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Diversity's Distractions Revisited: The Case of Latinx in Higher Education

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DIVERSITY'S DISTRACTIONS REVISITED: THE CASE OF LATINX IN HIGHER EDUCATION

Rachel F. Moran^{*}

As the United States Supreme Court considers the future of affirmative action in higher education, this Article reflects on a 2003 essay by Professor Derrick Bell, which provocatively argued that diversity is a distraction from other pressing problems of access to a bachelor's degree. The Article evaluates his claims with a focus on Latinx students, a rapidly growing segment of the college-going population. Bell believed that diversity is a less compelling justification for the use of race in admissions than corrective justice is. As a result, he predicted persistent litigation over the constitutionality of affirmative action programs. That prediction certainly proved accurate, but there still is reason to doubt that a corrective justice rationale would successfully dispel the controversy. The racial and ethnic make-up of America's youth has changed dramatically, and the growth in immigrant, mixed-race, and Latinx students complicates any understanding of corrective justice.

In addition, Bell concluded that affirmative action programs are largely irrelevant to most students because they do not attend elite colleges and universities. This Article shows that despite widening access to a college degree, stratification and privatization perpetuate the comparative advantages of students from privileged backgrounds. As more students enter college, advantaged students attend institutions with significantly greater resources and prestige, thus preserving inequality. Moreover, less affluent students incur substantial debt to obtain degrees with lower earning power. Latinx students exemplify the phenomenon. They are concentrated at less selective colleges and universities, and they receive lower levels of scholarship aid than other students do. Even as Latinx college-going rates rise, these challenges allow the college completion gap to persist. The Court's affirmative action jurisprudence also has shaped

^{*} Distinguished Professor of Law, UC Irvine School of Law. I would like to thank the *South Carolina Law Review* for including me in this symposium issue. I also am grateful for the support of Executive Director Ajay Mehrotra, his predecessor Robert Nelson, and the American Bar Foundation for supporting a project on "The Future of Latinos in the United States: Law, Opportunity, and Mobility," which has inspired much of this work. I also appreciate the willingness of Dean Song Richardson, Interim Dean Bryant Garth, and the UC Irvine School of Law to give the project a home on campus. I benefited greatly from feedback that I received at a scholarship retreat hosted by the Texas A&M University School of Law as well as comments from Professor Elizabeth Mertz. Finally, I want to acknowledge the invaluable research assistance provided by Mengyuan Xiao.

higher education policy in largely unappreciated ways. A principle of colorblindness constrains federal efforts to define and support Minority-Serving Institutions. Latinx students are heavily concentrated in Hispanic-Serving Institutions, but grants to these schools frequently support general programs and facilities instead of targeting Latinx students' needs.

The Article concludes with suggestions to address ongoing policy challenges through, among other things, improved support for the less prestigious educational workhorses of higher education, greater transparency in the college application process, enhanced need-based aid, and explicit recognition that Minority-Serving Institutions are laboratories for experimentation in serving a transforming student body.

I. INTRODUCTION.....	581
II. DIVERSITY'S DISTRACTIONS: THE ONGOING DEBATE OVER AFFIRMATIVE ACTION	589
A. <i>How Diversity Came to Be a Distraction</i>	589
B. <i>Is Diversity Really a Distraction?</i>	594
C. <i>The Complications of Diversity at the Ballot Box</i>	598
III. DISTRACTED NO MORE: MASSIFICATION, PRIVATIZATION, AND THE DESTABILIZATION OF MINORITY-SERVING INSTITUTIONS (MSIs)	602
A. <i>Massification, Stratification, and Segregation: The Limits of Access</i>	603
B. <i>Privatization and Declining Upward Mobility</i>	607
C. <i>Affirmative Action, Colorblindness, and the Destabilization of the Identity of Hispanic-Serving Institutions</i>	615
IV. TRANSCENDING DIVERSITY'S DISTRACTIONS: RETHINKING HIGHER EDUCATION POLICY	625
A. <i>Affirmative Action and Demographic Complexity: Why Policy Matters Even More</i>	625
B. <i>Doing Equity in a Diversifying and Socioeconomically Divided Society</i>	628
1. <i>Stratification and Meaningful Access</i>	628
2. <i>Privatization and Blocked Mobility</i>	633
3. <i>The Destabilization of MSIs and the Importance of Recognition</i>	637
V. CONCLUSION	640

