CLASS DISMISSED: Rethinking Socio-Economic Status and Higher Education Attainment

Omari Scott Simmons[†]

ABSTRACT

Keeping higher education affordable and accessible for many Americans is an integral part of furthering the public good. Although legal scholars have given considerable attention to K–12 educational disparities as well as the constitutionality and fairness of admissions practices at selective higher education institutions, they have ignored significant barriers that limit higher education attainment for many low socio-economic status (SES) students. Similarly, the existing regulatory architecture, including federal, state, and institutional policies, inadequately addresses the higher education needs of low-SES students. This article responds to this significant gap in legal scholarship. Advancing higher education attainment for low-SES students presents a rare opportunity for the Obama administration to leave an enduring reform legacy much in the same way Roosevelt achieved with the GI Bill and Lincoln with the Morrill Act. The heightened focus on higher education attainment for low-SES students is also quite timely given the nation's slow economic growth and the Supreme Court's recent decision in *Fisher v. Texas*. These factors, among others, have prompted higher education observers to consider the use of class as an alternative to the use of race in college admissions and beyond. In this legal, economic, and political environment, reforms targeting higher education attainment for low-SES students take on added significance. In response to these challenges, this Article proposes a more comprehensive K–16 framework to guide future reforms targeting higher education attainment for low-SES students. These reforms include: a rigorous K–12 education for a greater number of students, a transitional bridge between secondary school and

---

†. © 2014 Professor of Law, Wake Forest University School of Law; Executive Director, Simmons Memorial Foundation, Inc.; LL.M., University of Cambridge; J.D., University of Pennsylvania; B.A., Wake Forest University. I would like to thank Wendy Parker, Charles Lawrence, Michael Olivas, William Kaplan, Leland Ware, Sarah Watts, Kwasi Asare, and Timothy Davis for their insights. Also, I would like to thank Sally Irvin, Ben Reed Zakarin, Aly Campbell, Nicholas Illuminati, and Tiffany Chadwick for their valuable research assistance.

higher education, college-level reforms from federal, state, and institutional actors, and a presidential commission exclusively targeting higher education equity.

TABLE OF CONTENTS

INTRODUCTION 234

I. THE CURRENT HIGHER EDUCATION LANDSCAPE 245
A. Policy Environment 245
B. Higher Education Environment 248
1. Traditional Four-Year Colleges and Universities 250
2. Community College Trends 253
3. For-Profit Colleges & Universities 254
4. Vocational Schools 256
C. Political Economy 257

II. JUSTIFICATIONS FOR HIGHER EDUCATION ACCESS 259
A. Individual 260
B. Societal 261
C. Historical 262
1. The Morrill Acts I & II: Land Grant Schools and the Emergence of Public Colleges 263
2. The G.I. Bill 266
3. The Truman Commission Report on Higher Education 1947 .269
4. The Great Society and Civil Rights 270

III. FUTURE STEPS TOWARD EXPANSION 272
A. Presidential Commission on Higher Education Access and Equity 273
B. A Rigorous K–12 Education for Low-SES Students 275
C. College Counseling and Financial Literacy 277
D. Higher Education Level Reforms 281
1. Bolstering Need-Based Financial Aid Policies 282
2. Admissions practices that better reflect student potential rather than serving as a proxy for SES 292
3. Recommitting Public Institutions to their Public Missions 297

CONCLUSION 298

Higher education can't be a luxury—it is an economic imperative that every family in America should be able to afford.[1]

INTRODUCTION

Despite the historical expansion of higher education opportunities to broader segments of the populace, the United States has two higher education systems: one serving the privileged and another serving the vulnerable. Keeping higher education affordable and accessible for many Americans is an integral part of the American Dream. Yet the current regulatory architecture inadequately addresses the higher education needs of low socio-economic status ("SES") students. Although legal scholars have given considerable attention to K–12 educational disparities and the constitutionality and fairness of admissions practices at selective higher education institutions, they have ignored significant barriers that limit higher education attainment for many low-SES students. This Article addresses this critical gap in legal scholarship. A wealth of research highlights the strong correlation between low-SES—an important measure encompassing family income, education, and occupation—and limited higher education attainment.[2] Research consistently shows that finances are

1. President Barack Obama, Remarks by the President in State of the Union Address (Jan. 24, 2012) (transcript available at http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address).

2. As Professor Howard Gardner of Harvard's Graduate School of Education notes: "Tell me the zip code of a child and I will predict her chances of college completion and probable income; add the elements of family support (parental, grandparental, ethnic and religious values) and few degrees of freedom remain, at least in our country." Howard Gardner, *Paroxysms of Choice*, N.Y. REV. BOOKS, Oct. 19, 2000, at 44, 49 (reviewing books discussing charter schools and voucher programs), *available at http://www.nybooks.com/articles/archives/2000/oct/19/paroxysms-of-choice/*; *see also* WILLIAM G. BOWEN ET AL., EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION 73–94 (2005) (studying barriers that limit college opportunities for low-SES students); Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, *in* AMERICA'S UNTAPPED RESOURCES: LOW INCOME STUDENTS IN HIGHER EDUCATION 101, 106 (Richard D. Kahlenberg ed., 2004) (finding that only three percent of students at selective colleges and universities come from the bottom socioeconomic quartile, compared to seventy-four percent from the richest quartile); MITCHELL L. STEVENS, CREATING A CLASS: COLLEGE ADMISSIONS AND THE EDUCATION OF ELITES 15 (2007) (describing the significant advantages that high-SES parents, "[k]eenly aware of the terms of elite college admission," can provide to mold their children into "ideal [college] applicants"); Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631, 632–33 (2011) (finding that only five percent of American students at prestigious law schools come from families in the entire bottom half of the national SES distribution).

the primary deterrent for academically-qualified students who do not enroll in college.[3] Low-SES individuals constitute a significant proportion of the nation's populace, spanning multiple demographics including gender, race, ethnicity, and geography.[4]

In light of the nation's recent economic woes, higher education affordability and accessibility for lower, working, and middle-class students have become an important part of the national dialogue. Advancing higher education attainment for low-SES students presents a rare opportunity for the Obama administration to leave an enduring reform legacy, much in the same way as Roosevelt achieved with the GI Bill, and as Lincoln achieved with the Morrill Act.[5] The heightened focus on college access for low-SES students is also quite timely given the Supreme Court's recent decision in *Fisher v. University of Texas*. The *Fisher* decision has resuscitated, albeit indirectly, the class discussion in higher education.[6] Although the Supreme Court in *Fisher* essentially affirmed its decision in *Grutter v. Bollinger*, it now requires institutions that use race-conscious admissions practices to prove to courts that "no workable race-neutral alternatives would produce the educational benefits of diversity."[7] This state of affairs has prompted higher education observers to consider the use of class as an alternative to

3. Laura W. Perna, *Toward A More Complete Understanding Of The Role Of Financial Aid In Promoting College Enrollment: The Importance Of Context*, *in* HIGHER EDUCATION: HANDBOOK OF THEORY AND RESEARCH 131 (John C. Smart ed., 2010). In 2008, the postsecondary enrollment rate of recent high school graduates for the lowest quintile of American families was 55%, compared with an 80% enrollment rate in the top quintile; yet this understates the gap, because this measure includes only those who have graduated high school. *See* BAUM ET AL., COLLEGE BOARD, EDUCATION PAYS 2010: THE BENEFITS OF HIGHER EDUCATION FOR INDIVIDUALS AND SOCIETY 34–35 (2010), *available at* http://trends.collegeboard.org/sites/default/files/education-pays-2010-full-report.pdf.

4. The majority of low-SES students in the United States are white; however, low-SES is more concentrated among minority populations, particularly Hispanics and African Americans. *See* WILLIAM G. BOWEN ET AL., CROSSING THE FINISH LINE: COMPLETING COLLEGE AT AMERICA'S PUBLIC UNIVERSITIES 73 (2009). The demographic breakdown for recipients of Pell Grants, the federal government's primary form of assistance for low-income students, follows a similar pattern. *Id.*

5. Kevin Carey, *Higher-Education Reform: A Legacy for Obama?*, CHRON. HIGHER EDUC., Jan. 25, 2013, at A56, *available at http://chronicle.com/article/Higher-Education-Reform-a/136737/.*

6. Fisher v. Univ. of Tex., 645 F. Supp. 2d 587 (W.D. Tex. 2009), *reh'g denied*, 631 F.3d 213 (5th Cir. 2011), *petition for cert. filed*, 644 F.3d 301 (5th Cir. 2011); *see also* Kimberly A. Pacelli, Note, Fisher v. University of Texas at Austin*: Navigating the Narrows Between* Grutter *and* Parents Involved, 63 ME. L. REV. 569, 569 (2011).

7. Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2420 (2013).

the use of race in college admissions and beyond.[8] In this legal environment, college access reforms targeting low-SES students take on added significance.

In response to the struggling economy, record student debt levels, and mounting loan defaults, the Obama administration has pursued a range of efforts to promote college access and affordability: increasing Pell Grant amounts for low-income students, maintaining lower interest rates on student loans, direct government lending to students, adopting lenient income-based student loan repayment programs, proposing performance-based funding to incentivize institutions to enroll and graduate greater numbers of low-SES students, and using the bully pulpit to encourage states and institutions to control rising tuition costs.[9] These efforts alone, however, will not surmount the complex obstacles to obtaining higher education that low-income and working-class families face. These obstacles conspire at the individual, family, school, societal, and policy levels to limit students' higher education choices.[10] Addressing these layered obstacles is vital to the nation's long-term interests.

---

8. *See generally* William Darity, Jr. et al., *Who Is Eligible? Should Affirmative Action Be Group- or Class-Based?*, 70 AM. J. ECON & SOC. 238 (2011); Barbara J. Flagg, Essay, *Diversity Discourses*, 78 TUL. L. REV. 827 (2004); Roland G. Fryer, Jr. et al., *An Economic Analysis of Color-Blind Affirmative Action*, 24 J.L. ECON. & ORG. 319 (2008); Eboni S. Nelson, *What Price* Grutter*? We May Have Won the Battle, But Are We Losing the War?*, 32 J.C. & U.L. 1 (2005); L. Darnell Weeden, *Employing Race-Neutral Affirmative Action to Create Educational Diversity While Attacking Socio-Economic Status Discrimination*, 19 ST. JOHN'S J. LEGAL COMMENT. 297 (2005); Danielle Ledford, Note, *Is Race Neutrality a Fallacy? A Comparison of the U.S. and French Models of Affirmative Action in Higher Education*, 46 TEX. INT'L L.J. 355 (2011).

9. Kelly Field, *College Leaders Leave White House Summit Inspired to Act*, CHRON. HIGHER EDUC., Jan. 17, 2014, *available at* http://chronicle.com/article/College-Leaders-Leave-White/144075/ (The President organized White House Summit with 140 college leaders, business people, foundation heads, and nonprofit executives for the purposes of "[working] together to get more low-income students into, and through, college."); *see also* Katherine Skiba & Jodi S. Cohen, *Obama in push for more poor students to go to college*, CHI. TRIB., Jan. 16, 2014, *available at* http://articles.chicagotribune.com/2014-01-16/news/chi-obama-in-push-for-more-poor-students-to-go-to-college-20140116_1_college-preparation-low-income-students-more-than-100-colleges (President Obama appealed for the country to do more to ensure low-income students are able to attend college. The President went on to say that only 30 percent of low-income students enroll in college right after high school and "far worse, by their mid-20s, only 9 percent earn a bachelor's degree."); Kevin Carey, *Obama's Bold Plan to Reshape American Higher Education*, CHRON. OF HIGHER EDUC., (Feb. 13, 2013), http://chronicle.com/blogs/conversation/2013/02/13/obamas-bold-plan-to-reshape-american-higher-education/; Michael D. Shear, *Obama to Offer Plans to Ease Burden of Paying for College*, N.Y. TIMES, (Aug. 20, 2013), http://www.nytimes.com/2013/08/21/education/obama-to-offer-plans-to-ease-burden-of-paying-for-college.html?_r=0.

10. *See* Perna, *supra* note 3, at 129.

The United States is losing its edge over other industrialized nations with respect to college completion rates.[11] To counter this trend, the Obama administration adopted an ambitious goal to lead the world in college graduates by 2020. In the address where President Obama announced this 2020 college completion goal, he also challenged every American "to commit to at least one year or more of higher education or career training"; this could include community college, a four-year degree, vocational training, or some type of apprenticeship.[12] The Obama administration's 2020 goal reflects the long-term necessity of investing in human capital.[13] Reaching this goal inevitably requires increasing the college completion rates of underserved students, particularly low- and moderate-income students.

Nationwide, approximately 40 percent of the 52 million students in public K–12 schools come from low-income families, and that number is growing.[14] In certain regions of the country such as the South, the percentage of low-income students rises above 50 percent.[15] In 2006, the Advisory Committee on Student Financial Assistance estimated that between 2000 and 2010, 1.4–2.4 million students from low- and middle-income families would be academically qualified for college but would not complete a bachelor's degree due to financial obstacles.[16] This population of academically prepared students presents an opportunity to raise the nation's college degree production and further the public good.

---

11. *Lumina Foundation Strategic Plan 2013–2016*, LUMINA FOUND. (Feb. 5, 2013, 12:00 PM), http://www.luminafoundation.org/goal_2025.html.

12. President Barack Obama, Remarks by the President in the Address to Joint Session of Congress (Feb. 24, 2009) (transcript available at http://www.whitehouse.gov/the_press_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress).

13. Lorelle L. Espinosa, *Raising Graduation Rates Involves More Than Just Colleges*, CHRON. HIGHER EDUC., Dec. 12, 2010, at A22; Tamar Lewin, *Once a Leader, U.S. Lags in College Degrees*, N.Y. TIMES, July 23, 2010, at A11; Press Relase, Office of the Press Secretary, Fact Sheet: President Obama's Blueprint for Keeping College Affordable and Within Reach for All Americans (Jan. 27, 2012) (available at http://www.whitehouse.gov/the-press-office/2012/01/27/fact-sheet-president-obama-s-blueprint-keeping-college-affordable-and-wi).

14. S. EDUC. FOUND., A NEW MAJORITY: LOW INCOME STUDENTS IN THE SOUTH'S PUBLIC SCHOOLS 8–9 (2007), *available at* http://www.southerneducation.org/getattachment/b1995557-faec-42a1-a951-5fad5491b9e4/Publications/A-New-Majority-Low-Income-Students-in-the-South-s.aspx.

15. Of the 18,010,223 students enrolled in "Southern" public schools in 2006–2007, 54% were considered "low income." *Id.* at 15. Here, the "South" encompasses: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. *Id.*

16. Perna, *supra* note 3, at 131–32.

A wealth of recent research illustrates that too many capable low-SES students are derailed in their pursuit of a college degree. Low-SES students, when compared to their more privileged peers, are less likely to attend college. Those who do pursue higher education cluster at vocational schools, community colleges, for-profit colleges, and less selective four-year colleges.[17] They also tend to require remediation and have lower degree completion rates. Meanwhile, middle- and upper-class students with similar academic qualifications cluster at more selective four-year colleges and are more likely to complete their degrees.[18] At first glance, the expansion of higher educational opportunities for low-SES students, in an absolute sense, should close, rather than widen, socio-economic disparities.[19] A deeper examination, however, reveals a troubling higher education sorting pattern that threatens to perpetuate the social and structural imprint of existing class hierarchies. In short, low-SES not only constrains a student's choice concerning whether to attend college, but also the choice of where to attend.[20]

Although laudable, the Obama administration's 2020 goal has its critics. They question whether, in today's stagnant economy, the cost of a college degree is worth the investment and corresponding student debt load.[21] Other

---

17. According to Anthony Carnevale and Jeff Strohl, 240,000 high-achieving, low-income high school students do not attend the nation's elite universities, where graduates can earn potentially $2 million more over a lifetime. Sixty thousand of these students are Black and Latino. ANTHONY P. CARNEVALE & JEFF STROHL, SEPARATE & UNEQUAL: HOW HIGHER EDUCATION REINFORCES THE INTERGENERATIONAL REPRODUCTION OF WHITE RACIAL PRIVILEGE 7–11 (2013), *available at* http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/Separate&Unequal.FR.pdf.

18. *See* JENNY NAGAOKA, MELISSA RODERICK & VANESSA COCA, BARRIERS TO COLLEGE ATTAINMENT: LESSONS FROM CHICAGO 4 (2009), *available at* http://www.americanprogress.org/issues/2009/01/pdf/ChicagoSchools.pdf.

19. *See* BOWEN ET AL., *supra* note 4, at 9–10.

20. Income gaps alone may actually understate the degree of socio-economic imbalance because discrepancies in household wealth reflect an even dimmer outlook. The Great Recession has exacerbated these decreases in household wealth as well as intra-group and inter-group wealth gaps. Between 2005–2009, household wealth fell in the U.S. by 28%. Compared to a 16% decrease for white households between 2005–2009, Hispanic household wealth fell 66% and black household wealth fell 53%, respectively. RAKESH KOCHHAR ET AL., PEW RES. CTR., WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS AND HISPANICS 1, 13–14 (2011), *available at* http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf. The median household wealth for Whites is roughly 18 times more than Hispanic households and 20 times more than black households. *Id.* at 14. These wealth gaps between Whites, Hispanics, and Blacks are the largest since the government began recording these statistics over two decades ago. *Id.* at 1.

21. *See, e.g.*, PEW RES. CTR., IS COLLEGE WORTH IT? 1 (2011), *available at http://www.pewsocialtrends.org/files/2011/05/higher-ed-report.pdf* ("A majority of Americans

commentators cite the difficulty college graduates face securing jobs, how the influx of underprepared students at selective colleges may undermine educational standards, how colleges fail to prepare graduates for the workforce, and how the "college for all" mantra ignores a significant number of students who would be better served by high quality vocational training.[22] These critiques, however, are not new and mirror the historical opposition to various attempts to expand college access to low-SES students.[23] Even if these critiques raise valid concerns, these concerns do not outweigh the many societal and individual benefits generated by expanding higher education attainment to broader segments of the U.S. population, particularly low-SES students.

The U.S. is at a critical juncture in its history where the steps taken to advance higher education attainment today among low-SES students, similar to the G.I. Bill following World War II, could have profound

---

(57%) say the higher education system in the United States fails to provide students with good value for the money they and their families spend."); Roger Roots, *The Student Loan Debt Crisis: A Lesson in Unintended Consequences*, 29 SW. U. L. REV. 501, 520 (2000) ("[W]hile the number of college graduates has skyrocketed, the value and importance of a college education in the marketplace has decreased greatly."); Ben Wieder, *Thiel Fellowship Pays 24 Talented Students $100,000 Not to Attend College*, CHRON. HIGHER EDUC. (May 25, 2011), http://chronicle.com/article/Thiel-Fellowship-Pays-24/127622/; *see also* Daniel Indiviglio, *Chart of the Day: Student Loans Have Grown 511% Since 1999*, THE ATLANTIC (Aug. 18, 2011, 2:15 PM), http://www.theatlantic.com/business/archive/2011/08/chart-of-the-day-student-loans-have-grown-511-since-1999/243821/ (depicting the escalation of student loan debt in the past decade). Criticism of the value of college education has existed for decades, even when student loans were less burdensome and the job market was less volatile. *See, e.g.*, HOWARD R. BOWEN, INVESTMENT IN LEARNING 449–60 (1977) (analyzing such criticism, although ultimately concluding that higher education is worth its cost).

22. *See* WILLIAM C. SYMONDS, ROBERT B. SCHWARTZ & RONALD FERGUSON, PATHWAYS TO PROSPERITY: MEETING THE CHALLENGE OF PREPARING YOUNG AMERICANS FOR THE 21ST CENTURY 2–7 (2011), *available at* http://www.gse.harvard.edu/news_events/features/2011/Pathways_to_Prosperity_Feb2011.pdf (contending that our national strategy for education has been too narrowly focused on a collegiate approach and advocating for a more occupational training orientated approach); Anthony P. Carnevale, *College For All?*, CHANGE, Jan./Feb. 2008, at 22, 29 ("We need to aspire to a dual bottom line in American higher education, strike a pragmatic balance between education's growing economic role and its traditional cultural and political independence from economic forces. . . . Increasing the pragmatic relevance of education should extend educators' ability to empower Americans to do work of the world, rather than to retreat from it."); Ben Wildavsky, *What's a College Major Worth?*, CHRON. HIGHER EDUC. (Jan. 4, 2012, 4:22 PM), http://chronicle.com/blogs/worldwise/whats-a-college-major-worth/28994 (comparing the United States higher education system with that of China).

