so-called Bennett Hypothesis of former Education Secretary William J. Bennett. William J. Bennett, *Our Greedy Colleges*, N.Y. TIMES (Feb. 18, 1987), <http://www.nytimes.com/1987/02/18/opinion/our-greedy-colleges.html> (criticizing colleges and universities for raising tuition above the rate of inflation and complaining that although “Federal student aid policies do not cause college price inflation, . . . there is little doubt that they help make it possible.”). However, even if colleges and universities were to behave so strategically, as long as they continued to expand their recruitment of students from historically excluded groups, perhaps the price would be acceptable.

140. See, e.g., Rebecca Zwick & Jeffrey C. Sklar, *Predicting College Grades and Degree Completion Using High School Grades and SAT Score: The Role of Student Ethnicity and First Language*, 42 AM. EDUC. RES. J. 439 (2005) (assessing the power of the SAT as predictor of undergraduate academic performance and finding it overall less effective than high school grades).

141. *Fisher v. Texas*, 133 S.Ct. 2411, 2416 (2013).

142. Mark C. Long, Victor Saenz & Marta Tienda, *Policy Transparency and College Enrollment: Did the Texas Top Ten Percent Law Broaden Access to the Public Flagships?*, 627 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 82, 83 (2010) (surveying literature on the impact of the ten-percent plan and describing greater minority representation as “modest”).

143. *Fisher*, 133 S.Ct. at 2416.

to defining merit by, for example, seeking potential students who are outliers within the context of their high school. When facing a voter referendum that, if it had been successful, would have barred the consideration of race in admissions decisions, the University of Colorado at Boulder developed such a scheme, taking into account various student characteristics to identify high achievers.¹⁴⁴ Significantly, the adoption of this admissions approach would have enhanced both socioeconomic and racial diversity.¹⁴⁵

Reward institutions that effectively move students, including students who are members of groups historically underrepresented on college campuses, from matriculation to graduation. Although the moment of admission is undeniably critical to access, completion of the program of study matters, too, and the journey in between is a marathon. Different students with different abilities and skills enroll with different experiences that may have prepared them for college-level work to differing extents. Colleges should recognize such variation and provide the academic support, physical and mental health support, and mentorship that increase the odds of completion.¹⁴⁶ Students who are the first in their families to pursue higher education, students of color, students from poorer families, and students whose identities encompass two or more of these characteristics face worse odds of completion. The provision of various forms of support, recognizing students' varied and evolving needs, is an element of meaningful access that should be recognized as an important aspect of higher education, and that should be correspondingly incentivized.

These ideas for possible reforms have in common a recognition that the policies and practices determining who has access to higher education can and should evolve as we learn what works. The disparities in higher education opportunity briefly identified and analyzed in the preceding pages do not in themselves reveal how many or which students should go to this or that kind of college or university. There is no normative baseline to which we can safely refer because our ideas of what the characteristics of the college student population should be have changed, and they will continue to do so. The dynamism of national ideals creates a challenge but, like every challenge, also creates an opportunity. Perhaps it is possible to engage in an informed debate, which the arguments in this article will hopefully enhance.

144. Gaertner & Hart, *supra* note 126, at 378–79. The ballot initiative banning consideration of race failed, so the findings of the authors of this referenced article are based on a comparison of the unchanged admissions regime and the newly designed version. *See id.* at 390. However, the authors note that the results at the University of Colorado might not be achieved at an institution with a different profile. *See id.* at 399–400 (“This study suggests that the effectiveness of class-based affirmative action with respect to maintaining racial diversity hinges upon the sizes of the boosts class-based systems confer”), and so a focus on class to the exclusion of race might result in less racial diversity.

145. *Id.* at 392.

146. Some colleges and universities have already attempted to act on the insight that thoughtful and informed institutional support can promote completion. David L. Kirp, *What Can Stop Kids From Dropping Out*, N.Y. TIMES, May 6, 2016, at SR3.

V

CONCLUSION

Higher education opportunity in the United States is unevenly distributed along lines of class, race, and ethnicity, and consequently life opportunities associated with higher education are also unevenly distributed. The institutions and practices that determine who goes to college function to reinforce preexisting societal inequality along the lines of class and race. This article has provided an analysis of the inequitable distribution of higher education opportunity and of two critical mechanisms—the requirement that students use loans to pay for college and the requirement that applicants to selective colleges and universities display certain indicia of “merit”—that affect that distribution. This article suggests that reform efforts must attend to the multidimensionality of barriers that students confront and provides a guide to thinking about the effects on access of both race and class, in order to promote greater equity in access.