I. INTRODUCTION

In 2003, Professor Derrick Bell wrote an article entitled “Diversity’s Distractions.”¹ There, he provocatively argued that battles over diversity in higher education were “a serious distraction in the ongoing efforts to achieve racial justice.”² In his view, the diversity rationale failed on its own terms because it obscured persistent barriers of race and class, invited ongoing litigation due to its conceptual weakness, and endorsed a status quo that favored privileged White applicants.³ In addition, Bell thought that diversity distorted the nation’s policy priorities in higher education. As he explained, “The tremendous attention directed at diversity programs diverts concern and resources from the serious barriers of poverty that exclude far more students from entering college than are likely to gain admission under an affirmative action program.”⁴ As support, Bell noted that a 2003 Century Foundation report found that:

[I]f the nation’s most selective colleges abandoned affirmative action and looked only at grades and test scores, about 5,000 fewer black and Hispanic students would make the cut each year; but next year, officials estimate that because of budget cuts at least 20,000 black and Hispanic students will be shut out of California’s 108 community colleges.⁵

In this Article, I revisit Bell’s arguments about diversity’s distractions in the context of a growing cohort of Latinx students entering America’s colleges and universities. In Part II, I will address ongoing debates over affirmative action, as advocates contest the constitutionality of race-conscious admissions designed to achieve a diverse student body. As Bell predicted nearly twenty years ago, litigation over affirmative action at elite institutions of higher education has persisted. Despite the United States Supreme Court’s consistent endorsement of holistic review that relies on race as one factor in admissions,⁶ challenges to the programs abound. In 2017, for example, the Department of Justice under President Donald J. Trump announced that it would be investigating race-based admissions policies at several colleges and

1. Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622 (2003).

2. *Id.*

3. *See id.* at 1622–31.

4. *Id.* at 1622.

5. *Id.* at 1632.

6. *See Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 314 (1978); *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003); *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 374–76, 387–90 (2016).

universities.⁷ In addition, a nonprofit organization called Students for Fair Admissions (SFFA) filed lawsuits against Harvard University and the University of North Carolina in 2014.⁸ So far, those legal challenges have not succeeded in the lower courts,⁹ but there is widespread speculation that the Supreme Court will ultimately overturn affirmative action when it reviews these two cases.¹⁰

As these legal battles demonstrate, affirmative action remains a high-stakes contest. Elite colleges and universities play an outsized role in developing leaders of national importance.¹¹ If affirmative action disappears, the affected students will be the select few who attend prestigious schools, as Bell noted. However, the impact on the racial and ethnic make-up of the pipeline to prominent positions could prove considerable.¹² That said, even at elite institutions with affirmative action programs, diversity in admissions has been far from a panacea because of its fragile claims to normative respectability. The Court has regularly made clear that race-based admissions policies are a second-best option and should be eliminated once schools can enroll diverse student bodies through race-neutral means.¹³ These pronouncements treat any consideration of race or ethnicity as presumptively undesirable. So, it should come as no surprise that critics of affirmative action continue to argue that the time has come to end the programs as an unnecessary departure from a principle of colorblindness.¹⁴ Reflecting ongoing doubt about the programs' legitimacy, some states have banned affirmative action in higher education admissions.¹⁵ When selective flagship

7. See *infra* note 88 and accompanying text.

8. See *infra* notes 91–92 and accompanying text.

9. See *infra* note 93 and accompanying text.

10. See *infra* note 94 and accompanying text.

11. See DAVID F. LABAREE, *A PERFECT MESS: THE UNLIKELY ASCENDANCY OF AMERICAN HIGHER EDUCATION* 126 (2017).

12. See, e.g., WILLIAM BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* 160–62, 165–67 (2000); see also Nicholas A. Bowman, *Promoting Participation in a Diverse Democracy: A Meta-Analysis of College Diversity Experiences and Civic Engagement*, 81 REV. EDUC. RES. 29, 46–49 (2011) (finding that diversity experiences on college campuses, especially interpersonal interactions, led to enhanced civic engagement and growth for all students).

13. *Grutter v. Bollinger*, 539 U.S. 306, 342–43 (2003); *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 312–15 (2013).