23. *See infra* Part III.C.

consequences on the nation's future prosperity and the public good.[24] The "public good" is admittedly an ambiguous term without a simple definition. Some degree of consensus, however, has emerged around certain educational outcomes that are often equated with the public good, such as greater social cohesion, robust democratic participation, economic growth, reduced poverty rates, broad diffusion of information and technology, and the development of common values.[25]

Seismic demographic shifts in the U.S. population, along with changes in the global economy, also merit the expansion of higher education.[26] According to Secretary of Education Arne Duncan, the U.S. cannot turn a blind eye to "the educational inequities of today" since they will "translate into the economic obsolescence of tomorrow."[27] If current trends continue, the U.S. will face a shortage of 14 million college-educated workers by 2020, as approximately 70 million baby boomers retire.[28] By that time, six out of ten jobs in the U.S. economy are projected to depend on highly trained workers with college degrees.[29] Future workforce demand requires expanding college access. As William Bowen astutely observes:

---

24. *See* Proclamation No. 6703, 59 Fed. Reg. 32,643 (June 21, 1994) (reflecting on how the G.I. Bill "paved the way for an unparalleled period of U.S. economic growth and development").

25. Brian Pusser, *Higher Education, Markets, and the Preservation of the Public Good*, *in* EARNINGS FROM LEARNING: THE RISE OF FOR-PROFIT UNIVERSITIES 23, 26–27 (David W. Breneman et al. eds., 2006) (discussing underinvestment in the absence of government intervention).

26. *See* BOWEN ET AL., *supra* note 4, at 8–9 (noting that the majority of the U.S. population is projected to be non-Caucasian by 2042); *see also* Ronald G. Ehrenberg, *How Governments Can Improve Access to College*, CHRON. REV., April 6, 2007, at B6, *available at* http://chronicle.com/article/How-Governments-Can-Improve/9244 ("[T]he United States no longer leads the world in college-completion rates; improving those rates is important to the nation's economic well-being. . . . [T]he inequalities in access for students from different income groups have narrowed only slightly during the last 25 to 30 years, and inequalities in college-completion rates have narrowed even less. . . . [Furthermore,] the population groups that are growing the most rapidly have historically been underrepresented in higher education.").

27. Arne Duncan, Sec'y, U.S. Dep't of Educ., Remarks on the 45th Anniversary of "Bloody Sunday" at the Edmund Pettus Bridge, Selma, Alabama: Crossing the Next Bridge (Mar. 8, 2010). President Obama has definitively agreed, stating: "[e]ducation is the economic issue of our time." Barack Obama, Remarks by the President on Higher Education and the Economy at the University of Texas at Austin (Aug. 9, 2010) (transcript available at http://www.whitehouse.gov/the-press-office/2010/08/09/remarks-president-higher-education-and-economy-university-texas-austin).

28. ANTHONY P. CARNEVALE ET AL., HELP WANTED: PROJECTIONS OF JOBS AND EDUCATION REQUIREMENTS THROUGH 2018, EXECUTIVE SUMMARY 1 (2010), *available at* http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/HelpWanted.ExecutiveSummary.pdf.

29. *Id.*

> It will not do to concentrate efforts on improving outcomes of college-bound upper-class white students who already have a much higher rate of educational attainment than do other students—if for no other reason than that there are not going to be enough of them.[30]

The case for advancing higher education attainment among low-SES students is not merely a question of economic imperatives or workplace demand; it is rooted in our nation's commitment to participatory democracy, equity, and the public good.

The direction of the higher education access debate at the outset of the twenty-first century reflects a paradigm shift in which higher education appears more as a market-driven private good to be purchased and financed by the individual rather than a state responsibility.[31] Historically, government intervention has been more pronounced in the K–12 context. In contrast to K–12 education, students and their families are expected to pay for some portion of their higher education. Under these circumstances, one might expect market-based solutions to have added currency in the higher education context, as opposed to government intervention. Notwithstanding this perception, government intervention alongside competitive market forces is an essential pillar of our dynamic higher education system. From a macro perspective, government intervention to promote college degree attainment among low-SES students is warranted for several reasons. First, there is individual underinvestment in higher education because individuals make higher education decisions without considering its significant societal benefits or "spillover" effects.[32] Second, private markets may fail to provide funds students need to pay college tuition and fees.[33] Government-

30. BOWEN ET AL., *supra* note 4, at 9.

31. Lani Guinier, Comment, *Admissions Rituals As Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 129–30 (2003) (asserting that prior to the Reagan administration, higher education was perceived to be "a public good to be funded by the government"); *see also* DIANE RAVITCH, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM 226–28, 241 (discussing education as a public good and the limits of markets); Michael Hout, *More Universalism, Less Structural Mobility: The American Occupational Structure in the 1980s*, 93 AM. J. SOC. 1358, 1392 (1988) (commenting on Reagan's 1988 budget proposal, which stated, "[s]tudents are the principal beneficiaries of their investment in higher education. It is therefore reasonable to expect them—not the taxpayers—to shoulder most of the costs of that investment.").

32. Perna, *supra* note 3, at 141–42; *see* Pusser, *supra* note 25, at 26–27 (2006) (discussing underinvestment in the absence of government intervention).

33. Perna, *supra* note 3, at 141; *cf.* CONSUMER FIN. PROT. BUREAU, PRIVATE STUDENT LOANS 3 (2012), *available at* http://files.consumerfinance.gov/f/201207_cfpb_Reports_Private-Student-Loans.pdf ("[T]he financial institution private student loan market grew from less than

sponsored aid can help correct for this market failure. Without this intervention, demand for higher education would decrease along with investment. Third, individuals have asymmetric access to information concerning higher education opportunities.[34] Governments can address these information asymmetries by disseminating information. Fourth, government intervention is warranted because there is a societal benefit associated with reducing inequities across groups.[35] Social inequality, if unaddressed, has far-reaching consequences.[36]

Generally, policymakers and legal scholars have taken a piecemeal approach to expanding higher education access to low-SES students: addressing K–12 academic preparation and, at the higher education level, emphasizing admissions practices and financial aid.[37] This bifurcated

---

$5 billion in 2001 to over $20 billion in 2008, before contracting to less than $6 billion in 2011.").

34. *See* Pusser, *supra* note 25, at 32 (discussing information asymmetries that characterize higher education); *see also* Henry Hansmann, *Proprieta' e Concorrenza nell'Istruzione Universitaria* [*Ownership and Competition in Higher Education*], 1 MERCATO CONCORRENZA REGOLE 475–96 (1999), *available at* http://www.law.yale.edu/documents/pdf/Faculty/Hansmann_The_State_and_the_Market_in_Higher_Education.pdf (analyzing higher education market imperfections).

35. Perna, *supra* note 3, at 142 ("By building human capital, student aid and other policies that promote college enrollment enable individuals to earn higher incomes throughout their lifetimes, thereby eliminating the need for the public sector to provide annual income subsidies to these individuals."); Pusser, *supra* note 25, at 36–38.

36. *See* Richard H. McAdams, *Economic Costs of Inequality*, 2010 U. CHI. LEGAL F. 23, 23 (2010) (reviewing economic literature documenting the costs associated with social inequality).

37. *See, e.g.*, Hinckley A. Jones-Sanpei, *Public School Segregation and Social Capital*, 12 J. GENDER RACE & JUST. 329, 331–39 (2009) (on integration balancing social capital deficits); Goodwin Liu, *Brown, Bollinger, and Beyond*, 47 HOW. L.J. 705, 750–55 (2004) (on desegregation as a mechanism for improving academic preparedness); Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791, 792, 796–97 (2005) (same); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 332 (2007) (on K–12 school funding providing educational adequacy); James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1223 (2008) (same); James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2060 (2002) (same); *see also* Guinier, *supra* note 30, at 137–72 (analyzing whether admissions procedures reflect democratic principles); Mexican American Legal Defense and Educational Fund (MALDEF) et al., *Blend It, Don't End It: Affirmative Action and the Texas Ten Percent Plan After* Grutter *and* Gratz, 8 HARV. LATINO L. REV. 33, 54–60 (2005) (on percent plans in college admissions); Charles R. Lawrence III, Essay, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 969 (2001) (same); Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065 (1997) (on admissions alternatives to standardized tests); Michael A. Olivas, *Storytelling Out of School: Undocumented College Residency, Race, and Reaction*, 22 HASTINGS CONST. L.Q. 1019, 1084–86 (1995) (on reforming

approach, although helpful, is incomplete: it misunderstands how students arrive at college decisions; it lacks coordination across the entire K–16 continuum; it oversimplifies higher education attainment for low-SES students as a function of either academic preparedness or financial preparedness, rather than a confluence of contextual factors such as social capital; it understates the important qualitative aspects of higher education attainment, including the type of institutional setting students enter; and it often fails to account for potential lawmaker capture, or the prevailing political bias for addressing the needs of middle- and upper-class students at the expense of low-SES students. These blind spots not only threaten to undermine the Obama administration's 2020 goal, they also threaten the nation's future social, economic, and cultural vitality. Simply "applying abstract constitutional principles to concrete educational endeavors" will not suffice.[38] The complex challenges low-SES students face with regard to higher education attainment merit aggressive and comprehensive reform targeting the entire K–16 continuum.[39]

Part I of this Article first examines the current higher education landscape by exploring the range of higher education options: vocational schools, community colleges, for-profit colleges, as well as traditional public and private four-year colleges. It discusses the troubling higher education sorting pattern where low-SES students cluster at less selective higher education settings or attain no higher education altogether. Past higher education expansion led to increases in capacity for low-SES students at four-year colleges, particularly public colleges and universities. Today, community colleges and for-profit colleges absorb larger numbers of these students as state budgets contract. Coinciding with this sorting

admissions and tuition practices for undocumented immigrant students); Ellison S. Ward, *Toward Constitutional Minority Recruitment and Retention Programs: A Narrowly Tailored Approach*, 84 N.Y.U. L. REV. 609, 613–22 (2009) (on minority recruitment and retention programs).

38. Peter Schmidt, *Sandra Day O'Connor Revisits and Revives Affirmative-Action Controversy*, CHRON. HIGHER EDUC. (Jan. 14, 2010), http://chronicle.com/article/Sandra-Day-OConnor-Revisit/63523/ (discussing Justice Sandra Day O'Connor's post *Grutter v. Bollinger* essay concerning higher education disparities). Justice Sandra Day O'Connor's post-*Grutter v. Bollinger* statements suggest that the real problem of diversity rests with improving K–12 education, and if K–12 inequalities are addressed, there will be less need for higher education institutions to consider race and other forms of diversity.

39. *See* P. Michael Timpane & Arthur M. Hauptman, *Improving the Academic Preparation and Performance of Low-Income Students in American Higher Education*, *in* AMERICA'S UNTAPPED RESOURCES: LOW INCOME STUDENTS IN HIGHER EDUCATION 63–64 (Richard D. Kahlenberg ed., 2004) (discussing reforms targeting K-12 academic preparedness, the transition between secondary school and higher education, and college-level reforms promoting student performance and persistence.).

pattern are trends toward greater privatization in higher education such as the emergence of publicly-traded, for-profit colleges. Policymakers must consider the impact of these trends on low-SES students in order to prevent further marginalization and well-defined higher education stratification. Next, this Part explores the limits of the current education policy framework, which generally oversimplifies a complex problem. Ultimately, success in addressing higher education attainment issues for low-SES students demands more comprehensive, coordinated efforts and engagement from multiple stakeholders across the entire K–16 continuum. Finally, this Part discusses the political economy of higher education and its impact on opportunity for low-SES students. The rural, urban, and suburban divide that permeates the K–12 schooling discussion also has resonance at the higher education level. Popular market-based, consumer-driven reforms along with middle- and upper-class preferences currently dominate the higher education political agenda, overshadowing equity interests. The higher education system works well for traditional college-going students, but is less successful at guiding low-SES students to meaningful educational outcomes. Federal, state, and institutional policies should shift their focus to address increased pluralism and widening inequality.

Part II explores the justifications—individual, societal, and historical—for why policymakers and everyday citizens should desire the expansion of higher education for low-SES students. Policymakers and the public often take these justifications for granted or construe them narrowly, that is, focusing predominantly on the private economic benefits of higher education to the exclusion of equally important non-economic benefits. This approach significantly underestimates the total returns from higher education and leads to a short-term focus on economic costs while ignoring long-term educational benefits that remain invisible until decades later. This Part draws heavily from social science literature on higher education benefits. A more comprehensive analysis concerning the benefits of expanding higher education access among vulnerable students reveals how individual, group, and societal interests ultimately converge. Finally, this Part examines the general historical pattern of expanding higher education access by analyzing pivotal events in U.S. history. This expansion, often in the face of resistance, is at the heart of American economic and social vitality. Specifically, this Part addresses the following events: the Morrill Acts I & II, the G.I. Bill, the 1947 Truman Commission on Higher Education, and the confluence of Great Society and Civil Rights Movement reforms. These events have relevance today because our nation again stands at a crossroads in its history where the expansion of higher education opportunity remains essential to its future.

Part III addresses future reform steps toward higher education expansion for low-SES students. A more holistic, comprehensive and integrated reform strategy is necessary to significantly improve higher education attainment among low-SES students. The current piecemeal approach that policymakers take fails to acknowledge the important interconnections between K–12 and higher education, as well as sub-institutional factors that thwart educational achievement, such as the lack of social capital and information asymmetries. Systemic inequities at the K–12 level have profound negative repercussions for higher education attainment and undermine the mutual interests of stakeholders at both the K–12 and higher education levels. Similarly, the failure to account for sub-institutional factors limits the effectiveness of well-intentioned reform efforts.

To address these issues, this Part proposes a framework to guide future reform efforts. First, this Part recommends the establishment of a Presidential Commission on Higher Education Access and Equity. This commission would take a comprehensive approach to promoting access for low-income and working-class families. Next, this Part proposes reforms that target the entire K–16 education continuum: (i) K–12 academic preparedness, (ii) the transition between secondary school and higher education, and (iii) college-level student performance and persistence.

Specifically, these reforms include: (i) a rigorous K–12 education for low-SES students; (ii) quality college counseling within public schools that addresses social capital deficits and the financial literacy needs of students' families; (iii) the enhancement of federal, state, and institutional need-based financial aid policies; (iv) experimentation with admissions practices that better reflect vulnerable student potential rather than functioning as a proxy for socio-economic advantage; and (v) recommitting public institutions to their public missions.

Finally, this Article concludes by prompting lawmakers to make higher education access for low-SES students a higher priority in the broader education reform discussion. Specifically, this Article calls upon lawmakers to adopt its proposals and principles in future Higher Education Act amendments and other reform efforts.

I. THE CURRENT HIGHER EDUCATION LANDSCAPE

A. Policy Environment

The current regulatory environment fails to adequately address the higher education needs of low-SES students. Over the past two decades,

lawmakers have focused on K–12 academic preparation for low-SES students, often over-relying on standardized tests as a proxy for student achievement and educational quality.[40] At the same time, policymakers have underemphasized affordability and sub-institutional factors such as social capital deficits that impede low-SES students in their higher education pursuits.[41] The current framework is too narrowly focused to address the complex obstacles low-SES students face. A more comprehensive K–16 approach is needed to ensure greater higher education attainment for low-SES students.

Higher education attainment for low-SES students has two separate dimensions: a quantitative dimension related to expansion in absolute terms, and a qualitative dimension related to the type of higher education setting students enter, such as community colleges, for-profit universities, vocational schools, non-selective four-year colleges, or selective four-year colleges. Not only must more low-SES students receive higher education to meet the Obama administration's 2020 college completion goal, but more of these students must also pursue more selective four-year college options. Vocational schools, for-profit universities, and community colleges are only part of the access solution. Yet they have become the *de facto* path for many, if not most, low-SES students, a disproportionate number of whom are minorities—particularly Hispanic and African-American. This sorting pattern is inconsistent with the goal of providing encouragement and equal access to all students, enabling them to achieve an education commensurate with their potential. Policymakers must consider the actual quality of the higher education students receive and whether it adequately prepares them for productive citizenship, leadership, and the workforce. Higher education attainment is not merely an issue of enrollment and attendance; the setting, content, and quality of the education matter considerably.

Before embarking on a discussion of the current higher education environment, it is essential to recognize the entire K–16 continuum; that is, the linkages between higher education outcomes and the issues plaguing K–12 schooling.[42] Drop-out rates, inequitable funding, and current trends

---

40. *See* Ryan, *supra* note 37, at 1255.

41. *See* EDWARD P. ST. JOHN, REFINANCING THE COLLEGE DREAM: ACCESS, EQUAL OPPORTUNITY, AND JUSTICE FOR TAXPAYERS 9–12 (2003); Timpane & Hauptman, *supra* note 39, at 60.

42. *See generally* William A. Kaplin, *Expanding Student Access to and Success in Higher Education: Confronting Systematic Inequities* (Stetson University College of Law Research Paper No. 2010-04) (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1600310.

toward re-segregation all have negative implications for higher education attainment.[43] Yet many academics and lawmakers often take a piecemeal approach that fails to acknowledge these important interconnections.[44] This approach to reform undermines the mutual interests of stakeholders at both levels and fails to address systemic inequities. Systemic inequities at the K–12 level have repercussions for higher education attainment and vice versa.[45] For example, high school graduation rates are linked to college enrollment rates.[46] And poor K–12 academic preparation places additional burdens on higher education institutions to provide academic remediation.[47] This ultimately contributes to lower student persistence levels. Generally, low-SES students, without financial assistance and subsidies from public and private institutions to make college affordable, would forego higher education altogether. Public colleges and universities, in particular, are essential to training and producing teachers for the 52 million public school students nationwide.[48] Without in-state tuition subsidies, student debt loads

---

43. GOODWIN LIU ET AL., THE EDUC. TRUST, FUNDING GAPS 2006 1 (2006), *available at* http://www.edtrust.org/sites/edtrust.org/files/publications/files/FundingGap2006.pdf. For current trends towards resegregation, see Kaplin, *supra* note 42, at 27, and Kimberly Jenkins Robinson, *The Past, Present, and Future of Equal Educational Opportunity: A Call for a New Theory of Education Federalism*, 79 U. CHI. L. REV. 427, 428 (2012) ("[T]he average white student attends a school in which approximately 83 percent of the students are white, while the average minority student attends a majority-minority school, and approximately one-third of black and Latino students attend schools that are 90 to 100 percent minority."). For a detailed statistical discussion of school segregation, see GARY ORFIELD, REVIVING THE GOAL OF AN INTEGRATED SOCIETY: A 21ST CENTURY CHALLENGE 11–26 (2009), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf.

44. Kaplin, *supra* note 42, at 13–15 (explaining that the piecemeal approach to K-16 education reform is the historical legacy of traditionally separate oversight and planning bodies, entrenched by bifurcated systems and laws at both the state and federal level).

45. *Id.* at 23–24. The effects of systemic inequities and school resegregation can be seen as cyclical:

> [I]f racially isolated K-12 schools tend to be environments that are less amenable to learning and that disproportionately place minority students at risk, then these schools will graduate fewer minority students qualified and prepared for higher education. Consequently, the applicant pools for higher educational institutions would not become more diverse over time, and could become less diverse, making it more difficult for institutions to achieve racial and ethnic diversity of their student bodies. Some institutions may lower their expectations and settle for less diversity.

Id. at 34–35.

46. *Id.* at 34.

47. *Id.* at 35.

48. *Id.* at 48 ("The leadership role of colleges and universities in a global, information society, their expanding societal and global influence, and more specifically their crucial role in

might deter students from pursuing teaching careers. As one keen historical observer noted, "[k]nowledge does not flow upstream," and therefore the regulatory framework must adapt to these challenges. [49]

B. *Higher Education Environment*

A larger proportion of the U.S. population has access to higher education than in most countries in the developed world.[50] Students in the U.S. can ostensibly choose from an assortment of higher education institutional settings such as public universities, private universities, for-profit colleges, community colleges, and vocational schools. Despite its obvious strengths, the U.S. higher education system is imperfect and is characterized by structural obstacles. The nation's higher education system, dominated by public and private nonprofit institutions for the past two centuries, does not function like an ideal marketplace.[51] Although market-based competition-driven reforms have political salience and appeal for addressing common issues such as cost savings, productivity gains, innovation, and efficiency in the higher education system, standard market analysis alone does not provide an adequate lens. Overreliance on market models, irrespective of their benefits, could lead to flawed and misguided higher education policies because they fail to address multiple types of market failure. Ironically, the fervor surrounding market-based reforms does not match the paucity of empirical support concerning their effectiveness.[52] Existing research does not adequately address the ability of some market-based consumer-driven systems to redress social inequality and promote the public good.

Today, the disparities among rich and poor higher education institutions in overall spending per student have never been greater.[53] Although public impressions of higher education are often based upon a small group of selective institutions, the large majority of students, particularly low-SES

---

preparing teachers and supporting the professionalization of teachers, all point to an enhanced role in education reform.").

49. JONATHAN BALDWIN TURNER, A PLAN FOR AN INDUSTRIAL UNIVERSITY FOR THE STATE OF ILLINOIS (1851).

50. *See* NAT'L CTR. FOR PUB. POLICY & HIGHER EDUC., MEASURING UP 2008: THE NATIONAL REPORT CARD ON HIGHER EDUCATION 5–6 (2008), *available at* http://measuringup2008.highereducation.org/print/NCPPHEMUNationalRpt.pdf. Yet, the United States's historical edge has been steadily declining. *Id.*

51. Pusser, *supra* note 25, at 23–25.

52. *Id.* at 29–30.

53. DELTA COST PROJECT, TRENDS IN COLLEGE SPENDING 1999–2009, at 7 (2011), *available at* http://www.deltacostproject.org/resources/pdf/Trends2011_Final_090711.pdf.

students, attend non-selective institutions that spend approximately $10,000 per student per year; this is no more than the amount spent on a year of K–12 education.[54] Stated differently, institutions enrolling the most students spend less on their education. Legal scholars also tend to ignore what happens to the majority of students, who attend higher education institutions "off the grid," that is, institutions other than selective colleges.[55] There are approximately 17 million undergraduate students in the United States, yet only a fraction of this number, fewer than 25 percent, fit the traditional stereotype: the dorm-living, full-time student receiving significant financial support from parents.[56] Actually, fewer than 14 percent of undergraduate students live on campus and 82 percent of undergraduates work either part-time or full-time while enrolled in college to offset costs.[57] A majority of students must balance real world pressures of education, family and work that, in turn, limit their degree of academic engagement.[58]

The economic downturn has forced traditional public and private four-year colleges to seek alternative revenue sources as well as embark on a range of cost-cutting exercises to offset reductions in established sources of revenue.[59] As more state universities are eliminating programs and failing to increase their capacity to absorb growing numbers of low-SES students, for-profit universities are expanding to meet the growing demand for higher education, especially among low-SES students. Unlike higher education expansion in the past, the current expansion is characterized by the emergence of for-profit colleges along with the movement toward online or blended education delivery formats.[60] It is too early to surmise the exact long-term ramifications of these trends, but a potential outgrowth could be the further marginalization of low-SES students and more defined hierarchies across higher education settings.[61] Greater privatization in the higher education sector raises important questions concerning the

54. *Id.*

55. PAUL ATTEWELL & DAVID E. LAVIN, WHAT IS COLLEGE FOR?: THE PUBLIC PURPOSE OF HIGHER EDUCATION 86–87 (Ellen Condliffe Lagemann & Harry Lewis eds., 2011).

56. *Id.*

57. *Id.*

58. *Id.* at 89.

59. *See* JOHN AUBREY DOUGLASS, THE CONDITIONS FOR ADMISSION: ACCESS, EQUITY, AND THE SOCIAL CONTRACT OF PUBLIC UNIVERSITIES 246–47, 251, 254 (2007).

60. *Educating the Largest Minority Group*, CHRON. HIGHER EDUC. Nov. 28, 2003, at B6 (quoting Michael Olivas).

61. *See generally* Omari Scott Simmons, *For-Profits and the Market Paradox*, 48 WAKE FOREST L. REV. 333 (2013).

appropriate regulatory design for providing what has traditionally been considered a public good.[62]

The post-World War II era witnessed a massive expansion of higher education participation among low-SES students.[63] Low-SES student higher education participation rates quadrupled between 1940–1965 and doubled between 1965–1980.[64] Today, participation rates continue to increase, albeit moderately, for both traditional and low-SES students.[65] Notwithstanding these general upward trends in participation rates, the actual participation gaps between traditional and low-SES students remain as wide, if not wider, than gaps during the 1970s.[66] Participation rates, however, are merely one aspect of higher education attainment: inadequate K–12 preparation for college-level work and degree completion rates, which are much lower for low-SES students, are crucial dimensions of higher education attainment.[67] Low-SES students, who leave college after accumulating student loan debt, inevitably, are worse off than their more privileged counterparts.[68]

1. Traditional Four-Year Colleges and Universities

Thirty-one percent of all students seeking higher education attend four-year colleges and universities, with twenty-one percent attending public institutions and ten percent attending private institutions.[69] Public universities, in particular, play a vital role in access for low-SES students.

---

62. *See generally* STAFF OF S. COMM. ON HEALTH, EDUC., LABOR & PENSIONS, 111TH CONG., EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION (2010); Nicholas R. Johnson, *Phoenix Rising: Default Rates at Proprietary Institutions of Higher Education and What Can Be Done to Reduce Them*, 40 J.L. & EDUC. 225 (2011); Amanda Harmon Cooley & Aaron Cooley, *From Diploma Mills to For-Profit Colleges and Universities: Business Opportunities, Regulatory Challenges, and Consumer Responsibility in Higher Education*, 18 S. CAL. INTERDISC. L.J. 505 (2009).

63. *See* Patrick M. Callan, *Reframing Access and Opportunity: Problematic State and Federal Higher Education Policy in the 1990s*, *in* THE STATES AND PUBLIC HIGHER EDUCATION POLICY: AFFORDABILITY, ACCESS, AND ACCOUNTABILITY 87 (Donald E. Heller ed., 2d ed. 2011); Timpane & Hauptman, *supra* note 39, at 71; *see also* discussion *infra* Part II.

64. Timpane & Hauptman, *supra* note 39, at 71.

65. *Id.*

66. Lawrence Gladieux, *Low Income Students and the Affordability of Higher Education*, *in* AMERICA'S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN HIGHER EDUCATION 21 (Richard D. Kahlenberg ed., 2004).

67. Timpane & Hauptman, *supra* note 39, at 63–64.

68. Gladieux, *supra* note 66, at 23.

69. NAT'L CTR. EDUC. STATISTICS, U.S. DEP'T OF EDUC., NATIONAL POSTSECONDARY STUDENT AID STUDY SURVEY 2007–08: UNDERGRADUATE DATA ANALYSIS SYSTEM (2009).

Since the passage of the Morrill Acts, public universities have served as an engine of social and economic progress extending higher education to previously underserved populations.[70] Historically, most discussion among legal observers concerning college access targeted admissions practices at selective higher education institutions.[71] Only 9% of freshmen who attend highly selective colleges are from the bottom half of the economic distribution.[72] Yet substantial evidence indicates that attending selective institutions can yield significant economic returns for low-SES students.[73] These schools make up only a fraction of four-year colleges, but are the most coveted.[74] For example, the debate over group-based affirmative action largely concerns admission to selective institutions: undergraduate, graduate, and professional schools.[75]

Admission to a selective college for many middle- and upper-class parents is a signifier of distinction, a "badge" of merit for both student and parental achievement, as well as an attempt at social reproduction.[76]

---

70. Michael Mendez, *University Social Responsibility: Balancing Economic & Social Benefits of University Research*, J. SCI. POL'Y AND GOVERNANCE, 5, 16 (2011), *available at* http://www.sciencepolicyjournal.org/uploads/5/4/3/4/5434385/_university_social_responsibility.pdf.

71. *See, e.g.*, Jimmy Chan & Erik Eyster, *The Distributional Consequences of Diversity-Enhancing University Admissions Rules*, 25 J.L. ECON. & ORG. 499, 507 (2009) ("[A]ffirmative action is used almost exclusively in highly selective colleges . . . ."); Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 688 (1998) (finding it appropriate to focus narrowly on the fraction of elite higher education institutions because "second-tier" institutions "simply do not maintain the same level of student selectivity as to trigger the concerns in the affirmative action debate."); Camille Gear Rich, *Decline to State: Diversity Talk and the American Law Student*, 18 S. CAL. REV. L. & SOC. JUST. 539, 560 n.71 (2009) (finding that students who apply to "relatively non-selective universities," defined as those who admit at least 75% of applicants, "need not worry about affirmative action meaningfully reducing their chances of admission").

72. MCKINSEY & CO., THE ECONOMIC IMPACT OF THE ACHIEVEMENT GAP IN AMERICA'S SCHOOLS 9 (2009), *available at* http://silvergiving.org/system/files/achievement_gap_report.pdf.

73. *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 118, 129 (1998) (finding that students likely benefit from selective colleges because they "tend to have more resources, better facilities, more generous financial aid, and more faculty members who have strong reputations in their fields," in addition to the value of having "classmates of exceptional ability, who set high standards of intellectual excellence and offer challenging examples to emulate").

74. *See* STEVENS, *supra* note 2, at 16, 262–64 ("The measure of an institution's prestige has come to be defined, in part, by the proportion of each year's applicants it turns away . . . .").

75. *See* Issacharoff, *supra* note 71, at 674.

76. *See* STEVENS, *supra* note 2, at 14 ("My research suggests that one profound result of higher education's expansion has been the entrenchment of a complicated, publicly palatable,

Selective higher education institutions function as positional goods: deriving their value largely from their ranking or desirability relative to other higher education institutions.[77] Many selective schools fill their classes with a majority (e.g., two-thirds) of full paying students, who are not price sensitive. Selective and non-selective schools, generally speaking, market to different student demographics. The desirability and scarcity of selective college spots allows prestigious universities, in theory, to extract higher prices.

According to Henry Hansmann, higher education functions like an "associative good" where students and their families are not only interested in the price or the quality of instruction a college offers, but also the characteristics of a college's other students.[78] A college's most valuable resource is, perhaps, its student body.[79] The associative character of higher education distinguishes it from other goods and services in the standard marketplace. There is a strong tendency for similarly situated students to cluster at selective schools. This phenomenon, according to Hansmann, leads to greater stratification across various educational environments on the basis of personal characteristics such as SES.[80]

Some students' parents perceive that admission to an elite college, coupled with interaction with a predominately affluent student body, all but guarantees access to the nation's top corporations as well as graduate and professional schools.[81] This perception is rooted in truth: a student's classmates have a strong influence on their educational and social experiences, their social capital, as well as their personal and professional reputations.[82] Yet low-SES students, who have the most to gain from access to selective higher education institutions from a socio-economic advancement perspective, remain in short supply at these institutions. Instead, many low-SES students, despite demonstrating a strong desire and ability to attain a bachelor's degree, are overrepresented in educational

---

and elaborately costly machinery through which wealthy parents hand privilege down to their children."); *see also* JACQUES STEINBERG, THE GATEKEEPERS: INSIDE THE ADMISSIONS PROCESS OF A PREMIER COLLEGE xii (2003). *See generally* FRED HIRSCH, THE SOCIAL LIMITS TO GROWTH (1977).

77. *See generally* HIRSCH, *supra* note 76; *see also* Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 18–21 (1992).

78. Pusser, *supra* note 25, at 33; *see also* Henry Hansmann, *Higher Education as an Associative Good*, *in* FORUM FUTURES: 1999 PAPERS 11 (Maureen Devlin & Joel Meyerson eds., 1999).

79. *See* Pusser, *supra* note 25, at 33.

80. Hansmann, *supra* note 34, at 489; *see also* Pusser, *supra* note 25, at 33.

81. *See* STEINBERG, *supra* note 76, at xiv.

82. Pusser, *supra* note 25, at 33; Hansmann, *supra* note 34, at 487–88.

settings that differentially empower them: community colleges, for-profit colleges, and vocational schools.[83]

2. Community College Trends

Community colleges now account for roughly half of all students in higher education.[84] Between 1999–2009, community colleges accounted for the greatest increase in student enrollment, expanding by over 1.6 million students.[85] These institutions are vital to closing achievement and wealth gaps for low-SES students. Roughly equal proportions of low-SES and non-low-SES students attend community colleges.[86] The challenge for community colleges is to improve their low degree completion rates, as only 20% of students receive an associate's degree and 10% a four-year degree.[87] Transfer and articulation agreements between community colleges and four-year universities also need improvement. Currently, fewer than 25% of community college students transfer into four-year universities.[88] Additionally, community colleges face the challenge of remediation and offsetting K–12 academic deficits.

As state budgets decrease, low-SES students attending community colleges also have reason to be concerned. Community college funding and resources will likely be cut in greater proportion than at four-year public universities. Unlike public four-year universities, community colleges cannot offset costs by charging higher tuition to out-of-state students or easily alter legislator preferences for appeasing more affluent voters who presumably favor more selective four-year flagship universities.[89] Recent

---

83. Although vulnerable students have shown the greatest increase in the *desire* to attain a bachelor's degree, they remain much more likely to end up attending a two-year college, a for-profit college, or no college at all as compared to better-situated students who shared the goal of attending a four-year college. *See* JENNY NAGAOKA, MELISSA RODERICK & VANESSA COCA, BARRIERS TO COLLEGE ATTAINMENT: LESSONS FROM CHICAGO 4 (U. Chi. Consortium on Chi. Sch. Res. ed, 2008).

84. CHRISTOPHER M. MULLIN, WHY ACCESS MATTERS: THE COMMUNITY COLLEGE STUDENT BODY 4, 7 (American Association of Community Colleges ed., 2012).

85. DELTA PROJECT ON POSTSECONDARY EDUCATION COSTS, PRODUCTIVITY, AND ACCOUNTABILITY, EXTRACTS IN KEY ISSUE AREAS FROM "TRENDS IN COLLEGE SPENDING, 1999-2009," 1–2 (2011).

86. NAT'L CTR. EDUC. STATISTICS, *supra* note 69 (in 2008, 52% of low-income students and 49% of non-low-income students entering postsecondary education enrolled in a community college).

87. Timpane & Hauptman, *supra* note 39, at 88.

88. *Id.* at 88–89.

89. This practice may also crowd out vulnerable in-state students at selective universities during economic recessions and periods of budget shortfalls.

experience with budget constraints in California reveals how publicly-funded community colleges are turning away students, unable to meet demand.[90] Meanwhile, for-profit institutions absorb these underserved students.[91] Community college spending per student pales in comparison to spending at four-year universities, and the Great Recession has further limited their capacity to offer certain courses and provide a range of valuable services to low-SES students.[92] By opting for community college in a down economy when more selective options are available and attainable, low-SES students may be taking a much more difficult path toward socio-economic advancement.

3. For-Profit Colleges & Universities

For-profits are the fastest growing segment of the higher education market. Between 2000 and 2009, for-profit enrollment doubled at two-year institutions, while at the same time increasing five-fold at four-year colleges.[93] For-profit institutions have come under recent scrutiny for alleged "predatory" practices.[94] Low-income students are three times more likely to attend a for-profit college than their more privileged counterparts.[95] Supporters of for-profit college education contend that they offer access opportunities and flexibility for underrepresented groups that traditional

---

90. Eric Kelderman, *Calif. Governor Goes After For-Profits With Limits on Cal Grants*, CHRON. HIGHER EDUC., Jan. 27, 2012, at A4.

91. *Id.*

92. DELTA COST PROJECT ON POSTSECONDARY EDUCATION COSTS, PRODUCTIVITY, AND ACCOUNTABILITY, TRENDS IN COLLEGE SPENDING 1999–2009, 18–20 (2011).

93. Mary Beth Marklein, *For-Profit Colleges See Major Gains in Past Decade*, USA TODAY (June 2, 2011), http://www.usatoday.com/news/education/2011-05-26-for-profit-college-undergraduate-enrollment_n.htm.

94. *See* Melanie Hirsch, *What's in a Name? The Definition of an Institution of Higher Education and Its Effect on For-Profit Postsecondary Schools*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 817, 821–22 (2006) ("[S]eventy-four percent of institutional fraud cases over the past six years have involved proprietary schools. Critics . . . cite a litany of abuses, including 'admitting unqualified students, inflating graduation and job-placement rates, lying about accreditation, [and] paying bonuses to employees for signing up new pupils.'") (citing Samuel G. Freedman, *Tucked in Katrina Relief, a Boon for Online Colleges*, N.Y. TIMES, Oct. 12, 2005, at B8). One exploitative strategy involves intensely recruiting the homeless, who "are desirable because they qualify for federal grants and loans, which are largely responsible for the prosperity of for-profit colleges," but may have increased difficulty managing educational debt because they "are more likely to suffer from mental illness and substance abuse than the general population." Daniel Golden, *The Homeless at College;* BLOOMBERG BUSINESSWEEK MAG. (April 30, 2010), http://www.businessweek.com/magazine/content/10_19/b4177064219731.htm.

95. NAT'L CTR. EDUC. STATISTICS, *supra* note 69.

institutions fail to offer.[96] Notwithstanding the purported benefits for-profit institutions provide, the statistics appear ominous. For-profit institutions tend to be almost twice as expensive as state universities due to state subsidies. They receive over 27 billion dollars in federal financial aid. Their degrees or certificates often have questionable value in the marketplace, and two out of every five students' loans are in default fifteen years into repayment.[97] Although approximately 10% of all college students attend for-profit schools, their students account for half of all loan defaults.[98] This pattern of low-SES students borrowing money they cannot repay to purchase an apparently over-priced asset has generated well-deserved attention from lawmakers.[99] Between June 2010 and July 2012, the Senate Committee on Health, Education, Labor, and Pensions (HELP) under Chairman Tom Harkin conducted an investigation focusing on the for-profit sector of higher education. The investigation made numerous findings concerning for-profit abuses and recommendations that were included in a report, known as the "Harkin Report."[100] Also, in response, to the outcry concerning for-profits, the Obama administration and Department of Education promulgated the Gainful Employment Rule (GER) after earlier attempts to regulate this growing sector stalled.[101] The strength of these regulations was the subject of vigorous debate and controversy, especially following an unprecedented lobbying and litigation effort by for-profit institutions.[102] The Association of Private Colleges & Universities (APSCU)

---

96. *See* Simmons, *supra* note 61, at 337–38; Bill Pepicello, Letter to the Editor, *For-Profit University*, N.Y. TIMES, Feb. 18, 2007, § 4, at 11.

97. *See* Sam Dillon, *Troubles Grow for a University Built on Profits*, N.Y. TIMES, Feb. 11, 2007, at A1; Claudio Sanchez, *Morning Edition: For-Profit Colleges Fight Limits on Student Loans* (NPR radio broadcast June 9, 2010) (transcript available at http://www.npr.org/templates/story/story.php?storyId=127586513).

98. *See* Sanchez, *supra* note 97.

99. *See* Program Integrity: Gainful Employment, 75 Fed. Reg. 43616 (proposed July 26, 2010) (to be codified at 34 C.F.R. pt. 668).

100. S. REP. NO. 74-931, at 84 (2012) [hereinafter *Harkin Report*].

101. *See* Program Integrity: Gainful Employment, 34 C.F.R. § 668 (2012), *vacated by* Ass'n of Private Colleges & Universities v. Duncan, 870 F. Supp. 2d. 133, 158 (D.D.C. 2012) (holding the 35% program loan repayment rate required for continued eligibility for Title IV funding to be arbitrary and capricious under APA standards, requiring the entire regulatory scheme to be vacated).

102. Eric Lichtblau, *With Lobbying Blitz, For Profit Colleges Diluted New Rules*, N.Y. TIMES, Dec. 10 2011, at A1; Kelly Field, *For-Profit Colleges Win Major Concessions in Final 'Gainful Employment Rule'*, CHRON. HIGHER EDUC. (June 2, 2011), http://chronicle.com/article/For-Profit-Colleges-Win-Major/127744/ ("For-profit colleges, which have spent millions fighting the Education Department's proposed 'gainful employment' regulations, have won some major concessions in the final rule . . . . The changes . . . are

challenged the GER in *APSCU v. Duncan* and prevailed in the District Court for the District of Columbia. The court vacated the GER on grounds that DOE failed to provide sufficient justification for its percentage thresholds for student loan repayments.[103] Consequently, the GER does not, at present, impact proprietary institutions.

Additional government attempts to curb abusive practices in the for-profit industry have targeted misrepresentation, compensation, and recruiting practices.[104] Ultimately, greater controls and accountability are in the best interests of the public, regulators, and sustainability of the for-profit sector.[105] For-profit institutions are, without question, an important piece of the higher education access puzzle for low-SES students, but they are not a panacea for addressing socio-economic disparities and furthering the public good.[106] For-profits, particularly large publicly-traded ones, are largely accountable to shareholders and susceptible to short-termism. There are also serious questions concerning the relative economic value of for-profit college degrees when compared to traditional four-year college degrees in the labor market and beyond.[107] Moreover, for-profit college students tend to be less affluent, receive less grant-based financial aid, and finance a larger proportion of their higher education through loans.

4. Vocational Schools

Vocational schools are an important part of the higher education system, upon which employers and the public rely for the provision of services (e.g., beauticians, massage therapists, plumbers, mechanics, etc.). It is one of

---

expected to significantly reduce the number of programs that would be penalized by the department.").

103. *Duncan*, 870 F. Supp. 2d. at 158.

104. Amanda Harmon Cooley, *The Need for Legal Reform of the For-Profit Educational Industry*, 79 TENN. L. REV. 515, 553–58 (2012).

105. *See, e.g., id. But see* Anthony J. Guida, Jr. & David Figuli, *Higher Education's Gainful Employment and 90/10 Rules: Unintended "Scarlet Letters" for Minority, Low-Income, and Other At-Risk Students*, 79 U. CHI. L. REV. 131 (2012).

106. *See generally* Simmons, *supra* note 61.