14. A leading proponent of colorblindness and a principal architect of recent challenges to affirmative action in higher education is Richard Blum. See Hua Hsu, *The Rise and Fall of Affirmative Action*, NEW YORKER (Oct. 15, 2018), <https://www.newyorker.com/magazine/2018/10/15/the-rise-and-fall-of-affirmative-action> [<https://perma.cc/6GLM-5FJH>]; Bianca Quilantan, *An Anti-Affirmative Action Group Is Trying to Erase Race from College Admissions*, POLITICO (Jan. 1, 2020), <https://www.politico.com/news/2020/12/01/affirmative-action-race-college-admissions-441475> [<https://perma.cc/NT7H-RY7V>].

15. Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1202 (2010).

public universities in these states responded by adopting race-neutral alternatives to diversify their student bodies, the successes were held up as evidence that race-conscious programs were no longer necessary. Experiences at these schools have only heightened demands to end race-based admissions as a violation of the collective commitment to colorblindness.¹⁶

In addition to identifying inherent weaknesses of the diversity rationale, Bell pointed out that the affirmative action debate could be a diversion from other important barriers to obtaining a college degree. He did not devote nearly as much time to this observation, but in Part III of this Article, I will unpack the main ways in which affirmative action debates narrow our nation's policy focus and hamper access for traditionally underrepresented students, particularly those in the Latinx community. I will focus on Latinx students because this youthful population is expected to account for an expanding share of college and university enrollments in the coming years.¹⁷ Rates of college enrollment and completion for Latinx historically have lagged behind those for Whites.¹⁸ As Latinx seek to boost their participation in higher education, several key factors other than affirmative action will affect their odds of success. The first major challenge relates to ongoing stratification and segregation in higher education in the face of dramatic enrollment growth. In the years following World War II, colleges and universities underwent "massification" as post-secondary attendance expanded significantly.¹⁹ To accommodate the rapid increase, community colleges and less selective four-year institutions became the educational workhorses that made broad access possible.²⁰ Today, as is true of students generally, most Latinx attend

16. See *Fisher I*, 570 U.S. at 305; Halley Potter, *What Can We Learn from States that Ban Affirmative Action?*, CENTURY FOUND. (June 26, 2014), <https://tcf.org/content/commentary/what-can-we-learn-from-states-that-ban-affirmative-action/> [https://perma.cc/JM4F-JYFJ].

17. Aaron Cantu, *Universities Try to Catch Up to Their Growing Latinx Populations*, HECHINGER REP. (June 4, 2019), <https://hechingerreport.org/universities-try-to-catch-up-to-their-growing-latinx-populations/> [https://perma.cc/W63B-H7VV]. Between 2000 and 2015, the number of Latinx students enrolled in colleges and universities more than doubled and between 1996 and 2016, the percentage share of Latinx students in higher education rose from 8% to 19%. *Id.*

18. Meredith Kolodner, *New Research Shows Latinos Closing the Racial Gap on College Degrees, But Still Lagging Far Behind Whites*, HECHINGER REP. (Dec. 14, 2017), <https://hechingerreport.org/new-research-shows-latinos-closing-racial-gap-college-degrees-still-lagging-far-behind-whites/> [https://perma.cc/K2Q2-9V4C]. Between 2002 and 2015, the gap in college enrollment rates between Latinx and Whites narrowed by 2.7% but still hovered at about a 10% difference. *Id.*

19. See *infra* notes 150–55 and accompanying text.

20. See *infra* note 162 and accompanying text.

institutions like these rather than selective colleges and universities.²¹ In fact, Latinx are disproportionately concentrated at two-year schools.²² Massification has not dispelled patterns of stratification and segregation among institutions. Many Latinx go to institutions of higher education that are readily identifiable by race and ethnicity as well as class.²³ Because affirmative action speaks only to the integration of elite campuses, it does not reach these issues of segregation in the higher education pyramid.