107. *See* STAFF OF S. COMM. ON HEALTH, EDUC., LABOR & PENSIONS, 111TH CONG., EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION 4 (2010) (finding that the combination of poor student outcomes and high loan default rates of for-profit institution graduates "calls into question the taxpayers return on their multi-billion-dollar investment, and leaves many unanswered questions with regard to whether a sufficient number of students receive an education that provides them with the knowledge and skills they need to obtain jobs to repay their student debt").

multiple pathways toward post-secondary education. A recent report from the Harvard Graduate School of Education asserts that a four-year degree is not for all students.[108] The report highlights the potential for quality vocational training for the "forgotten half" of students who do not pursue a four-year degree but nonetheless seek occupational credentials. The report concludes that even with increased numbers of college graduates, quality vocational training remains necessary to address the skill and opportunity gaps in the country.[109]

C. Political Economy

The assumption that other Americans do not benefit from expanding higher education access to low-SES students is misguided. In his book *Five Miles Away, A World Apart*, James Ryan identifies a troubling disconnect between the destinies of the poor and the privileged in the educational context.[110] In this context, the public good is more easily subverted. The danger of such a perspective is vividly illustrated when one considers the consequences associated with not extending higher education access to low-SES populations: higher incarceration rates, adverse health care outcomes, higher poverty rates, reduced civic engagement, and lower government tax revenues are only several of the many potential consequences.[111]

Today, rigid ideological commitments to libertarianism, individualism, and market fundamentalism have become popular stances among lawmakers and citizens who indiscriminately invoke the market's "invisible hand" to right wrongs, such as acute inequity.[112] These extreme market-based perspectives are often rhetorical and lack an empirical foundation. To further the public good, communitarian goals must temper the market-based focus that dominates higher education debates. These extreme market-based

---

108. *See* WILLIAM C. SYMONDS, ROBERT B. SCHWARTZ & RONALD FERGUSON, PATHWAYS TO PROSPERITY: MEETING THE CHALLENGE OF PREPARING YOUNG AMERICANS FOR THE 21ST CENTURY 2–7 (Harvard University Graduate School of Education 2011) (contending that our national strategy for education has been too narrowly focused on a collegiate approach and advocating for a more occupational training orientated approach)

109. *Id.* at 2–3 (noting that, by 2018, 14 million new jobs will have been created requiring non-baccalaureate postsecondary certification).

110. JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA 271–72 (2011).

111. *See* Elizabeth Gudrais, *Unequal America: Causes and Consequences of the Wide—and Growing—Gap between Rich and Poor*, HARVARD MAGAZINE, July–Aug. 2008, at 22 (finding that wide societal disparities have a negative impact across the entire society); MCKINSEY & CO., *supra* note 72, at 96.

112. Pusser, *supra* note 25, at 37.

perspectives are often rhetorical and lack an empirical foundation. To further the public good, communitarian goals must temper the market-based focus that dominates higher education debates. Furthermore, businesswomen and men have no monopoly on innovative strategies, creativity, and expertise.[113] The "idolization" of business skills and experience as a panacea for social issues is potentially dangerous.[114] The market is merely a means, not an end in itself.

Acquiescence to the status quo is often broadly justified in terms of "academic ability," since college admission ostensibly employs fair and legitimate criteria.[115] This belief reflects the idea that some inequality is meritocratic: an outgrowth of greater effort, risk-taking, and greater investment in human capital that provides beneficial incentives and productivity.[116] Considerable disagreement, however, centers on "exactly how meritocratic" the observed inequality in an economy is, and how much inequality is the product of "greater effort or risk-taking."[117] Notwithstanding this dispute, from a political vantage point, middle- and upper-class interests steer the higher education policy debate, sometimes crowding out the interests of low-SES students.[118] Addressing education disparities, in part, requires the acknowledgment and, in some instances, dismantling of established sources of privilege and personal advantage.[119]

---

113. Garry W. Jenkins, *Who's Afraid of Philanthrocapitalism?*, 61 CASE W. RES. L. REV. 753, 794 (2011).

114. *Id.*

115. *See* ANDY FURLONG & FRED CARTMEL, HIGHER EDUCATION AND SOCIAL JUSTICE 2 (2009). Controversy exists over whether standardized test scores, extensively utilized in college admissions decisions, are in fact fair and legitimate measurements of academic ability; *see also* Richard C. Atkinson & Saul Geiser, *Reflections on a Century of College Admissions Tests*, *in* RESEARCH & OCCASIONAL PAPERS SERIES, CENTER FOR STUDIES IN HIGHER EDUCATION (2009), http://cshe.berkeley.edu/sites/default/files/shared/publications/docs/ROPS-AtkinsonGeiser-Tests-04-15-09.pdf. *See generally* William C. Kidder & Jay Rosner, *How the SAT Creates "Built-In Headwinds:" An Educational and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 131 (2002); Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065, 1117–18 (1997).

116. *See* Richard H. McAdams, *Economic Costs of Inequality*, 2010 U. CHI. LEGAL F. 23, 23–24 (2010).

117. *See id.*

118. *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 292–94 (1962). *See generally* RYAN, *supra* note 110.

119. *See generally* PIERRE BOURDEIU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE (Harvard Univ. Press 1987) (asserting that education is a tool for cementing class distinctions).

Advancing higher education attainment among low-SES students is not a zero-sum issue; it impacts the entire society in crucial ways.[120]

Over sixty years ago, the Truman Commission on Higher Education (1947) eloquently described the role of education: "[t]hus, the social role of education in a democratic society is at once to insure equal liberty and equal opportunity to different individuals and groups, and to enable the citizens to understand, appraise, and redirect forces, men, and events as these tend to strengthen or weaken their liberties."[121] Liberty permits development of individual capacities and self-realization but requires communal responsibility and cooperation for its dissemination throughout society, across individuals and groups. In this sense, ideological debates pitting individual liberty versus equal opportunity draw a false dichotomy. Barriers to higher education inevitably present a dilemma for both society and the individual. Without equal educational opportunity, democracy suffers, talent is lost, culture erodes, and liberty is undermined. Higher education is our nation's key instrument for social mobility and stability, as well as our nation's most effective weapon against threats to liberty and opportunity. To perform this vital role, education must remain relevant to the needs and problems of contemporary society and its diverse constituencies. Current higher education policies and practices fall woefully short. Instead of tearing down class distinctions, current higher education policies and practices reinforce them.

II. JUSTIFICATIONS FOR HIGHER EDUCATION ACCESS

Higher education benefits are often underestimated and misunderstood in academic and political debates. The justifications for reform are not simply a function of the oft-mentioned gains to individual earnings, jobs, or broader economic growth; standing alone, these are an inadequate basis for comprehensive higher education policy. They also include long-term, individual non-market and societal benefits. Higher education is a dynamic process with short- and long-term consequences that defy prediction. Higher education's total impact cannot be reduced to neat quantitative terms; its value reflects intellect, personality, and other intangible

120. *See* BOWEN ET AL., *supra* note 4, at 263–65 (describing the societal impact of higher education attainment); *see also* Gudrais, *supra* note 111; MCKINSEY & CO., *supra* note 72, at 96.

121. HIGHER EDUCATION FOR AMERICAN DEMOCRACY: A REPORT OF THE PRESIDENT'S COMMISSION ON HIGHER EDUCATION 5 (vol. I 1948).

characteristics.[122] There is a tendency to focus narrowly on the economic benefits of higher education to the exclusion of equally important non-economic factors. Consequently, this approach significantly underestimates the total returns from higher education and may lead to an impatient short-term focus on economic costs while ignoring long-term educational benefits that remain invisible until decades later.[123]

A. Individual

From an individual standpoint, higher education does much more than contribute to income; it is linked to an important array of benefits that are not always easily measured: better personal, spousal, and child health outcomes; children's educational gains; greater longevity, and even happiness. At the individual level, one's ability to sell one's labor in the marketplace for a premium correlates with educational attainment.[124] College education helps guide student self-discovery and assists them in securing careers commensurate with their interests.[125] College-educated people have higher incomes, experience less unemployment, work longer hours and "have greater 'allocative ability,' that is, ability to adjust promptly and appropriately to changing economic demands, technologies,

---

122. *See* BOWEN ET AL., *supra* note 4, at 22.

123. *Id.* at 447–48. Many college education outcomes cannot be accurately quantified in dollar terms. Yet there are general benefits individuals receive from their college education, as one observer acknowledges:

> [C]ollege does produce, on the average, certain clearly identifiable effects on its students. . . . *On the average*, college education significantly raises the level of knowledge, the intellectual disposition, and the cognitive powers of its students. It produces a large increase in substantive knowledge; moderate increases in verbal skills, intellectual tolerance, esthetic sensibility, and lifelong cognitive development; and small increases in mathematical skills, rationality, and creativity.

Id. at 432–33 (citation omitted).

124. The correlation between formal education and higher occupational status has been asserted since at least 1927, and today that correlation "may be the firmest empirical finding in the sociology of education." David B. Bills, *Credentials, Signals, and Screens: Explaining the Relationship between Schooling and Job Assignment*, 73 REV. EDUC. RES. 441, 441 (2003); *see also* PITIRIM SOROKIN, SOCIAL AND CULTURAL MOBILITY 170–71 (1959) (asserting that "schools represent one of the most important channels of vertical circulation . . . a graduate is often paid better than a non-graduate at the same position"). Moreover, graduates of elite institutions earn about $2 million more over a lifetime. CARNEVALE & STROHL, *supra* note 17, at 29–31.

125. *See* BOWEN ET AL., *supra* note 4, at 434 ("In the area of economic productivity, college assists its students in the process of self-discovery and helps them find careers congruent with their talents, interests, and aspirations.").

and resource supplies."[126] Higher education influences individual behavior, values, and attitudes, thereby spontaneously changing society, particularly where college-educated persons engage socially as voters, consumers, workers, family members, and organizational leaders.[127]

B. Societal

Arguably, a significant portion of the benefits generated by higher education are societal and are perilously ignored by policymakers.[128] These benefits include: reduction of poverty and inequality, participation in democratic processes that impact political stability and human rights, lower criminal justice costs and crime rates, lower health care costs, lower public assistance and transfer payments, diffusion of new knowledge, environmental sustainability, and greater social cohesion.[129] In light of these benefits, current levels of investment in higher education, taking into consideration the costs, are too low. These societal benefits illustrate how an investment in higher education for low-SES students yields far-reaching tangible and intangible benefits. Indeed, one can make a compelling argument that extending higher education is superior and distinct from extending other social benefits such as transfer payments, distribution of goods in kind, and progressive taxation because "it not only changes what people get but also what they can contribute and what they are."[130] Beyond economic necessity and enlightened self-interest, important fairness issues are linked to the extension of higher education. A failure to expand access to the vulnerable frustrates the American Dream, particularly the egalitarian notion of attaining equality through education.[131]

Despite compelling societal justifications for expanding higher attainment for low-SES populations, the political discourse surrounding college access is often characterized by divisive rhetoric. Examining

126. *Id.* Notably, "[f]ar fewer people without, at least, a college education are represented in the highest income brackets;" seventy percent of "top income earners have at least a bachelor's degree," whereas only twelve percent of individuals in the bottom third of the income bracket graduated from college. MCKINSEY & CO., *supra* note 72, at 99.

127. MCKINSEY & CO., *supra* note 72, at 263. For an additional list of benefits, *see* Pusser, *supra* note 24, at 36–38.

128. *Compare* WALTER MCMAHON, HIGHER LEARNING, GREATER GOOD 326 (2009) (asserting that significant portion of the benefits generated by higher education are societal), *with* Henry Hansmann, *The Evolving Economic Structure of Higher Education*, 79 U. CHI. L. REV. 159 (2012) (asserting that most higher education benefits are individual).

129. *See* MCMAHON, *supra* note 128.

130. *See* BOWEN ET AL., *supra* note 4, at 358.

131. *Id.* at 342.

broader questions of democracy, economic growth, and justice carries implications for the future of *all* Americans by prompting them to think about fulfilling the nation's potential. The expansion of higher education access among low-SES students illustrates how individual, group, and societal interests ultimately converge. Addressing these broader questions related to the public good will reorient the college access debate away from a narrow market-based paradigm, and build common ground among legal observers, policymakers, and the public.[132]

C. *Historical*

The most compelling justification for expanding access is historical. Higher education expansion is one of the seminal issues of this century. The Obama administration has the rare opportunity to create an enduring legacy through higher education reform efforts—similar to President Lincoln with the Morrill Act and President Roosevelt with the G.I. Bill.[133] Throughout American history, access to higher education has expanded incrementally in an upward fashion, although major shifts occurred only after World War II. Until the 1950s, elite universities and colleges reserved admission for students "fortunate enough to have been born into the right family or to have attended a particular . . . high school."[134] American higher education evolved from a predominately elite experience to a massive system that delivered advanced education to a broader spectrum of people.[135] This expansion pattern lies at the heart of American economic, social, cultural, and democratic vitality.

The history of higher education in the United States reflects an attempt to balance seemingly contradictory aims of fairness, associated with equal

---

132. The direction of the access debate at the outset of the twenty-first century points to a paradigm shift in which higher education appears more as a market-driven, private good to be purchased and financed by the individual. *See* Guinier, *supra* note 31, at 129–30 (asserting that prior to the Reagan administration, higher education was perceived to be "a public good to be funded by the government"); *see also* Michael Hout, *More Universalism, Less Structural Mobility: The American Occupational Structure in the 1980s*, 93 AM. J. SOC. 1358, 1392 (1988) (commenting on Reagan's 1988 budget proposal, which stated, "[s]tudents are the principal beneficiaries of their investment in higher education. It is therefore reasonable to expect them—not the taxpayers—to shoulder most of the costs of that investment"). DIANE RAVITCH, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM 226–28, 241 (2011) (discussing education as a public good and the limits of markets).

133. Kevin Carey, *Higher Education Reform: A Legacy for Obama?*, *supra* note 5.

134. STEINBERG, *supra* note 76, at xi. It was common for colleges to set aside a proportion of each entering class for graduates of selective, nearby "feeder" high schools. *Id.*

135. *See* FURLONG & CARTMEL, *supra* note 115, at 1–5.

access, and protectionism of embedded elite and middle-class advantage.[136] Policymakers have, at critical historical junctures, taken a long-term view in favor of expanding access to further the public good. Such expansions have often been met with resistance. This pattern of expansion reflects the principle that college education should be "readily accessible to successive waves of students on easy and inviting terms."[137] In the past, the supply of higher education has responded to both existing demand and anticipated future demand.[138] Today, the nation stands at another crucial juncture where the expansion of higher education attainment for low-SES populations will help determine its future vitality.

1. The Morrill Acts I & II: Land Grant Schools and the Emergence of Public Colleges

The Morrill Acts represent a turning point in the federal government's involvement in higher education.[139] The Acts provided not only for the distribution of federal funds and resources to state colleges, but also federal regulation to promote accountability and cooperation.[140] Congress introduced the First Morrill Act in order to extend opportunity:

> [T]o the industrial classes of the country to obtain a liberal education, something more than what was bestowed by our universities and colleges in general, which seemed to be more based on the English plan of giving education only to what might be called the professional classes, in law, medicine, and theology.[141]

---

136. *Id.*

137. *See* BOWEN ET AL., *supra* note 4, at 450.

138. *Id.*

139. *See* Morrill Act of 1862, 7 U.S.C. § 301 (2006); Morrill Act of 1890, 7 U.S.C. § 321 (2006); *see also* ROGER L. WILLIAMS, THE ORIGINS OF FEDERAL SUPPORT FOR HIGHER EDUCATION 26 (1991); *see also* Ellen Condliffe Lagemann & Harry Lewis, *Renewing the Civic Mission of American Higher Education*, *in* WHAT IS COLLEGE FOR? THE PUBLIC PURPOSE OF HIGHER EDUCATION 19 (Ellen Condliffe Lagemann & Harry Lewis, eds., 2012) ("The first Morril Act of 1862 provided an initial stimulus to practical curricula at colleges across the nation . . . This expansion radically extended American higher education, enlarging its orbit to include farming and mining and industrial engineering.").

140. *See* WILLIAMS, *supra* note 139, at 35, 150–51, 155.

141. *Id.* at 20 (quoting Remarks of Senator Morrill Before the House Committee on Education Respecting the Land-Grant Colleges (Oct. 24, 1890), *in* ATHERTON PAPERS (MSG 6) at Box 7, Folder C (The Pennsylvania State University)). The First Morrill Act had three basic components: (i) "the creation of an endowment in public lands for the support of higher education"; (ii) "the designation of the type of higher education the federal government was to

At the time of the Act's passage, nearly four out of five Americans represented the "industrial classes," with a majority engaged in agriculture.[142] European scientific dominance also gave impetus to the Act.[143] Despite its potential benefits, the Act received several objections, namely: challenges to the constitutionality of the federal government's role in higher education pursuant to the Tenth Amendment, fears that the Act was a competitive threat to existing colleges and universities, and concerns regarding its general worthiness for national treasury funding.[144] Despite previous unsuccessful attempts to pass similar bills, the path for the First Morrill Act's passage was cleared, in part, by the absence of Southern legislative opposition during the Civil War and fewer concerns about the constitutionality of Congressional funding for education pursuant to the General Welfare clause of the Constitution.[145]

The First Morrill Act, however, proved to be an underfunded mandate and could not adequately support the growth of land-grant institutions and promote state funding.[146] Consequently, Congress passed two acts, the Hatch Act of 1887 and the Second Morrill Act of 1890, to achieve the land-grant vision.[147] Between 1890 and 1900, land-grant institutional enrollment

---

support" (agriculture and the mechanical arts, though not exclusively); and (iii) the "[obligation of] states to maintain the endowment intact and to replace any reduction in the amount of that fund." Gordon C. Lee, *The Morrill Act and Education*, 12 BRIT. J. OF EDUC. STUD. 19, 26–27 (1963). State institutions could attain land-grant status if they were: (i) an agricultural college founded before the war; (ii) an existing state university; or (iii) a new institution built in response to land-grant legislation. WILLIAMS, *supra* note 139, at 40.

142. *See* WILLIAMS, *supra* note 139, at 1–2.

143. *See id.* at 13.

144. *See id.* at 38.

145. *See id.* at 11–12, 39; U.S. CONST. art. I, § 8. Jacksonian Democracy still permeated the Southern states, resulting in strong resistance to public education. *See* WILLIAMS, *supra* note 139, at 14–15. However, the first bill supporting land-grant institutions narrowly passed both houses in 1859, before being struck down by a veto from President Buchanan. The bill was passed two years later with little opposition from the Civil War congress and was signed by President Lincoln. *See id.* at 11, 39.

146. *See* WILLIAMS, *supra* note 139, at 3, 53, 70; *see also* Lee, *supra* note 141, at 30–31.

147. The Hatch Act of 1887 established agricultural experiment stations through an annual appropriation and was passed in response to the significant economic hardship which had befallen the agricultural industry in the 1870s, and the Second Morrill Act provided an annual federal appropriation, whereas the First Morrill Act had provided only a one-time appropriation. 7 U.S.C. §§ 361a et seq. (2006); 7 U.S.C. §§ 321 et seq. (2006). *See* WILLIAMS, *supra* note 139, at 3–4, 119 (explaining how attempts to pass a Second Morrill Act were unsuccessful until the land-grant funding it requested was directly linked to the Hatch Act, taking advantage of the political sympathy towards the struggling farmer); *id.* at 3, 150, 153–54 (describing how the increased federal funding of the Second Morrill Act allowed for expanded curriculum development and spurred the states to provide more funding on the creation and upkeep of campus facilities).

soared 213%.[148] The Second Morrill Act also impacted higher education for southern African-Americans, many of whom were the descendants of former slaves. Under the First Morrill Act, only three states—Virginia, South Carolina, and Mississippi—allocated land-grant funds to African-American collegiate education.[149] The Second Morrill Act precluded the payment of funds to states that maintained segregated land-grant colleges, but allowed southern states to receive federal funding if they maintained separate land-grant institutions for African-Americans.[150] Curiously, the federal government created a Southern exception, or carve-out, providing no mechanism to examine the quality of such "separate" institutions. Not surprisingly, these segregated institutions often provided an inferior education. In absolute terms, the Second Morrill Act expanded higher education access for Southern African-Americans. However, it clearly sanctioned the "separate but equal" principle, making the Second Morrill Act a precursor to future cases such as *Plessy v. Ferguson* and *Sweatt v. Painter*.[151]

Despite their shortcomings, land-grant institutions generally opened up doors of education opportunity among groups "who previously had not gone to college in great numbers."[152] By offering practical instruction

---

148. *See* WILLIAMS, *supra* note 139, at 208, 224 (finding that by 1900, 19,238 students were enrolled at the sixty-five established land-grant universities).

149. *See* Lee, *supra* note 141, at 32.

150. *See* WILLIAMS, *supra* note 139, at 145, 150. *See also* John Wilson, *Closing the Morrill Gap*, ED.GOV BLOG, (July 10, 2012), http://www.ed.gov/blog/2012/07/closing-the-morrill-act-gap/.

> Twenty-eight years after the first Morrill Act, a second Morrill Act established many of the nation's public historically black colleges and universities (HBCUs), including Alabama A&M University, Kentucky State University, and North Carolina A&T State University. The states were given a choice to either admit African Americans, or create separate institutions. Eighteen HBCUs were created in response to that choice.

Id.

151. *See* Lee, *supra* note 141, at 32 (noting that only twelve total students were taking courses of a standard collegiate level throughout all seventeen of the Negro land-grant colleges in 1917); *see also* discussion *infra* Part III.D.

152. WILLIAM JEYNES, AMERICAN EDUCATIONAL HISTORY: SCHOOL, SOCIETY, AND THE COMMON GOOD 195 (2007). The federal government's definitive exertion of power over educational policy was also motivated by concerns over the stability of democracy in a starkly stratified citizenship. *See* J. B. TURNER, INDUSTRIAL UNIVERSITIES FOR THE PEOPLE. PUBLISHED IN COMPLIANCE WITH RESOLUTIONS OF THE CHICAGO AND SPRINGFIELD CONVENTIONS AND UNDER THE INDUSTRIAL LEAGUE OF ILLINOIS 5 (Morgan Journal Book and Job Office ed. 1853) (asserting that a system of education which serves only the upper-class causes a concentration of power that lends itself to political corruption and exhaustive exploitation of the subordinate laborer, and ultimately results in despotism).

alongside the liberal arts and charging cheaper tuition fees than traditional colleges, land-grant institutions made great strides reflecting the ability of public higher education institutions to promote social mobility on a broader scale.[153] Today, more than 100 land-grant institutions enroll more than 1.3 million students and over time land-grant institutions have educated approximately 20 million people.[154]

2. The G.I. Bill

The Servicemen's Readjustment Act of 1944, otherwise known as the "G.I. Bill," can be viewed as part of broader New Deal reforms and the extension of President Franklin Delano Roosevelt's "economic bill of rights."[155] Ironically, the G.I. Bill's drafters did not necessarily intend for the Act to convey universal higher education access, despite its having that derivative impact. The G.I. Bill's drafters conceived the Act as a partial solution to post-war chaos and as a reward for military service.[156] Prior to the end of World War II, most higher education institutions had no plans for the broad extension of higher education access, despite access being a historically important concept to political thinkers and educational leaders.[157] Nonetheless, the G.I. Bill had an unprecedented transformative

---

153. *See* CHARLES K. ADAMS ET AL., ADDRESSES DELIVERED AT THE MASSACHUSETTS AGRICULTURAL COLLEGE, JUNE 21ST, 1887, ON THE 25TH ANNIVERSARY OF THE PASSAGE OF THE MORRILL LAND GRANT ACT 20 (J. E. Williams ed. 2007) (1887); Lee, *supra* note 141, at 34; *see also* Arne Duncan, Sec'y, Dep't of Educ., Agricultural Education in the 21st Century: Secretary Duncan's Remarks at the FFA Convention (Oct. 21, 2010), *available at* http://www.ed.gov/news/speeches/agricultural-education-21st-century-secretary-arne-duncans-remarks-ffa-convention ("Up until Lincoln acted, colleges and universities had been largely reserved for the few. But President Lincoln believed that in 'the race of life', everyone should have equal privileges—and education was the leveler.").

154. JEYNES, *supra* note 152, at 194.

155. *See* BOWEN ET AL., *supra* note 2, at 30 (describing FDR's 1944 State of the Union address, calling for a "second Bill of Rights" which would guarantee "protection from the economic fears of old age, sickness, accident, and unemployment"); Melissa Murray, *When War Is Work: The G.I. Bill, Citizenship, and the Civic Generation*, 96 CAL. L. REV. 967, 990 (2008) (reviewing SUZANNE METTLER, SOLDIERS TO CITIZENS: THE G.I. BILL AND THE MAKING OF THE GREATEST GENERATION (2005) (linking the ideals of the G.I. Bill with those of the New Deal)).

156. *See* Keith W. Olson, *The G.I. Bill and Higher Education: Success and Surprise*, 25 AM. Q. 596, 600 (1973) ("Anxiety about economics . . . preceded and dominated [the G.I. Bill's] altruism toward veterans."); Milton Greenberg, *How the GI Bill Changed Higher Education*, CHRON. HIGHER EDUC., June 18, 2004, Vol. 50, Issue 41, at B9 ("At the war's end, the nation faced a massive demobilization of both the military and the domestic wartime economy. . . Political leaders genuinely feared the chaotic and revolutionary conditions that characterized the decades of the 1920s and 1930s . . . .").

157. *See* BOWEN ET AL., *supra* note 2, at 4.

impact on higher education access and social advancement in the United States.[158] The G.I. Bill democratized higher education and home ownership, which ultimately led to a post-war expansion of the middle class and the flattening of class hierarchies.[159] In total, the Act helped 2.2 million World War II veterans attend college, of whom half were first-generation college students.[160] Further, the U.S. government received a return of approximately eight dollars in income taxes for every dollar spent on G.I. Bill education benefits.[161]

Title II of the G.I. Bill addressed educational benefits and offered veterans with ninety days of service up to four years of funding for vocational training or higher education, including tuition, fees, books, and a monthly stipend.[162] Nearly half of the 15 million eligible veterans availed themselves of the opportunity.[163] In real terms, the educational funding under the Act was generous and sufficient to pay expenses at most elite colleges and universities.[164] The ease of administering the G.I. Bill's education benefits was also instrumental in its success. In essence, the G.I. Bill functioned as a centralized entitlement and voucher program that was administered through individual students rather than higher education institutions or government bureaucracies.[165] Put differently, the government

158. Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284. *See* William Clinton, Proclamation No. 6703, 59 Fed. Reg. 32,643 (June 21, 1994) (reflecting that the G.I. Bill "opened the door to the American dream of opportunity for advancement to an entire generation of young Americans . . . and paved the way for an unparalleled period of U.S. economic growth and development"); John Bound & Sarah Turner, *Going to War and Going to College: Did World War II and the G.I. Bill Increase Educational Attainment for Returning Veterans?*, 20 J. LAB. ECON. 784, 785 (2002) (noting that under the G.I. Bill, total college enrollment increased by over 50% from prewar numbers); CHRISTOPHER JENCKS & DAVID RIESMAN, THE ACADEMIC REVOLUTION (St. Martin's Press 1982) (1969) (finding that the accommodation of veterans instigated a period of unprecedented growth in higher education facilities, with nearly 1,700 new institutions founded between 1944 and 1994).

159. *See* Murray, *supra* note 155, at 974.

160. MILTON GREENBERG, THE GI BILL: THE LAW THAT CHANGED AMERICA 36 (1997).

161. *Id.* at 37.

162. Servicemen's Readjustment Act of 1944, Pub. L. No. 346, §§ 400–03, 58 Stat. 284, 288.

163. *See* Murray, *supra* note 155, at 973.

164. Reporting that the federal stipend suddenly made elite universities affordable, *Time* magazine observed "why go to Podunk College, when the Government will send you to Yale?" *Education: S.R.O.*, TIME, Mar. 18, 1946, at 75. Current financial aid benefits for veterans do not compare in real terms.

165. *See* Greenberg, *supra* note 156; *see also* SUZANNE METTLER, SOLDIERS TO CITIZENS: THE G.I. BILL AND THE MAKING OF THE GREATEST GENERATION 65 (2005) (interviewing veterans on their personal experiences with the educational benefits of the bill).

made the money available, but veterans decided if and where to use the benefit.

The G.I. Bill had a profound impact on higher education institution demographics that, prior to World War II, "were characteristically rural, private, small, elitist, white, and Protestant . . . ."[166] To a large extent, "[p]ublic institutions were not too dissimilar."[167] The massive influx of veterans into the higher education system via the G.I. Bill was not necessarily met with open arms. For example, former Harvard president James Conant initially expressed reservations that waves of unqualified students would flood college campuses, though he later warmed to the idea.[168] In a sense, the G.I. Bill democratized higher education by providing immigrant (e.g., European), religious (e.g., Jews and Catholics), and low-SES groups access to higher education and ultimately to various professions.[169] In addition to its obvious longstanding economic benefits, the G.I. Bill promoted high levels of civic engagement and positive feelings toward the federal government. One observer contends that the G.I. Bill's design had a communicative function reinforcing the government's support for veterans.[170]

Although the G.I. Bill was facially gender and race neutral, not all groups benefitted equally from its provisions. For example, the bill had a limited impact on female veterans, who represented only 64,000 (i.e., less than 3 percent) of the veterans who attended college under the G.I. Bill.[171] Arguably, the G.I. Bill had the temporary impact of displacing women and slowing their college enrollment growth. The G.I. Bill had a similarly limited impact on higher education outcomes for African-Americans.[172] In

166. Greenberg, *supra* note 156. By 1947, veterans accounted for 49% of college enrollments. *Id.*

167. *Id.*

168. GREENBERG, *supra* note 160, at 39. Conant ultimately praised the veterans as being "the most mature and promising students Harvard has ever had." *Id.*

169. *See* Greenberg, *supra* note 156; Bound & Turner, *supra* note 158.

170. *See* METTLER, *supra* note 165, at 153 (arguing that the generous benefits and efficient administration of the G.I. Bill conveyed the government's appreciation for veterans, which in turn spurred the veterans towards active civic participation).

171. *See* Greenberg, *supra* note 156.

172. *See* Sarah Turner & John Bound, *Closing the Gap or Widening the Divide: The Effects of the G.I. Bill and World War II on the Educational Outcomes of Black Americans,* 63 J. ECON. HIST. 145, 146, 151, 170 (2003) (finding that, even though a greater percentage of black enlisted men than white indicated an interest in G.I. Bill education or training, black veterans were less likely to be academically prepared for college programs, which disadvantaged them in the admissions process at a time when college enrollment was in such high demand; also, the sub-standard quality of the schools that black veterans did gain admittance to may have limited the educational benefit actually realized by this group).

fact, the G.I. Bill may have created an even greater economic rift between African-Americans and whites in the South.[173] Technically, aid under the G.I. Bill did not confine African-Americans' choices to the segregated universities in the South. However, social networks, economics, and other factors inevitably constrained the choices of African-American veterans to a greater degree. The disparities between African-Americans in the South and African-American veterans elsewhere illustrate how Congress' failure to create uniform standards for implementation, coupled with different policies and conditions at the state and local level, undermined the equitable distribution of federal programs. This ultimately yielded divergent interstate outcomes for African-Americans.[174] The challenges Southern African-Americans experienced with the G.I. Bill highlight the potential limitations of decentralized choice-based reforms that contemporary education reformers may find instructive.[175]

3. The Truman Commission Report on Higher Education 1947

Following World War II and the influx of more students into the higher education system, President Harry Truman established a Commission that created a 1947 report titled *Higher Education for American Democracy*.[176] The Commission's report emphasized democracy, access, equality, and made recommendations such as: (i) expanding the federal government's role in funding higher education institutions, (ii) expanding the role of community colleges, and (iii) increasing college access and equity.[177] The Commission's emphasis on democracy, access and equity differ markedly from the largely market-based justifications that currently dominate higher education access debates.[178] The Commission linked higher education

173. *See id.* at 170–72.

174. *See id.* at 171–72.

175. *See id.*

176. PRESIDENT'S COMMISSION ON HIGHER EDUCATION, *supra* note 121.

177. *Id.*, vol. 1, at 41, 67; *Id.*, vol. 2, at 23.

178. *See* Claire Gilbert & Donald Heller, *The Truman Commission and Its Impact on Federal Higher Education Policy from 1947 to 2010* at 1–2 (2010), *available at* http://www.ed.psu.edu/educ/cshe/working-papers/CSHE%20Working%20Paper%20%239. *See also* BOWEN ET AL., *supra* note 4, at 5 ("In the present state of public opinion, evidence of the benefits of higher education—not rhetorical flourishes—is being demanded. . . . The fashionable words are 'efficiency' and 'accountability.'"); MCMAHON, *supra* note 128, at 118 ("Higher Education has become so expensive to students, their families, and governments that it has become essential to articulate what they are getting for their investment."). Current research and writing on college access often strives to justify equity goals in terms of economics, as well,

access for low-SES students to broader societal concerns recognizing that college access determined by socio-economic status deprived the nation of a potential cadre of leaders and many competent citizens as well as perpetuated class divisions.[179] The Commission considered the elimination of financial barriers to higher education as the key vehicle to greater access.[180] Despite the Commission's extensive work and contribution to a national dialogue on higher education, many of its recommendations were not implemented until decades later because of the lack of political will and support at the federal level.[181] Eventually, however, the federal government expanded its higher education role in key areas with the Great Society and Civil Rights reforms.

4. The Great Society and Civil Rights

After coming into office, President Lyndon Johnson signed the Civil Rights Act of 1964, which created an influential mechanism that withheld federal funds from schools and other institutions that refused to desegregate.[182] In addition, President Johnson, a former teacher of underprivileged Mexican children in Texas, helped create a patchwork of federal legislation and programs to address educational disparities such as the Elementary and Secondary Education Act of 1965 (reauthorized in 2010 as the No Child Left Behind Act) and the Higher Education Act of 1965.[183] These Great Society programs complemented civil rights legislation by increasing the federal funds available to desegregated schools and providing significant funds to aid disadvantaged students.[184]

The Higher Education Act of 1965 explicitly articulated the goal of making college affordable for all Americans.[185] The Act established a clear federal role in higher education of promoting equality of opportunity.[186] It carried forward key recommendations previously articulated in the Truman

---

by analyzing "non-market benefits," or, improvements to an educated person's quality of life other than increased income. *See, e.g.*, MCMAHON, *supra* note 128.

179. Gilbert & Heller, *supra* note 178, at 2.

180. PRESIDENT'S COMMISSION ON HIGHER EDUCATION, *supra* note 120, vol. 2, at 23.

181. *See* Gilbert & Heller, *supra* note 178, at 1.

182. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 24.

183. SHEILA CURRAN BERNARD & SARAH MONDALE, SCHOOL: THE STORY OF AMERICAN PUBLIC EDUCATION, 145–48 (2002). The Higher Education Act of 1965 ushered in a new era of federal financial aid for higher education. *See infra* Part III.E.

184. *See* BARBARA MILLER SOLOMON, IN THE COMPANY OF EDUCATED WOMEN: A HISTORY OF WOMEN AND HIGHER EDUCATION IN AMERICA 58, 198 (1985).

185. 79 Stat. 1219 (2010).

186. MICHAEL MUMPER, REMOVING COLLEGE PRICE BARRIERS 78 (1996).

Commission Report.[187] The Act contained five major parts: Title I created community service and continuing education programs; Title II upgraded university libraries; Title III provided aid to historically black colleges and universities; Title IV provided for college student aid; and Title V established the National Teaching Corps.[188] Title IV, the Act's hallmark, provided three types of financial assistance: loans, grants, and college work-study.[189] Specifically, Title IV of the Act made college more affordable for millions of Americans.[190] Yet it failed to achieve universal college affordability because it was too small.[191] Also, the political climate during the late 1960s and early 1970s—marked by rioting, student protest, and war—soured the electorate's perspective on student aid.[192] Notwithstanding, the Act has survived and undergone several reauthorizations.[193] Today, however, the amount of available aid covers a much smaller portion of college costs in real terms.[194]

Our nation's history vividly illustrates the importance of expanding college access to broader segments of the U.S. population. It also reflects the many perils of economic stagnation and social stratification. These dangers are especially evident in the American South where expanding college access met, and continues to meet, its strongest opposition.[195]

---

187. *See* Gilbert & Heller, *supra* note 178, at 5–6, 14.

188. MUMPER, *supra* note 186, at 78.

189. *Id.*

190. *See* BERNARD & MONDALE, *supra* note 197, at 145–48.

191. *Id.* at 80–81.

192. *Id.* at 81.

193. The Higher Education Act of 1965 was reauthorized in 1968 (P.L. 90-575), 1972 (P.L. 92-318), 1976 (P.L. 94-482), 1980 (P.L. 96-374), 1986 (P.L. 99-498), 1992 (P.L. 102-325), 1998 (P.L. 105-244), and 2008 (P.L. 110-315). The next reauthorization is scheduled to occur in 2013. *Reauthorization of the Higher Education Act of 1965*, FINAID, http://www.finaid.org/educators/reauthorization.phtml (last visited May 14, 2012).

194. The purchasing power of a Pell Grant toward a four-year college education in 2010 has been cut to less than half of what it was in 1979. In 1979-80, the maximum Pell Grant covered 77% of the cost at a public four-year college and 36% at a private four-year college. By 2010–11, these percentages had dropped to 36% and 15% respectively. Mamie Lynch et al., *Lifting the Fog on Inequitable Financial Aid Policies*, EDUC. TRUST, Nov. 2011, at 4, *available at* http://www.edtrust.org/sites/edtrust.org/files/publications/files/Lifting%20the%20Fog%20FINAL.pdf. *See also* Michael Mumper, *Does Policy Design Matter? Comparing Universal and Targeted Approaches to Encouraging College Participation*, 17 EDUC. POL'Y 38, 49 (2003).

195. *See* WILLIAMS, *supra* note 139, at 11, 39 (asserting that the Morrill Act, which provided government resources for public colleges, only passed due to the legislative absence of the Southern states during the Civil War); Turner & Bound, *supra* note 172, at 145, 151–54 (discussing the prolonged racial segregation of Southern colleges and universities); *see also* WILLIAMS, *supra* note 139, at 15 (asserting that the South resisted a public obligation to provide

Today, Southern states, rural areas in particular, continue to lag behind other states in multiple social, economic and educational categories.[196] According to the Pew Center on the States, the South is the most downwardly economically mobile region of the country.[197] Certain demographic segments of the Southern population (e.g., African-Americans) rival developing countries in health outcomes such as infant mortality rates.[198] These Southern states should serve as a cautionary tale with respect to limiting college access and opportunity.

Notwithstanding the historical pattern of expanding higher education to low-SES students, significant barriers still exist. Poor academic preparedness, information deficits, social capital deficits, financial hardship, and political weakness continue to limit college opportunities for many low-SES students.[199] The regulatory architecture impacting low-SES students, especially at the federal level, has changed little since the Johnson administration Great Society reforms. The existing policy framework is too antiquated to deal with the nation's present and future challenges.

III. FUTURE STEPS TOWARD EXPANSION

In order to better address higher education access for low-SES students, reforms must target all phases of the K–16 continuum: K–12 academic preparation; transitional assistance between secondary school and higher education; and college-level achievement. These reforms must be comprehensive and address emerging demographics, quality, stratification, and market failures such as information asymmetries. Such reforms must engage multiple stakeholders—federal and state government actors as well as higher education institutions and private entities. The regulation of higher education has traditionally. fallen to the state governments, who play the

---

a K-12 education longer than other regions did). *See generally* SOLOMON, supra note 184 (noting that Southern colleges and universities prohibited women from attending classes with men after other regions had transitioned to coed campuses).

196. *See, e.g.*, PEW CENTER ON THE STATES, PEW CHARITABLE TRUSTS, ECONOMIC MOBILITY OF THE STATES: EXECUTIVE SUMMARY 2 (2012), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/MobilityofStates_Summary%281%29.pdf (studying economic mobility on a state-by-state basis and finding that Southern states are consistently downwardly mobile).

197. *Id.*

198. *See* Robert Gibbs, *New South, Old Challenges*, RURAL AM., Feb. 2001, at 1, 2–4; *see also* AMARTYA SEN, DEVELOPMENT AS FREEDOM 21–24, 96–98, 154–55 (1999).

199. *See* WILLIAM G. BOWEN ET AL., EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION 73 (2005). Notably, the low-income student category contains more white students than minority students although racial minorities are disproportionately represented. *Id.* at 74.

most important role. Realistically, the federal government's control over state affairs is limited. Nonetheless, the federal government's leadership role is quite important. It has important tools at its disposal to influence reform at the state level: funding mechanisms such as competitive grants; the ability to collaboratively shape legislation with non-federal actors; the "bully pulpit" to influence broader adoption of reform proposals; and other extreme measures such as litigation.[200]

Optimally, a national framework embodying principles of cooperative federalism and democratic experimentalism is necessary. Cooperative federalism recognizes the need for collaboration and interaction between federal, state, and local actors to achieve more meaningful reforms.[201] Democratic experimentalism recognizes how inflexible, one-size-fits-all, and top-down approaches may crowd out the benefits of bottom-up participation, expertise, and innovation.[202] These bottom-up innovations and strategies may eventually be scaled-up and serve as the basis for a national reform model.

A. Presidential Commission on Higher Education Access and Equity

Given the importance of higher education stratification, social mobility, and democracy, the current administration should create a Presidential Commission to study and formulate reform recommendations for future adoption by federal and state governments as well as higher education institutions.[203] The importance of accessible, affordable, quality higher education is a key linchpin upon which the nation's future vitality rests.[204] Although commissions on education are not uncommon, a Presidential commission with a singular focus on higher education access and equity would be groundbreaking.[205] Such a commission would bring together

200. *See* Carey, *Obama's Bold Plan to Reshape American Higher Education*, *supra* note 9.