Next, there are challenges related to privatization and declining intergenerational mobility. During the post-war period of enrollment growth, public support for institutions of higher education grew steadily. In the 1980s, however, government funding began to erode as officials insisted on norms of personal responsibility and self-help. Politicians increasingly categorized higher education as a private good, one that mainly benefited the students themselves. College graduates therefore should pay for their own schooling by borrowing against enhanced future earnings.²⁴ As government support declined and tuition rose, the United States ceased to lead the world in college completion rates,²⁵ and the prospects for intergenerational mobility

21. Juan Salgado, *Expanding Latino Potential Through Community Colleges*, ASPEN INST. (Aug. 28, 2018), <https://www.aspeninstitute.org/blog-posts/expanding-latino-potential-through-community-colleges/> [<https://perma.cc/LZ5X-YSPL>] (reporting that 52% of Latinx undergraduates were enrolled at community colleges).

22. Elizabeth Baylor, *Closed Doors: Black and Latino Students Are Excluded from Top Public Universities*, AM. PROGRESS (Oct. 13, 2016), <https://www.americanprogress.org/article/closed-doors-black-and-latino-students-are-excluded-from-top-public-universities/> [<https://perma.cc/2EWF-6B2H>] (discussing how, in 2014, 56% of Latinx students attended community colleges compared to 41% of Whites and 37% of Asian Americans; Blacks, Native Americans, and Pacific Islanders also disproportionately attended community colleges).

23. See ANDREW HOWARD NICHOLLS, EDUC. TRUST, SEGREGATION FOREVER?: THE CONTINUED UNDERREPRESENTATION OF BLACK AND LATINO UNDERGRADUATES AT THE NATION'S 101 MOST SELECTIVE COLLEGES AND UNIVERSITIES 2–3 (2020) (finding that over half of the country's most selective institutions of higher education remain inaccessible to Black and Latinx students and the problems are greater in states with large Black and Latinx populations); Rachel Baker et al., *Race and Stratification in College Enrollment Over Time*, 4 AM. EDUC. RSCH. ASS'N OPEN 1, 13 (2018) (describing evidence of “effectively maintained inequality”); Jonathan Rothwell, *The Stubborn Race and Class Gaps in College Quality*, BROOKINGS INST. (Dec. 18, 2015), <https://www.brookings.edu/research/the-stubborn-race-and-class-gaps-in-college-quality/> [<https://perma.cc/9SMQ-USAH>]. Black, Latinx, low-income, and first-generation students were substantially more likely to attend a low-performing college than Whites or Asian Americans. *Id.*

24. See Jordan Weissman, *The Privatization of Our Public Colleges (In Two Charts)*, SLATE (Apr. 22, 2014), <https://slate.com/business/2014/04/college-costs-the-privatization-of-public-higher-education.html> [<https://perma.cc/53Y6-X5K5>]. Between 1988 and 2013, net tuition revenue rose from 23.8% to 47.4% of all public higher education funding.

25. *Higher Education*, THE WHITE HOUSE (Oct. 17, 2016), <https://obamawhitehouse.archives.gov/issues/education/higher-education> [<https://perma.cc/652E-KEPN>]. In 1990, the United States led the world in college completion rates but ranked 12th in 2016. *Id.*

declined.²⁶ Of course, correlation is not cause, but there are grounds to suspect that financial obstacles played a role in deterring people from enrolling in and completing college.²⁷ The burden of paying for a degree has put a strain on middle-class families but has proven even more daunting for working-class and poor families.²⁸ In fact, the gap in college attainment for high-achieving students from low-income and high-income families has become so striking that one leading political scientist wonders whether it has undermined a shared faith in the American dream.²⁹ Again, affirmative action does not speak to these difficulties, focusing only on admissions and not financial aid. Yet, for Latinx students, who are disproportionately likely to grow up in families with limited income and wealth, these barriers are palpable when deciding whether to pursue a college degree.³⁰

Finally, there are difficulties related to the ways in which affirmative action debates have destabilized the identity and legitimacy of Minority-Serving Institutions (MSIs), including Hispanic-Serving Institutions (HSIs). The ideal of colorblindness has cast doubt on the ongoing vitality of any form of race-consciousness in higher education. In debates over whether to recognize HSIs and create a program of federal grants, some critics have worried that this kind of race-conscious commitment is unconstitutional.³¹ Congress ultimately declared a college or university to be an HSI if it enrolls at least 25% Latinx in its undergraduate student body.³² That definition is numbers-driven rather than normative: it does not require any deliberate effort to diversify the student body, nor does it demand any intentionality in serving

26. Jonathan M.V. Davis & Bhashkar Muzumder, *The Decline in Intergenerational Mobility After 1980* 1, 11–13, 31–32 (Fed. Rsrv. Bank of Chi., WP 2017-05, Jan. 14, 2022, rev. ed.).