201. The promise of cooperative federalism, however, is most likely subject to favorable political conditions such as the political alignment of state governors, state legislatures, and the White House.

202. *See, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 314 (1998); Susan Sturm, *Gender Equity Regimes and the Architecture of Learning*, *in* LAW & NEW GOVERNANCE IN THE EU AND THE US 323, 325 (Gráinne de Búrca & Joanne Scott eds., 2006).

203. *See* WILLIAM ZUMETA ET AL., FINANCING AMERICAN HIGHER EDUCATION IN THE ERA OF GLOBALIZATION 164–65 (2012).

204. Gary Rhoades, *Forget Executives, the AAUP Should Turn to Grass-Roots Leaders*, CHRON. HIGHER EDUC., Jan. 13, 2012, at A48.

205. *See* PRESIDENT'S COMMISSION ON HIGHER EDUCATION, *supra* note 121; NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL

representatives with diverse higher education perspectives and take a long-term investment-oriented view. This is especially important as budget-strapped states disinvest in higher education and colleges focus on bottom-line revenues.[206] A commission is also necessary because of the protracted rhetorical debates and legislative gridlock that stifle well-intentioned efforts at both the state and federal levels.[207] Emerging from the commission's policy dialogue would be a national strategy to assist states and higher education institutions in achieving the national goal of increasing higher-education attainment for low-SES populations.

On the 2008 campaign trail, presidential candidate Barack Obama decried the use of commissions to solve the nation's problems.[208] Ironically, the Obama administration has made significant use of the commission model to address a range of topics: the British Petroleum oil spill, bioethics, nuclear energy, and national debt.[209] President Obama's Second Inaugural Address made it clear that higher education for lower, working, and middle-class families has become a salient second-term issue that resonates with the public.[210] Subsequently, the Obama administration announced a new college rating system, plans to allocate federal aid to colleges based upon their performance, and a pledge to address college affordability.[211] The existing regulatory architecture is outdated and unable to meet today's challenges. Similar to the Truman Commission, another commission on higher education is needed to

---

REFORM (1983), *available at* http://reagan.procon.org/sourcefiles/a-nation-at-risk-reagan-april-1983.pdf; MARGARET SPELLINGS, U.S. DEPT. EDUC., COMM'N ON THE FUTURE OF HIGHER EDUC., A TEST OF LEADERSHIP: WRITING THE FUTURE OF U.S. HIGHER EDUCATION (2006), *available at* http://www2.ed.gov/about/bdscomm/list/hiedfuture/reports/final-report.pdf.

206. *See* Rhoades, *supra* note 204; *see also* Eric Kelderman, *Duncan Criticizes States as 'Penny-Wise and Pound-Foolish' for Higher-Ed Cuts*, CHRON. HIGHER EDUC., Aug. 9, 2012, *available at* http://chronicle.com/article/Duncan-Criticizes-States-as/133509/.

207. Rick Lyman, *Governors Criticize Gridlock in Congress*, N.Y. TIMES, (Jan. 15, 2014), *available at* http://www.nytimes.com/2014/01/16/us/politics/from-governors-to-congress-a-blunt-message-do-something.html.

208. On the 2008 campaign trail, presidential candidate Barack Obama decried the use of commissions to solve the nation's problems. *Obama Flip-Flops on Use of Presidential Commissions*, POLITIFACT.COM, http://www.politifact.com/truth-o-meter/statements/2010/jul/01/barack-obama/obama-flip-flops-use-presidential-commissions/ (last visited May 16, 2012).

209. *See id.*

210. *See* President Barack Obama, Inaugural Address (Jan. 21, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama; *see also* Thomas B. Edsall, *The Politics of Going to College*, N.Y. TIMES (Apr. 1, 2012), http://campaignstops.blogs.nytimes.com/2012/04/01/the-politics-of-going-to-college.

211. *See* Carey, *Obama's Bold Plan to Reshape American Higher Education*, *supra* note 9.

address the contemporary challenges that threaten to undermine the nation's potential.

B. A Rigorous K–12 Education for Low-SES Students

A quality K–12 education is a key element of higher education attainment.[212] Research indicates that far too many K–12 students lack a rigorous education that cultivates important competencies such as effective writing, communication, and critical thinking skills.[213] There are multiple paths toward a rigorous K–12 education.[214] The panoply of reforms to promote equity for low-SES students—school desegregation lawsuits, adequacy lawsuits, school choice, accountability mechanisms, charter

---

212. Allie Bidwell, *Obama Reaffirms Old Education Promises in State of the Union*, U.S. NEWS & WORLD REPORT, Jan. 29, 2014, *available at* http://www.usnews.com/news/articles/2014/01/29/obama-reaffirms-old-education-promises-in-state-of-the-union-address ("[The President] called on state and federal regulators to invest in early childhood education, as a way to build up the struggling economy and the nation's academic standing. He also urged college leaders to continue to look for ways to push the high cost of college tuition down, and touted the recent college affordability summit he hosted at the white house."); *see also* Adrienne Lu, *Elected officials embrace preschool, but funding is catch*, USA TODAY (Feb. 28, 2014), *available at* http://www.usatoday.com/story/news/nation/2014/02/28/stateline-preschool-funding/5894775/ (President Obama, as well as lawmakers and local officials from both parties agree on the benefits of prekindergarten. "High-quality" programs are critical to achieving "lower school dropout rates, reduced costs to the criminal justice system and higher wages.").

213. Lyndsey Layton, *Study: Poor children are now the majority in American public schools in South, West* WASH. POST, (Oct. 16, 2013), http://www.washingtonpost.com/local/education/study-poor-children-are-now-the-majority-in-american-public-schools-in-south-west/2013/10/16/34eb4984-35bb-11e3-8a0e-4e2cf80831fc_story.html. The article notes that in a large part of the country, "classrooms are filling with children who begin kindergarten aleady behind their more privileged peers." *Id.* The current education system "continues to assume that [most students[are middle class and have independent resources outside the schools in order to support their education. . . ." *Id.* This is a misguided assumption. Children from families with low literacy, who are not read to at home, who have poor health, and a variety of other social and economic problems are not going to test well. As a result, low-income schools have the lowest test scores. *See also* Claire Robertson-Kraft & Angela Duckworth, *True grit: Trait-level perseverance and passion for long-term goals predicts effectiveness and retention among novice teachers,* (in press), 2 (2012) ("Unfortunately, less effective teachers are disproportionately concentrated in the neediest schools and districts, making students from low-income communities less likely to be exposed to high quality instruction than their peers in higher-income communities.").

214. High stakes testing strategies, such as those created by No Child Left Behind in 2001, have failed to provide a rigorous education for many low-SES students across the country. *See* RYAN, *supra* note 110, at 259; *see also* ROBERT J. STERNBERG, COLLEGE ADMISSIONS FOR THE 21ST CENTURY (2010). *But cf. Special Issue: College and University Admissions*, EDUC. PSYCHOL., Jan.–Mar. 2012.

schools, vouchers, and others—often coalesce around a basic goal: providing a quality and more rigorous education for the greatest number of students.[215] Yet the extension of a rigorous education to a broader segment of the population presents significant challenges. These challenges are discussed extensively in legal literature.[216]

Basic examples of a rigorous curriculum include International Baccalaureate (IB) and Advanced Placement (AP) programs.[217] These programs approximate college level rigor and signal student readiness to colleges. Interestingly, there have been initiatives to extend IB and AP

---

215. *See generally* James E. Ryan, *The Supreme Court and Voluntary Integration,* 121 HARV. L. REV. 131 (2008) (on school desegregation); Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Our Elementary and Secondary Schools*, 50 B.C. L. REV. 277 (2009) (same); Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791 (2005) (same); Goodwin Liu, *Brown, Bollinger, and Beyond*, 47 HOW. L.J. 705 (2004) (same); Goodwin Liu, Essay, *"History Will Be Heard": An Appraisal of the Seattle/Louisville Decision*, 2 HARV. L. & POL'Y REV. 58 (2008) (same); Hinckley A. Jones-Sanpei, *Public School Segregation and Social Capital*, 12 J. GENDER RACE & JUST. 329 (2009) (same); Wendy Parker, *Limiting the Equal Protection Clause, Roberts Style*, 63 U. MIAMI L. REV. 507 (2009) (same); James E. Ryan, *Brown, School Choice, and the Suburban Veto*, 90 VA. L. REV. 1635 (2004) (on school choice); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 285 (1999) (same); James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043 (2002) (same); James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 54 UCLA L. REV. 547 (2007) (same); James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C. L. REV. 1659, 1695–96 (2003) (on adequacy lawsuits); James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223 (2008) (same); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330 (2007) (same); Martha S. West, *Equitable Funding of Public Schools Under State Constitutional Law*, 2 J. GENDER RACE & JUST. 279 (1999) (same); William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat From Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545 (2006) (same); Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995) (same); Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995) (same); Michael Heise, *Adequacy Litigation in an Era of Accountability*, *in* SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY 262 (Martin R. West & Paul E. Peterson eds., 2007) (same).

216. *See supra* note 215.

217. The Advanced Placement program is administered by The College Board and offers college-level courses in the high school setting in a variety of subject areas. DIANE RAVITCH, EDSPEAK: A GLOSSARY OF EDUCATION TERMS, PHRASES, BUZZWORDS, AND JARGON 14 (2007). The International Baccalaureate program is described as "[a] rigorous international program of study that originated in Switzerland and has spread to more than 100 nations." *Id.* at 124. High school students in either program may earn college credit by scoring on a proficient level on a final examination. *Id.* at 14, 124.

programs to low-income schools.[218] According to one study, the number of low-income schools offering IB courses has increased significantly.[219] Yet the actual number of low-income students enrolled in IB courses has increased only marginally.[220] Although the cause of this discrepancy is uncertain, one contributing factor, perhaps, is that IB programs are used to promote multiple goals. They promote academic enrichment and may function as a carrot for middle-income families to promote economic and racial diversity in otherwise homogeneous urban schools. Some of these low-income schools offering IB curriculums function as magnet schools and are *de facto* schools within schools. The presence of rigorous academic programs in the neediest school districts is without question a net positive; however, expanding a rigorous curriculum to the greatest of number of low-income students should remain the primary concern. These concerns highlight an interesting political tension where the fate of underprivileged students is linked to the presence of more privileged students.[221] James Ryan identifies a similar phenomenon between urban and more affluent suburban school districts in the K–12 context.[222]

C. *College Counseling and Financial Literacy*

The transition between K–12 and higher education has a vital impact on higher education attainment for low-SES students. Whereas legal scholars have explored K–12 academic achievement as well as higher education

---

218. Laura Perna, Joni Finney, & Patrick Callan, *The Role of Public Policy in Higher Education Performance: Lessons from a Five-State Policy Review*, Association for the Study of Higher Education, Public Policy Pre-Conference Forum, Nov. 16, 2011; *see also* Robin M. Kyburg et al., *Advanced Placement and International Baccalaureate Programs: Optimal Learning Environments for Talented Minorities?*, 18 J. ADVANCED ACAD., No. 2 2007, at 172, 174 (2007); INT'L BACCALAUREATE ORG. INCREASING ACCESS FOR DIVERSE SCHOOLS AND STUDENTS, (2010), *available at ibo.org/recognition/resources/documents/AccessBrochure1.6.pdf.*

219. *Id.* Within the United States (US), almost one-third of the schools offering the Diploma Programme are Title I eligible, serving a significant proportion of low-income students, and about one-sixth of IB students registering for examinations qualify for the federal free and reduced price lunch program, which subsidizes meals for students whose family income is at or near the poverty line. More than 40% of the IB Diploma Programme students in the US are non-white or Hispanic. *Id.*

220. *See* Kyburg et al., *supra* note 218.

221. *See*, *supra* note 213 (In some cases underprivileged students "show up for kindergarten with a working vocabulary half as large as their peers." These students need to spend additional time in school and be given access to health care, social, and emotional support.)

222. *See* RYAN, *supra* note 110, at 271–72.

admissions practices, they have largely ignored the importance of this transitional phase. Nationwide there are 460 students for every counselor.[223] The availability of college counseling varies across state, district, and school lines.[224] Variations are manifested "in differences . . . in the number of students per counselor, as well as in differences in the availability of a dedicated college and career coordinator and center."[225] Seventy-seven percent of private high schools employ a position dedicated to college counseling assistance, compared to only 21% of public high schools nationwide that do so.[226] The provision of quality ancillary college counseling support should occur alongside academic instruction in a school environment that manifests a "college going" culture.

Research indicates that school counselors are ill-equipped to advise students regarding financial aid and do not typically receive training in this area.[227] Improving knowledge of financial aid resources would reduce the number of students who enroll in college but never apply for financial aid. A 2004 study found that approximately 1.7 million low- and moderate-income students who enrolled in colleges nationwide between 1999–2000 did not fill out the FAFSA form.[228] Fifty percent of these students were likely eligible for Pell Grants.[229] There is a strong correlation between FAFSA completion and college enrollment, especially among low-SES populations.[230] A 2007 Chicago Public Schools study illustrated that students who complete the FAFSA are twice as likely to enroll in college.[231]

---

223. *See* JEAN JOHNSON ET AL., BILL & MELINDA GATES FOUND., CAN I GET A LITTLE ADVICE HERE? 3 (2010), http://www.publicagenda.org/files/pdf/can-i-get-a-little-advice-here.pdf.

224. *See* Laura W. Perna et al., *The Role of College Counseling in Shaping College Opportunity: Variations across High Schools,* 31 REVIEW HIGHER EDUC. 131, 153 (2008).

225. *Id.*

226. *Id.*; NAT'L ASS'N. FOR COLL. ADMISSIONS COUNSELING, STATE OF COLLEGE ADMISSION 2006 55 (David A. Hawkings & Melissa Clinedinst eds., 2006), *available at* http://www.nacacnet.org/PublicationsResources/Research/Documents/06StateofAdmission.pdf.

227. *See* Perna, *supra* note 3, at 147–49.

228. *Id.* at 156.

229. *Id.*

230. CONSORTIUM ON CHICAGO SCHOOL RESEARCH, FROM HIGH SCHOOL TO THE FUTURE: POTHOLES ON THE ROAD TO COLLEGE at 4 (2008) *available at*: http://ccsr.uchicago.edu/downloads/1835ccsr_potholes_summary.pdf ("Students who reported completing a FAFSA by May and had been accepted into a four-year college were more than 50 percent more likely to enroll than students who had not completed a FAFSA. This strong association holds even after we control for differences in students' qualifications, family background and neighborhood characteristics, and support from teachers, counselors, and parents.").

231. *Id.*

In response to this strong correlation, the Department of Education initiated a FAFSA Completion Project to promote FAFSA completion and the Obama administration's 2020 goals.[232] Ultimately, the project will provide for broad online posting of FAFSA completion rates on a school-by-school basis.[233]

In order to address further stratification in the higher education system, policymakers should either mandate[234] or at least strongly encourage the formation of an integrated self-standing college counseling function in the nation's public high schools, particularly in the neediest school districts.[235] Higher education resembles what economists call an "experience good" because its value or quality is usually not discernible until long after consumers have experienced it.[236] A keen observer describes the nature of higher education as follows:

> The chief products of higher education, learning in all its manifestations, consists primarily of changes in people—changes in their knowledge, their characteristics, and their behavior. These changes are generated in the first instance by instruction, research,

---

232. *See* Todd May, *ED Announces FAFSA Completion Project Expansion*, ED.GOV BLOG, (May 31, 2012), http://www.ed.gov/blog/2012/05/ed-announces-fafsa-completion-project-expansion/ ("If students don't think they can pay for college, they won't apply for college. Giving more young people access to the tools they need to apply for federal student aid is a key part of our strategy to make America number one in the world for college graduates by 2020."- Arne Duncan, U.S. Secretary of Education); *See also* CONSTANCIA WARREN ET AL., U.S. DEPARTMENT OF EDUCATION, FROM INFORMATION TO ACTION: A GUIDE TO USING POSTSECONDARY DATA TO IMPROVE STUDENTS' CHANCES FOR POSTSECONDARY SUCCESS 3 (2012), *available at* http://www2.ed.gov/programs/slcp/information-to-action.pdf (citing Chicago Study on FAFSA completion).

233. *FAFSA Completion Data Tool*, DEP'T OF EDUC., http://www.fsa4counselors.ed.gov/clcf/FAFSACompletion.html (last updated Mar. 20, 2012).

234. Perna, *supra* note 3, at 152 (noting that thirty states and the District of Columbia already mandate general school counseling for 9th–12th grade students).

235. *See* NAT'L ASS'N. COLL. ADMISSIONS COUNSELING, COLLEGE ACCESS AGENDA FOR THE 111TH CONGRESS (2010), *available at* http://www.nacacnet.org/issues-advocacy/MemberAction/Documents/CollegeAccessAgenda111.pdf; PATRICIA M. MCDONOUGH, NAT'L ASS'N. FOR COLL. ADMISSIONS COUNSELING, COUNSELING AND COLLEGE COUNSELING IN AMERICA'S HIGH SCHOOLS 4, 7–8, 13 (2004); *see generally* Omari Scott Simmons, *Lost in Transition: The Implications of Social Capital for Higher Education Access*, 87 NOTRE DAME L. REV. 205 (2011).

236. *See* Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 68–69 (1973) ("Credence qualities are those which, although worthwhile, cannot be evaluated in normal use."). This can be a particular disadvantage to potential first-generation college students who are provided with limited evidence of the financial return of higher education within their family, school, or community. *See* Laura W. Perna, *Studying College Access and Choice: A Proposed Conceptual Model*, *in* HIGHER EDUCATION: HANDBOOK OF THEORY AND RESEARCH 99, 108 (2006).

> and public service. But learning may set in motion a dynamic process leading to further changes in people and also to broad social changes.[237]

The benefits of higher education extend far into the future, and therefore students and their parents naturally must rely on an array of crude heuristics—relatives, acquaintances, glossy brochures, U.S. News & World Report, and other college guides—as a risk-reduction strategy when making college choices.[238] Compared to more affluent students, low-SES students are not similarly situated and have inferior access to valuable college and financial aid information. For example, a recent study by the U.S. Consumer Financial Protection Bureau asserts that many students do not differentiate between federal and private student loans or know that the former generally have more consumer-friendly terms and protections.[239] Low-SES students' greater sensitivity to college prices and loans presents an additional challenge to access that effective counseling could help ameliorate.[240]

The current federal and state focus on college readiness standards has limited value if large numbers of low-SES students either fail to enroll in college or "under-match" in their choices.[241] College counseling departments should be staffed with competent, experienced, and well-trained professionals, who are exclusively focused on college related activities.[242] In order to be effective, college counseling departments must

---

237. *See* BOWEN, *supra* note 21, at 16.

238. Lower income students are more sensitive to college sticker price than their middle- and upper-class peers who are more likely to consider institutional reputation and brand. For example, Theda Skocpol notes: "Given the obvious costs they would have to struggle to pay directly or by taking on debt, many lower-income and modest-income families do not understand the putative value of future income gains of higher education." Theda Skocpol & Suzanne Mettler, *Back to School*, DEMOCRACY: J. IDEAS 12 (2008), http://www.democracyjournal.org/pdf/10/SkocpolMettler.PDF.pdf. According to a recent study by the Urban Institute, 36% of student debt holders with household incomes above $100,000 express concerns about their ability to repay their loans, meanwhile 72% of student debt holders with household incomes below $25,000 express concerns. *See* Signe-Mary McKernan & Caroline Ratcliffe, *Forever in Your Debt: Who Has Student Loan Debt, and Who's Worried?*, URBAN INST. 2 (Jun. 26, 2013), http://www.urban.org/UploadedPDF/412849-Forever-in-Your-Debt-Who-Has-Student-Loan-Debt-and-Whos-Worried.pdf.

239. CONSUMER FIN. PROT. BUREAU, *supra* note 33, at 11 ("PSLs are credit-based products designed to mimic key product features of Stafford Loans—with distinctions that are critical for consumer awareness and risk."). For a discussion of key differences between federal student loans and private student loans, see *id.* at 11–13.

240. *See* Pusser, *supra* note 25, at 39.

241. *See generally* Simmons, *supra* note 61.

242. Perna, *supra* note 224, at 143.

have visibility, standing, continuity, and ample resources to assist students and parents effectively. In addition, these departments must engage and even deputize teachers as well as administrators in the college counseling process.[243] The permanence of the high school college counseling function, even if outsourced to a quality third-party provider, contributes to the creation of a college-going culture among teachers, administrators, and the entire student body.[244]

D. Higher Education Level Reforms

Government intervention into the higher education system to stimulate demand often occurs in two ways: public supply and public subsidy. Public supply refers to the direct provision of higher education by public institutions.[245] This is the most direct mechanism for the production of public benefits where student higher education demand and the provision of higher education by private nonprofit and for-profit institutions are insufficient. For example, public universities play a crucial role in training teachers for K–12 education. Higher tuition prices at private nonprofit and for-profit institutions may provide financial disincentives for students to pursue K–12 teaching careers with modest pay. Also, consider federal initiatives during the 1960s to integrate public education as another example of direct government intervention producing far-reaching public benefits. Here, more direct intervention was needed to effectuate broad social change because student demand was insufficient and did not challenge access barriers resulting from racial segregation in higher education.[246]

On the other hand, public subsidy occurs when governments increase demand by making resources available to pay college prices, usually in the form of student financial aid (demand-side subsidies) or direct institutional

---

243. Although teachers in most schools have a limited role in direct college counseling, there are tasks which could be incorporated into the classroom to complement a "college-going culture," e.g. having students "write a college application essay in their English classes" or complete a portfolio of high school projects. *Id.* at 148.

244. The college counseling function provides programming to engage students in college access related activities starting with the ninth grade. Such early intervention would enhance a number of admissions related outcomes such as better standardized test outcomes, rigorous course selection, and navigating more specialized admissions processes (e.g., early decision, ROTC, etc.). *See* MCDONOUGH, *supra* note 235, at 5–6.

245. Pusser, *supra* note 25, at 34–36.

246. *Id.* at 35 ("[Federal initiatives to integrate public higher education] were implemented through direct government intervention in public institutions where consumer demand had long been insufficient to effect social change.") (citation omitted).

grants (supply-side subsidies).[247] The current federal financial aid loan and grant programs as well as the G.I. Bill are examples of successful demand-side public subsidies that produce significant public benefits. Without government intervention in the form of public supply and public subsidy, market failures may lead to under-investment that concomitantly undermines many significant public benefits.

Government intervention is also necessary to protect low-SES students from market volatility and exploitation. Students make postsecondary education choices based upon perceived costs and benefits. These perceptions are inevitably influenced by contextual factors, that is, norms associated with a student's family and high school, in addition to the broader policy, economic, and environmental forces.[248] Policies simply cannot assume the presence of rational market actors. Instead they should consider differences in perception and capabilities among groups when designing policies. Also, policies should incentivize higher education institutions to address the needs of low-SES students.

1. Bolstering Need-Based Financial Aid Policies

Generally, financial aid has four major characteristics: source, form, goals, and eligibility criteria. Financial aid comes from an array of sources, inlcuding: federal programs (65%), colleges and universities (21%), state governments (7%), and private organizations and employers (7%).[249] The form of financial aid also varies and includes grants, loans, work-study, tax credits and deductions. Existing aid policies reflect an assortment of goals including: rewarding achievement, encouraging human capital investment, promoting access for low-SES and other vulnerable students, improving affordability for middle-class students, and encouraging economic development.[250] Eligibility criteria generally fall into two categories: need-based and non-need-based.

There is an interesting dichotomy concerning financial aid reform at the federal, state, and institutional levels between accessibility for low-SES students and affordability for middle-class students.[251] These two groups

247. *Id.* at 34–36.

248. Perna, *supra* note 3, at 145 (providing College Board estimates).

249. *Id.* at 134.

250. *Id.* at 134–36.

251. On federal financial aid reform, see MAMIE LYNCH, JENNIFER ENGLE & JOSÉ L. CRUZ, EDUC. TRUST, PRICED OUT: HOW THE WRONG FINANCIAL-AID POLICIES HURT LOW-INCOME STUDENTS 2 (2011) ("In recent budget debates, most policymakers have focused on ways to

inevitably compete for resources with the latter group often receiving the political spoils. To an extent, lawmakers have struck a bargain with middle-class voters creating two parallel financial aid systems: a low-SES need-based system characterized by various forms of need-based aid—grants, loans, and work-study; and a middle-class system characterized by merit-based aid, loans, tax credits, 529 plans, and subsidies.[252] The current balance between middle-class affordability concerns and reforms targeting low-SES students is distorted.

Higher education has become less affordable as a result of several trends: (i) tuition increases along with significant decreases in state education expenditures, (ii) the growing proportion of low-income students, and (iii) a movement away from need-based aid toward merit-based grants and scholarships.[253] For purposes of this Article, the third trend is of particular importance. There is a need to revert back to need-based aid principles to promote both a fair and efficient allocation of private and public resources. A confluence of federal, state, and institutional policies is needed to counter the general trend of moving away from need-based aid and to further broader public goals.

---

control the 'unsustainable growth in the Pell Grant program' . . . . Meanwhile, the $19.4 billion spent on tuition tax credits and deductions in 2010—of which 61% and 91% of beneficiaries, respectively, were middle-income and upper-income families—have largely avoided scrutiny."), *available at* http://www.edtrust.org/sites/edtrust.org/files/publications/files/PricedOutFINAL_2.pdf. On state financial aid reform see *id.* ("[S]tate grants not based on need have grown at triple the rate of need-based grants over the past 10 years. These politically popular programs disproportionately benefit middle-income and upper-income students, who likely would go to college without the additional financial assistance. Such policies siphon funds away from low-income students and students of color . . . ."); Gladieux, *supra* note 66, at 32–34 ("The antipoverty origins of the 1965 Higher Education Act have faded into history as eligibility for federal student aid has been extended up the economic ladder."). On institutional financial aid reform see LYNCH ET AL., *supra* ("Together, our colleges and universities control more than a third of all funds available for student grants . . . . Yet these institutions [choose] to distribute this aid in a highly regressive manner. Private nonprofit colleges and universities spent *almost twice as much* on students from families in the top quintile of family income as they did on those in the bottom quintile. Even public institutions spent *roughly the same amount* on students from the wealthiest families as they did on those from low-income backgrounds.") (citations omitted); *see also* EDUC. TRUST, LIFTING THE FOG ON INEQUITABLE FINANCIAL AID POLICIES 7, figs.7 & 8 (2011) (compiling financial aid distribution information into graphs), *available at* http://www.edtrust.org/sites/edtrust.org/files/publications/files/Lifting%20the%20Fog%20FINAL.pdf.

252. *See* ZUMETA ET AL., *supra* note 203, at 89–94 (2012) (compiling the various higher education financing sources); ST. JOHN, *supra* note 41, at 2–4 (summarizing the history of government funding for higher education); Gladieux, *supra* note 66, at 39 fig.1.10 (showing a pie chart depicting student aid spending by source).

253. *See* ZUMETA ET AL., *supra* note 203, at 16–28; Gladieux, *supra* note 66, at 28–34.

a. Federal Government

The federal government does not set higher education prices, but instead leaves pricing to the market. Nonetheless, the U.S. Department of Education spends approximately $155 billion per year in grants and loans and this federal aid accounts for roughly 15% of revenues for colleges nationwide.[254] The provision of federal financial aid—grants, loans, and work-study—enables millions of low-SES students to attend college.[255] The ratio among types of need-based aid has changed significantly over the years.

Some observers argue that the availability of federal loans in large part contributed to increases in college tuition costs.[256] The empirical evidence, however, does not fully support that conclusion. One study found little connection between the availability of loan-based aid and tuition increases.[257] It argues that tuition increases would have remained relatively steady had state investment in higher education continued at higher levels.[258] Tuition increases are also, in large part, the result of cost shifting rather than cost increases. Reducing tuition growth generally requires two events or a combination thereof: college costs must decrease or subsidies

254. *See* Gladieux, *supra* note 66, at 38.

255. *See* ZUMETA ET AL., *supra* note 203, at 92–94 tbl.4.3, 96 tbl.4.4.

256. Dylan Matthews, *The Tuition Is Too Damn High, Part VII: Is government aid actually making college more expensive?*, WASH. POST (Sept. 3, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/09/03/the-tuition-is-too-damn-high-part-vii-is-government-aid-actually-making-college-more-expensive/ (Several studies support the idea that government subsidies are actually making colleges more expensive, not affordable); *see also* Richard Vedder, *Loans Are Part of the Problem Not the Solution*, N.Y. TIMES (May 12, 2012), http://www.nytimes.com/roomfordebate/2012/05/12/easing-the-pain-of-student-loans/loans-are-part-of-the-problem-not-the-solution ("Expanding student loans enhances the ability of colleges to engage in a costly academic arms race that our nation increasingly cannot afford.").

257. NATIONAL CENTER FOR EDUCATION STATISTICS, STUDY OF COLLEGE COSTS AND PRICES, 1988-89 TO 1997-98 (2008), *available at* http://nces.ed.gov/pubs2002/2002157.pdf (2001 study which found no correlation between increases in government subsidy and increases in tuition). *See generally* ST. JOHN, *supra* note 41; *but cf.* ZUMETA ET AL., *supra* note 203, at 166 (For states and institutions "[t]uition increases become even easier to justify when they coincide with increases in federal funding for student financial aid, particularly when the aid programs are sensitive to tuition in calculating student eligibility for funds.").

258. *See generally* ST. JOHN, *supra* note 41. *But see* William J. Bennett, *Our Greedy Colleges*, N.Y. TIMES, Feb. 18, 1987, *available at* http://www.nytimes.com/1987/02/18/opinion/our-greedy-colleges.html?pagewanted=all&src=pm (arguing that increases in federal financial aid cause increase in college tuition costs).

from state and institutional sources must increase.[259] Today, tuition levels are increasing faster than costs.[260] At the same time, state and institutional subsidies from endowments are declining.[261] Consequently, students are bearing a higher proportion of overall costs as state and institutional subsidies decline.

Pell Grants are the most important program for low-SES students, yet the program is often subject to cuts and is projected to run a six billion dollar deficit in the 2014–15 academic year.[262] The federal government must therefore place the Pell Grant program on firm financial footing. The maximum Pell Grant amount must also increase to assist needy students because increases have not kept up with rising tuition costs at public and private colleges.[263] Pell Grants peaked in the mid- to late-1970s and have since been overtaken by a movement toward loan-based aid.[264] The purchasing power of a Pell Grant toward a four-year college education in 2010 was less than half of what it was in 1979. In 1979–80, the maximum Pell Grant covered 77% of the cost at a public four-year college and 36% at a private four-year college. By 2010–11, these percentages had dropped to 36% and 15% respectively. The reduction of Pell Grant purchasing power inevitably increases student reliance on loans.[265] For low-SES students, this early debt and burden of paying off loans has negative downstream effects on retirement savings, homeownership, and wealth building.

---

259. DELTA PROJECT ON POSTSECONDARY EDUC. COSTS, PRODUCTIVITY, AND ACCOUNTABILITY, WHO PAYS FOR HIGHER EDUCATION?: CHANGING PATTERNS IN COST, PRICE, AND SUBSIDIES, (2010), *available at* http://www.deltacostproject.org/resources/pdf/issuebrief_01.pdf.

260. *Id.*

261. *Id.*

262. NAT'L COLL. ACCESS NETWORK, INCREASING RETURN ON INVESTMENT FROM FEDERAL STUDENT AID 4, *available at* https://www.collegeaccess.org/roifromfsa.

263. ZUMETA ET AL., *supra* note 203, at 91 fig.4.5 (showing that Pell Grant per recipient as a percentage of average annual tuition and fees at public four year colleges declined from 109.64% in AY 1980–81 to 45% in AY 2004–05); *see also* SHANNON M. MAHAN, CONG. RESEARCH SERV., FEDERAL PELL GRANT PROGRAM OF THE HIGHER EDUCATION ACT: BACKGROUND, RECENT CHANGES, AND CURRENT LEGISLATIVE ISSUES 25–26 fig.6 (2011) ("In AY 2010–2011, the total maximum grant ($5,550) is expected to cover approximately 62% of the average tuition, fees, room, and board at public two-year institutions, 34% at public four-year institutions, and 14% at private four-year institutions."). Another major cut to the Pell Grant program in recent years was the elimination of additional "year-round/summer" grants that helped students continue their studies during the summer months. This elimination of summer grants, after only a single year of operation, is inconsistent with increasing college completion rates. Thus, "year-round/summer" grants should be restored. NAT'L COLL. ACCESS NETWORK, *supra* note 262, at 4.

264. *See* Gladieux, *supra* note 66, at 33–34.

265. McKernan & Ratcliffe, *supra* note 238, at 7.

Whereas the purchasing power of federal grant aid to low-SES students has declined in real terms, the eligibility requirements for loan-based aid has broadened to include more affluent students.[266] Today, more middle- and even upper-class students qualify for federal loans because eligibility criteria have expanded.[267] This eligibility expansion has had the impact of thinly spreading financial resources at the expense of the needy. Making college affordable for middle-class families and students has, in essence, trumped accessibility for lower- and working-class students. Popular tax credits, such as the American Opportunity Tax Credit, and tax deductions also reflect this trend because they disproportionately benefit more affluent households.[268]

Research shows that different types of aid have varied impacts on student enrollment. For example, grants have a greater positive impact on enrollment than loans. Low-SES students are more sensitive to borrowing than their middle-class counterparts. Although loans are, without question, helpful in getting students through college, growth in low-SES student loan debt may skew future higher education, career, and professional choices.[269] Historically, policymakers have focused on the financial needs of students while they are in college to the exclusion of what happens further down the road. To offset the future negative effects of student borrowing, the federal government now assists some borrowers *after* college when loan payments are due through the Income-Based Repayment Program (IBR). The IBR, in essence, allows borrowers with low monthly incomes to pay lower monthly payments and have their remaining debt forgiven after twenty years. This beneficial program, however, is underutilized and has low participation rates. Only 1.1 million borrowers are enrolled in IBR out of 37 million students who have outstanding loan balances.[270] Notably, 5.4 million of these student borrowers have a past due student loan account. Currently,

---

266. *See* Pusser, *supra* note 25, at 32–34.

267. For the expansion of student loan eligibility, see ZUMETA ET AL., *supra* note 203, at 70–76. This shift began in 1978, when "the Middle Income Student Assistance Act (MISAA) was enacted . . . and lifted the income ceiling for eligibility for guaranteed student loans." *Id.* at 70. This trend continued in 1992, with amendments to the Higher Education Act, creating "the Parent Loan for Undergraduate Students (PLUS) program and an unsubsidized Stafford or guaranteed student loan (GSL) program, both without income caps for eligibility . . . . In particular, student loans became a way to help middle- and higher-income families finance college . . . ." *Id.* at 76.

268. NAT'L COLL. ACCESS NETWORK, *supra* note 262, at 5.

269. Gladieux, *supra* note 66, at 24.

270. NAT'L COLL. ACCESS NETWORK, *supra* note 262, at 6.

borrowers must opt-in to the program.[271] Instead, the IBR should become the default or primary means of loan repayment for all student borrowers.[272]

In addition to increasing appropriations for need-based aid as opposed to non-need-based aid (e.g., raising current Pell Grant levels), the federal government must partner with states and provide them with incentives to adopt more low-income student-friendly aid policies. Accordingly, the federal government should expand the modestly funded Leveraging Educational Assistance Partnership (LEAP) program.[273] Through LEAP the federal government provides states with matching funds to encourage them to provide need-based aid to students: usually in the form of grants or work-study.[274] A more expansive federal-state partnership program based upon the LEAP concept would encourage states to increase appropriations for need-based aid compared to other types of aid.

Although the U.S. Department of Education spends $155 billion per year on financial aid, the accountability mechanisms associated with these funds are rather weak.[275] The Obama administration has announced general plans to attach accountability mechanisms to federal aid, but has yet to unveil a detailed program. Notwithstanding, the Obama administration is either considering or should consider the following: (i) proposing performance-based funding to incentivize institutions to enroll and graduate greater numbers of low-SES students; and (ii) enhancing data collection and reporting to evaluate qualitative concerns and the government's return on investment. Recent government attempts to heighten the regulation of for-profit institutions such as the "Gainful Employment Rule" ("GER") are yet another example of attempts to achieve greater returns on government investment and protect students.[276] Accountability measures like the GER should extend more broadly to all categories of higher education programs. When crafting new accountability mechanisms, lawmakers must not overreach to avoid unintended consequences such as encouraging higher education institutions to abandon low-SES students, who are perceived as more risky.

In addition to enhancing the amount of government financial aid available to students, the federal government can help protect low-SES

---

271. *Id.*

272. *Id* at 5.

273. ZUMETA ET AL., *supra* note 203, at 168.

274. *Id.*

275. In order to receive Title IV student aid funds, all higher education institutions—non-profit, public, or for-profit—must meet certain Cohort Default Rate thresholds.

276. *See generally* Cooley, *supra* note 104.

students and their families from market abuses and exploitation through a range of policies aimed at consumer protection. Recent changes in the private student loan market are instructive. In the decade leading up to the financial crisis of 2008, the "private student loan market grew from less than $5 billion in 2001 to over $20 billion in 2008 before contracting to less than $6 billion in 2010."[277] During the above-mentioned growth period, lending standards were weak, lenders disbursed loans directly to students with limited school involvement or certification, and many low-SES students over-borrowed and eventually defaulted on their private loans.[278] Following the financial crisis of 2008, the federal government introduced a range of policy changes in the private student loan market to curb abuses and default rates.[279] Following the passage of the Health Care and Education Reconciliation Act of 2010, the Federal Direct Loan Program eliminated the controversial role of private lenders and reduced costs.[280] Another example of enhanced consumer protections is the recent government effort to curb abuses by for-profit higher education providers.

b. State Policies

State financial aid to students can take various forms, ranging from reduced tuition subsidies at state higher education institutions to portable state grant programs. In the current economic climate, tuition has become a more important source of revenue for public institutions. Public four-year colleges often rely on differential pricing for in-state and out-of-state students to finance their programs. At many state flagship universities, in-state student tuition is subsidized by charging out-of-state students a premium. Yet, this approach is not the only way for public institutions to maximize revenues. In theory, some public institutions could further utilize differentiated pricing: charging in-state students different prices based upon their demonstrated financial need or charging based upon the particular program of study.[281] But these approaches may present political and practical challenges. From a political perspective, a growing number of today's citizens view higher education as a private good and adopt a rigid market-based consumer-driven approach to higher education. Consequently,

277. CONSUMER FIN. PROT. BUREAU, *supra* note 33, at 3.

278. *Id.* at 21–24.

279. *Id.* at 27–29.

280. David M. Herszenhorn, *Student Loan Bill Poised to Pass in Health Vote*, N.Y. TIMES, (Mar. 21, 2010), http://www.nytimes.com/2010/03/22/education/22pell.html.

281. For example, institutions might charge more for science programs that are more costly.

they seem reluctant to have their tax dollars and other payments subsidize less privileged groups.

State need-based and merit-based grants are another important source of support for students. The general state trend reflects a shift toward awarding more merit-based grants.[282] State merit-based grant programs such as Georgia's HOPE Scholarships and Florida's Bright Futures programs are particularly popular among influential middle- and upper-class voters.[283] Hence, the proportion of available state need-based aid has declined.[284] Today's large-scale state budget shortfalls even threaten the viability of these popular merit-based programs.

Beyond financial aid, states can also play an important consumer protection role. For example, state governments, through enhanced

---

282. Daniel de Vise, *State grant aid goes increasingly to the wealthy*, WASH. POST (May 15, 2012), http://www.washingtonpost.com/blogs/college-inc/post/state-grant-aid-goes-increasingly-to-the-wealthy/2012/05/15/gIQARIvHRU_blog.html (according to recent report, "state grant an scholarship programs for college students increasingly favor students who aren't needy"); *See generally* BROOKINGS, BEYOND NEED AND MERIT: STRENGTHENING STATE GRANT PROGRAMS (2012), *available at* http://www.brookings.edu/research/reports/2012/05/08-grants-chingos-whitehurst.

283. ZUMETA ET AL., *supra* note 203, at 76 ("A side benefit for the governor and legislators was (and is) that the program has proven wildly popular with the voting public, far more so than the targeted, need-based programs driven by concerns of efficiency and equity."); *see also* CARL VINSON INST. OF GOV'T, HOPE SCHOLARSHIP JOINT STUDY COMMISSION REPORT, 15–16 (2003), *available at* www.cviog.uga.edu/free-downloads/hope-joint-study-commission-report.pdf (explaining that an August 2003 poll showed 80% of Georgians polled felt either extremely or somewhat positive about the HOPE scholarship program). For a discussion of the popularity of state merit-based scholarship programs, including Georgia HOPE and Florida Bright Futures, see Jeffrey Selingo, *Questioning the Merit of Merit Scholarships*, CHRON. HIGHER EDUC., Jan. 19, 2001, at A20, *available at* http://chronicle.com/article/Questioning-the-Merit-of-Merit/15616/.

> But the biggest problem with the scholarships may be simply that the public loves them too much. College officials and lawmakers alike complain that the merit programs have become so popular that they are impossible to change. For some state policymakers, the scholarships are becoming to middle-class parents what Social Security is to an older generation.

Id.