27. *See id.* at 24–26, 32 (finding suggestive evidence that one reason for decreased intergenerational mobility after 1980 was a higher correlation between family income and a child's educational attainment but acknowledging that more research was necessary).

28. *See* BRENO BRAGA ET AL., WEALTH INEQUALITY IS A BARRIER TO EDUCATION AND SOCIAL MOBILITY 4 fig.1 (2017) (showing that 70.1% of children from the highest income quartile complete at least two years of college by age 25 compared to 57.3% of the middle-high quartile, 45.7% of the low-middle quartile, and 41% of the lowest quartile).

29. *See* ROBERT PUTNAM, OUR KIDS: THE AMERICAN DREAM IN CRISIS 189–90 (2015).

30. In 2019, Latinx median household income was \$56,113, which was 30% lower than the median White household income, and Latinx median household wealth was \$14,000, just 9% of median White household wealth. Dedrick Asante-Muhammad et al., *Racial Wealth Snapshot: Latino Americans*, NAT'L CMTY. REINVESTMENT COAL. (Sept. 17, 2021), <https://nrcr.org/racial-wealth-snapshot-latino-americans/> [<https://perma.cc/HN8F-3D4R>].

31. *See infra* notes 277–303.

32. 20 U.S.C. § 1101(a)(5)(B). In addition, to qualify as an eligible institution, a college or university must be accredited, enroll a high proportion of low-income students, and have low expenditures. *Id.* § 1101(a)(2)(B).

Latinx students.³³ The federal grants program reflects a similarly limited conceptualization of HSIs.³⁴ Like MSIs more generally, HSIs receive very modest federal funding, and with the rapid growth in Latinx college students, grants have not kept pace with expanding enrollments.³⁵ Moreover, the funds can be used for buildings and programs that serve all students and confer only incidental and uncertain benefits on Latinx students.³⁶ Even as colorblindness weakens the definition of HSIs, ongoing segregation in higher education means that Latinx students rely heavily on these institutions to obtain a college degree.³⁷ Questions of funding are important because most HSIs are resource-strapped two-year and four-year public universities, and only a handful are highly selective research universities.³⁸ As a result, controversies over affirmative action are largely irrelevant to many HSIs' admissions programs. Instead, these institutions must focus on strategies to support and retain students as administrators stretch their thin resources.

33. See GINA A. GARCIA, AM. COUNCIL ON EDUC., DEFINING "SERVINGNESS" AT HISPANIC-SERVING INSTITUTIONS (HSIs): PRACTICAL IMPLICATIONS FOR HSI LEADERS 1–2 (2019) (there are problems in defining "servingness" and the grant process could clarify ambiguities); Deborah A. Santiago, *Public Policy and Hispanic-Serving Institutions: From Invention to Accountability*, 11 J. LATINOS & EDUC. 163, 165 (2012) (describing the need for accountability metrics for HSIs that go beyond enrollment figures); Anne-Marie Nunez & Alex J. Bowers, *Exploring What Leads High School Students to Enroll in Hispanic-Serving Institutions: A Multilevel Analysis*, 48 AM. EDUC. RSCH. ASS'N J. 1286, 1287 (2011). Most HSIs did not feature this designation prominently. *Id.*

34. See GARCIA, *supra* note 33, at 2; Nicolas Vargas & Julio Villa-Palomino, *Racing to Serve or Race-ing for Money? Hispanic-Serving Institutions and the Colorblind Allocation of Racialized Federal Funding*, 5 SOC. OF RACE & ETHNICITY 401, 411–13 (2019).

35. Vargas & Villa-Palomino, *supra* note 34, at 405 (noting the failure of federal funding to keep pace with the growth in HSIs and the increasing competition for limited funds); Mariah Bohanon, *Moving Beyond Enrollment: The Future of HSIs Depends on More Than Growing Student Numbers*, INSIGHT INTO DIVERSITY (Nov. 15, 2019), <https://www.insightinto-diversity.com/moving-beyond-enrollment-the-future-of-hispanic-serving-institutions-depends-on-more-than-growing-student-numbers/> [<https://perma.cc/VDF7-WFSF>] (describing how the average amount of funding for HSIs dropped from \$821,000 in 2010 to \$447,000 in 2016).