284. NAT'L ASS'N OF STATE STUDENT GRANT & AID PROGRAMS, 42ND ANNUAL SURVEY REPORT ON STATE-SPONSORED STUDENT FINANCIAL AID 2010–2011, at 9–10 (2012), *available at* http://www.nassgap.org/viewrepository.aspx?categoryID=3#. From award years 2001–2002 through 2010–2011 (ten year total), distributed state-level, need-based grant aid increased 84.8%, compared with a 137.2% increase in distributed non-need-based grant aid over the same period. *Id.* From 2009–2010 through 2010–2011 (one year comparison), as many states were in budgetary crises due to the Great Recession, state-level, need-based grant aid increased 1.5%, compared with an 11% increase in non-need-based grant aid over the same period. *Id.* While nineteen states made some form of cut to non-need-based grant aid between award years 2009–2010 and 2010–2011, twenty-three states reduced need-based grant aid over the same period. *Id.*

licensing requirements for higher education institutions, can help prevent the issuance of bogus degrees and abuses by "degree mills."[285]

c. Institutional Practices

Private and public higher education institutions can help propel low-SES students toward degree attainment through an assortment of need-based aid policies. The overwhelming majority of colleges and universities in the U.S. share a common feature: they subsize the education offered to students, that is, they charge students tuition less than the total cost of services, often relying upon non-tuition sources of support.[286] Yet, the means and methods through which these higher education institutions subsidize educational costs differs.[287] For example, public insitutions tend to rely upon federal, state, and local appropriations to subisize their students, whereas private institutions rely on endowment earnings, gifts, and grants.[288] Public institutions often provide general subsidies, where nearly 90 percent of total subsidies, are given to all students in the form of across-the-board reduced in-state tuition.[289] This general subsidy approach often leaves fewer resources for more discretionary individual aid.[290] Alternatively, private institutions often subsidize through individual aid given to "different students in different amounts for different reasons" such as finanical need, athletic prowess, and academic ability.[291] Whereas, tuition at private instiutions may be much higher than at public institutions, the percentage of overall individual subsidy is also higher, nearly 30 percent of total subsidies.[292] Institutions make strategic choices regarding the type of subsidies they provide—individual, general, or a combination of both. On average, private insitutions provide a high cost education at a high price. Meanwhile, public institutions provide a lower cost education at a lower price.

Although they enroll very small numbers of low-SES students, well-endowed private institutions have a financial advantage in being less tuition-dependent and able to provide larger individual subsidies to

285. *See generally* ROBERT H. REID, AMERICAN DEGREE MILLS: A STUDY OF THEIR OPERATIONS AND OF POTENTIAL WAYS TO CONTROL THEM (1959).

286. *See* Michael McPherson, Morton Schapiro, and Gordon Winston, *The Economic Analogy*, Discussion Paper No. 37 (1996) at 2–13.

287. *Id.*

288. *Id.*

289. *Id.* at 9–10.

290. *Id.*

291. *Id.* at 5–6.

292. Id. at 9.

students. But, even endowments at private institutions may face restrictions. Moreover, high costs do not necessarily deter many targeted applicants from selective private institutions. To a degree, a high-priced private college education is a "positional good" where its standing relative to other institutions actually enhances its attractiveness to consumers. Selective higher education institutions also resemble an "associative good" where the attractiveness of a particular school is tied to the personal characteristics of its students. These descriptions of selective higher education seem quite plausible considering their representative socio-economic demographics.

Public universities, particularly state flagships, compete for students with private universities and attempt to prevent brain drain by offering merit-based scholarships to high achieving in-state students. Recent research reveals a significant shift away from need-based aid toward merit-based aid.[293] The economic downturn has also made "full paying" out-of-state students a very attractive option for public four-year colleges and universities. Some selective public flagship and private colleges cater to relatively indistinguishable socioeconomic student demographics. In a 2013 Inside Higher Ed survey of college admissions directors, over half of the respondents indicated that they had consciously stepped up efforts to recruit "full pay" students in recent years.[294] These efforts to attract affluent students include generous merit aid packages and auxiliary spending on campus amenities.[295] Within this context, the financial needs of low-SES students are subverted. But, the threat of federal and state action may prompt all types of institutions to adjust their policies to become more hospitable to low- and moderate-income students.

Optimistically, an assortment of private and public colleges have instituted progressive aid policies that cap student loans or offer free tuition for low- to moderate-income students.[296] These policies, especially at public universities, may have far-reaching impacts. They reflect the important "social contract" public institutions should have with the citizenry. Beyond providing direct support, such policies may have an indirect motivational or signaling impact on low-SES students' higher education aspirations.[297]

---

293. STEPHEN BURD, NEW AMERICA FOUND., UNDERMINING PELL 3–4 (2013).

294. Dylan Matthews, *The Tuition Is Too Damn High, Part VIII: Is This All Rich Kids' Fault?*, WASH. POST (Sept. 4, 2013, 9:00 AM), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/09/04/the-tuition-is-too-damn-high-part-viii-is-this-all-rich-kids-fault/?hpid=z5.

295. *See id.*

296. *See* DOUGLASS, *supra* note 59.

297. Perna, *supra* note 3, at 138–39 (explaining that low-SES students tend to be more price sensitive than their more privileged counterparts).

2. Admissions practices that better reflect student potential rather than serving as a proxy for SES

Admissions practices are an important method for advancing higher education attainment among low-SES students. A number of colleges adopt need-blind admissions practices, that is, they do not take an applicant's ability to pay into account when rendering an admissions decision. This does not mean, however, that a need-blind school will meet that student's demonstrated financial need upon acceptance. Only a handful of schools can live up to this commitment. The popularity of need-blind admissions has declined in the current economic climate that pressures institutions to be more "need-aware" or "need-sensitive." Whereas most public institutions are need-blind, private institutions, who use a larger proportion of institutional funds to meet financial need, are generally not. They remain more conscious of students' financial circumstances when managing enrollment.

Professor Lani Guinier argues that admissions decisions at selective higher education institutions constitute political decisions that have broad consequences for American society.[298] Guinier cites upward mobility and individualism as core American values that "legitimate our democratic ideal of equal opportunity for all."[299] Higher education promotes upward mobility because it functions as a "status marker," not simply enhancing learning by matching one's skills with the appropriate learning environment.[300]

Existing selection systems may perpetuate structural inequality and inherited privilege. As previously mentioned, selective higher education institutions function as "positional goods"—deriving their value largely from their ranking or desirability relative to other higher education institutions.[301] Middle- and upper-income families can afford SAT

298. Guinier, *supra* note 31, at 135–36 ("The task of constituting each class is a political act because it implicates the institution's sense of itself as a community, as well as the larger society's sense of itself as a democracy.").

299. *Id.* at 137–38.

300. *Id.* at 138. Guinier cites three types of upward mobility—contest mobility, sponsored mobility, and structural mobility—of which the first two approaches are most likely to be employed by admissions officers. *Id.* at 137–38, 143–44, 151, 159 (describing contest mobility as the kind which is "achieved through competitive success on standardized tests," or through "the candidate's own efforts in an open contest"; sponsored mobility as that which occurs when people in influential positions "hand-pick a few candidates to ascend the ladder of higher education"; and structural mobility as the role that colleges and universities play when they craft admissions policies around "the greater role of higher education in the political, economic, and social structure of community").

301. *See generally* FRED HIRSCH, THE SOCIAL LIMITS TO GROWTH (1977); Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1 (1992).

preparation that raises test scores and college counseling that enhances admission prospects. Students from families with low and modest incomes often lack these resources.[302] This criticism, in part, prompted the College Board to recently modify the SAT exam.[303] Ongoing debate concerning the SAT's efficacy has prompted a number of schools to drop the SAT as a requirement for admission.[304] Although the so-called "fair test" movement is growing, Wake Forest University is the only Top 25 U.S. News and World Report ranked national university to drop the SAT requirement for admission.[305] After going SAT-optional, Wake Forest University experienced no drop-off in student selectivity, student performance, or its national ranking.[306] SAT-optional is not synonymous with reduced standards as some of the most selective private institutions in the country are SAT-optional. Ironically, prior to adopting the SAT, the University of California had a system that functioned more equitably than its current system.[307] Challenges to the implementation of alternative selection

---

302. Robert Schaeffer, *Test Scores Do Not Equal Merit*, *in* SAT WARS: THE CASE FOR TEST-OPTIONAL COLLEGE ADMISSIONS 153, 157 (Joseph A. Soares ed., 2012) [hereinafter SAT WARS].

303. Tamar Lewin, *A New SAT Aims to Realign With Schoolwork*, N.Y. TIMES (Mar. 5, 2014) *available at* http://www.nytimes.com/2014/03/06/education/major-changes-in-sat-announced-by-college-board.html?_r=0 (discussing how the College Board reworked the SAT exam because it had "become disconnected from high school work and that only 20% of classroom teachers see "college-admission tests as a fair measure of the work their students have done").

304. *Id.* at 153–54; *See also* Robertson-Kraft & Duckworth, *supra* note 213, at 16 (study conducted on more than 3,500 participants found that "follow-through in high school was a better predictor than all other measured variables, including SAT scores and high school rank, of leadership and accomplishment in college").

305. Martha Allman, *Going Test Optional*, *in* SAT WARS 169, 169 (2012); for university rankings and entrance requirements, see *National University Rankings*, U.S. NEWS & WORLD REPORT, http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities/data (last visited January 15, 2014).

306. Allman, *supra* note 305, at 175. Discussing the results of its first test-optional admissions process, Allman states: "The number of students who had graduated in the top 10% of their class rose substantially. We doubled the number of international students, and 23% of our enrolling freshmen were students of color, up from 18% the previous year. More than 10% of the entering class was first-generation college students." *Id.*

307. John Aubrey Douglass, *SAT Wars at the University of California*, *in* SAT WARS 50, 52 (2012) ("Before 1960 . . . the University of California admitted approximately the top 15% of all state high school graduates. After the implementation of the 1960 Master Plan for Higher education, that figure was reduced to the top 12.5%."). Douglass also notes "prior to 1960, UC had admissions policies that allowed for approximately 10% of all admissions to be Special Action, precisely in recognition of the varying quality of high schools and the adverse circumstances faced by many students who are from poor and underrepresented groups." *Id.* at 61–62. *See also* Expert Report of John Aubrey Douglass Regarding the History of UC

methods often concern resource restraints and narrow overly deterministic perspectives on student potential.[308] A prime example of an overly deterministic perspective is Charles Murray's work arguing that society harbors unrealistic ambitions for low-income students, with lower standardized admission test scores, who attend schools that are too intellectually demanding for them, leading to more college dropouts.[309] Extensive research by Bowen, McPherson, and Chingos debunks this narrow deterministic approach: low-SES students generally do not overreach in their abilities when selecting colleges; in fact, many undermatch, that is, attend schools well below what their GPAs and standardized test scores qualify them for.[310] This research also made the important observation that the most accurate predictor of college completion was not standardized admission tests like the SAT or ACT, but students' high school GPA irrespective of where the student attended high school.[311]

Current admissions criteria, particularly the SAT, are too narrow. They fail to capture important characteristics that psychologists identify as important predictors of high achievement and success. Whereas, a great deal is known about IQ, its measurement, and its predictive outcomes, very little is known about why some individuals accomplish more than persons with equal or greater intelligence.[312] The SAT, essentially an IQ test, ignores important noncognitive traits that have a significant influence on high

---

Admissions at 3–4, Ass'n. of Christian Schs. v. Stearns, 678 F. Supp. 2d 980 (2008), *available at* www.universityofcalifornia.edu/news/acsi-stearns/expertreports/douglass.pdf (explaining that the UC system began requiring the SAT I in 1968).

308. Schaeffer, *supra* note 302, at 165 ("For larger universities, which might receive 10,000 or more applications each year, the shift would be more complicated. Additional, trained file readers would be needed to ensure that each student's credentials are carefully reviewed."); *see also* Allman, *supra* note 305, at 175 ("In retrospect, we could not have anticipated the dramatic increase in workload, the labor-intensiveness of the process, the challenge of attempting to interview the entire applicant pool, the technical challenges of written online interview options . . . .").

309. *See generally* RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE (1994); Richard Sander, *The Consideration of Race in UCLA Undergraduate Admissions*, PROJECT SEAPHE (Oct. 20, 2012), http://www.seaphe.org/pdf/uclaadmissions.pdf; PAUL TOUGH, HOW CHILDREN SUCCEED: GRIT, CURIOSITY, AND THE HIDDEN POWER OF CHARACTER 150–54 (2012) (discussing studies that debunk deterministic arguments).

310. *See* BOWEN ET AL., *supra* note 4. These findings are supported by recent research from Anthony Carnevale and Jeffrey Strohl. CARNEVALE & STROHL, *supra* note 16, at 29–31.

311. Differences in graduation rates among students from low quality and high quality schools do indeed exist, but the difference is marginal. *See* TOUGH, *supra* note 309 (describing the findings of the Bowen study).

312. *See* Duckworth, et. al, *Grit: Perseverance and Passion for Long Term Goals,* 92 J. PERS. & SOC. PSYCHOLOGY 1087 (2007).

achievement in higher education and beyond.[313] In a groundbreaking study, Angela Duckworth and other researchers examined a noncognitive trait known as "grit."[314] Grit, defined as perservance and passion for long term goals, "entails working strenuously toward challenges, maintaining effort and interest over years despite failure, adversity, and plateaus in progesss."[315] Specifically, the study examined educational attainment among adults, the retention of cadets at the U.S. Military Academy at West Point, grade point averages among Ivy League undergraduates, and the ranking of particants in the National Spelling Bee.[316] The study's findings indicate that grit, under certain cirsumtances, may have a greater impact on success than IQ.[317] According to Duckworth, "[t]he gritty individual approaches achievement as a marathon; his or her advantage is stamina."[318] This line of research holds promise for developing admissions practices and selection criteria that better identify student potential for success.

Even "[a] principled commitment to merit selection can perpetuate ascribed identities and experiences of those in a position to define merit."[319] No matter which selection system is utilized, some degree of gaming is unavoidable. There is a need to develop, constantly reassess, and diversify admissions practices that better reflect student potential rather than serving as a proxy for SES.[320] To address these issues, experts suggest adopting selection systems promoting "structural mobility," by crafting admissions policies around "the greater role of higher education in the political, economic, and social structure of community."[321] They cite the G.I. Bill and the Texas Ten Percent Plan as examples of policies promoting structural mobility that, in turn, generate student diversity across class, geographic

313. *Id.*

314. *Id.*

315. *Id.* at 1087–88.

316. *Id.*

317. *Id.*

318. *Id.* ("Whereas disappointment or boredom signals to others that it is time to change trajectory and cut losses, the gritty individual stays the course.").

319. Guinier, *supra* note 31, at 142.

320. *Id.* at 146–47 ("Indeed, the relationship between test scores and status markers such as parents' education, grandparents' socioeconomic status, racial identity, and geographic location is very strong. The correlation between test scores and SES indicators is even stronger than the correlation between test scores and future academic performance.") (citations omitted); *see also* Robert J. Sternberg, *College Admissions Assessments: New Techniques for a New Millennium*, *in* SAT WARS 85, 87 (2012) ("School assessments, like standardized tests, often emphasize analytical and memory-based skills . . . . These memory and analytical skills are precisely the abilities in which many children of the middle and upper middle classes excel, resulting in a fairly substantial correlation between tests scores and socioeconomic class.") (citation omitted).

321. Guinier, *supra* note 31 at 159.

and racial lines.[322] But even strict adherence to such approaches can have limitations or negative consequences.[323] Recent attention given to the Supreme Court's decision in *Fisher v. Texas* has resuscitated, albeit indirectly, the class discussion in higher education.[324] The ambiguity surrounding the *Fisher* decision has prompted higher education observers to consider the use of class as an alternative to the use of race in college admissions.[325] Yet, some observers question the efficacy of so-called race-neutral means to promote racial diversity recognizing the "unavoidable reality" that no race-neutral proxy will work as well as race conscious means of promoting racial diversity, and all proxies impose costs.[326] An exclusively class-based approach would, in all likelihood, dilute the number of Hispanic and African-American students in certain regions due to their smaller proportion of the population and other factors.[327] For purposes of this article, it is unnecessary to pit various types of diversity, for example, class versus minority status, against one another.[328] Policymakers should revisit the issue of class on an ongoing basis and not simply as an alternative to other types of diversity. Notwithstanding the vigorous debate on admissions practices and criteria, it is important to note that institutional admissions practices are but one facet of higher education access for low-SES students.

---

322. *Id.* at 161–62. *See generally* Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245 (1999).

323. *See, e.g.*, Michelle Adams, *Isn't It Ironic? The Central Paradox at the Heart of "Percentage Plans"*, 62 OHIO ST. L.J. 1729, 1735 (2001); *see also* Simmons, *supra* note 61.

324. Fisher v. Univ. of Texas at Austin, 645 F. Supp. 2d 587 (W.D. Tex. 2009), *aff'd* 631 F.3d 213 (5th Cir. 2011), *rev'd* 133 S. Ct. 2411 (2013). (holding that strict scrutiny applies to university's consideration of race in admissions decisions); *see, e.g.*, Pacelli, *supra* note 6.

325. Eric Hoover, *Colleges Contemplate a 'Race Neutral' Future*, CHRON. HIGHER EDUC. (Oct. 14, 2013), http://chronicle.com/article/Colleges-Contemplate-a/142291/. *See generally* Darity, Jr. et al., *supra* note 8; Flagg, *supra* note 8; Fryer, Jr. et al., *supra* note 8; Nelson, *supra* note 8; Weeden, *supra* note 8; Ledford, *supra* note 8.

326. Thomas J. Kane & James E. Ryan, *Why 'Fisher' Means More Work for Colleges*, CHRON. HIGHER EDUC. (July 29, 2013), http://chronicle.com/article/Why-Fisher-Means-More-Work/140567/.

327. *See* Darity Jr. et al., *supra* note 8, at 245–46 (explaining that a group-based affirmative action policy in the United States would make 27.3 million black and Hispanic households, 24% of all U.S. households, eligible for affirmative action; whereas under a class-based affirmative action policy, at the same 24% cutoff, 63% of black households and 70% of Hispanic households would lose affirmative action eligibility and be replaced by 18% of Asian households and 20% of white households).

328. *See generally id.* (illustrating the impact of class-based admissions preferences in the absence of race-based preferences).

3. Recommitting Public Institutions to their Public Missions

Historically, expanding opportunity and strengthening democracy were critical elements of public university missions. Public universities seemingly operated under a "social contract" producing both public and private benefits.[329] They promoted democracy, spurred economic growth, prevented brain drain, provided access to leadership positions, served as catalysts for social movements, and furthered the public good. The current economic climate presents significant challenges for college affordability and completion because state support for higher education continues to fall. State support for higher education nationwide fell 7.6% between 2011 and 2012.[330] In nineteen states, the decrease in support fell beyond 10%.[331] Degree programs are being cut, institutions consolidated, and tenure becoming less prevalent. In this environment, market-based reforms have added appeal to remedy cost-related issues.[332] But their impact on the broader public benefits mentioned above appears mixed and unsubstantiated. Popular market-based approaches alone are insufficient. Direct public production of higher education is an integral strategy for pursuing the public good. The historical prominence and growth of the public university was not merely a coincidence; it was a matter of necessity.

Public universities, particularly state flagships, must take greater interest in low-SES students. Realistically, the federal and state regulatory framework must provide adequate incentives to facilitate a shift in emphasis. One possible strategy would be performance-based funding whereby state and institutional funding formulas take into account low-SES student enrollment and degree completion rates.[333] A growing number of states, as well as the federal government, are considering adopting or expanding upon their performance-based funding models.[334]

Public institutions must also take greater interest in K–12 education. Historically, they played a more active role in K–12 education through standard setting, curriculum design, and teacher training. But higher education's influence on K–12 education has waned in comparison to state

---

329. *See* DOUGLASS, *supra* note 59.

330. Eric Kelderman, *State Support for Colleges Falls 7.6% in 2012 Fiscal Year*, CHRON. HIGHER EDUC., Jan. 23, 2012, at A5, *available at* http://chronicle.com/article/article-content/130414/.

331. *Id.*

332. Pusser, *supra* note 25, at 29.

333. *See* Timpane & Hauptman, *supra* note 39, at 85; Eric Kelderman, *States Push Even Further to Cut Spending on Colleges*, CHRON. HIGHER EDUC., Jan. 27, 2012 at A1–A4, *available at* http://chronicle.com/article/States-Push-Even-Further-to/130416/.

334. Kelderman, *supra* note 333, at A4.

governors, corporations, and other special interests. Public higher education institutions can also play an important role by forging partnerships with community actors and underprivileged schools. Greater public higher education involvement in K–12 education is critical to enhancing opportunities for low-SES students and meeting the Obama administration's college completion goal.

CONCLUSION

A decline in higher education access and affordability for low-SES students will spur a concomitant decline in the societal and individual benefits produced by the nation's higher education system, bringing on adverse consequences: reduced tax revenues, high incarceration rates, poor health outcomes, poverty, social polarization, and a decline in democratic participation. Future reform efforts, such as amendments to the Higher Education Act, should embody this Article's proposals and principles that have significant empirical and anecdotal support. Lawmakers, scholars, and higher education institutions must look beyond the existing regulatory architecture that is ill-suited to meet present and future challenges facing low-SES students. Higher education attainment for low-SES students is a national issue deserving of a comprehensive forward-looking response. Our nation can no longer afford to dismiss class.