36. See Vargas & Villa-Palomino, *supra* note 34, at 407 (describing how successful HSI grant applications sought money "to fund new programs, infrastructure, distance-learning tools, endowments, and other causes" that benefited the campus generally and did not mention Latinx students in particular).

37. See DEBORAH A. SANTIAGO ET AL., EXCELENCIA IN EDUC., LATINOS IN HIGHER EDUCATION: COMPILATION OF FAST FACTS (2019), <https://www.edexcelencia.org/research/publications/latinos-higher-education-compilation-fast-facts> [<https://perma.cc/E49N-DHEJ>]. HSIs make up 17% of all colleges and universities but enroll 66% of all Latinx undergraduates. *Id.*

38. ANDREW MARTINEZ & NICOLE M. GARCIA, AN OVERVIEW OF R1 HISPANIC SERVING INSTITUTIONS: POTENTIAL FOR GROWTH AND OPPORTUNITY 4, 7 (2020) (describing eleven HSIs that were recognized as R1 institutions, that is, highly active research universities with doctoral programs, in 2018).

In Part IV, I turn to how an engagement with diversity's distractions can enable policy makers to transcend the narrow conflict over affirmative action and advance broader policy reforms needed to promote Latinx access to higher education. The debate over affirmative action has only grown more complicated as proponents of corrective justice, much like Bell, criticize selective colleges and universities for overlooking the most disadvantaged students.³⁹ These normative disagreements cast doubt on the ongoing propriety of race-conscious admissions, intensify controversies over affirmative action, and deflect attention from other key dynamics that bear on students' opportunity and mobility. With respect to massification, a critically important consideration is how to strengthen the educational workhorses that serve most college students. To that end, state governments must revisit funding formulas that lead to huge per-pupil gaps in resources for two-year and four-year public institutions.⁴⁰ Although equalization of funding is unlikely, policy makers should consider how much per-capita funding is necessary to operate a rigorous academic program. Otherwise, disparities in instructional quality can become significant obstacles to successful transfer from a two-year to a four-year institution.⁴¹ Despite various proposals to strengthen community colleges as gateways to a bachelor's degree, Congress so far has failed to take any action. Even so, the issue remains on the reform agenda.⁴²

As for privatization, state governments must decide whether to provide more means-tested scholarships that allow students from low-income and working-class families to attend college without incurring significant debt. One difficulty is that constituents often fear that any shift in financial aid priorities will come at the expense of merit aid, which emphasizes grades and test scores and often benefits students from affluent families. Yet, as the class divide in college-going and completion widens, means-tested aid could be an important way to ensure that needy students receive enough funding to make college an affordable option.⁴³ Similarly, the federal government must decide whether it is willing to revisit the eligibility for and size of Pell grants, traditionally used to help low-income students but now expanded to include

39. See, e.g., KEVIN BROWN, *BECAUSE OF OUR SUCCESS: THE CHANGING RACIAL & ETHNIC ANCESTRY OF BLACKS ON AFFIRMATIVE ACTION* 7–17 (2014) (arguing that immigrant Blacks and multiracial Blacks have displaced more deserving ascendant Blacks with two native-born Black parents, who are likely to be disadvantaged descendants of slaves).

40. See *infra* notes 343–53.

41. See *infra* notes 354–55.

42. See Alexis Gravely, *It's Not Over Till It's Over*, *INSIDE HIGHER EDUC.* (Oct. 25, 2021), <https://www.insidehighered.com/news/2021/10/25/free-community-college-cut-bidens-spending-package> [<https://perma.cc/B95C-GQT8>]. Although the Build Back Better Plan no longer includes free community college, advocates vow to continue to pursue this reform. *Id.*

43. See *infra* notes 388–90.

some middle-class students. Like state governments, Congress has to determine whether to increase awards to keep up with the cost of attendance, even if that requires focusing funds on only the neediest students. It is worth noting that steps like these would not only improve college access for disadvantaged youth but also bolster the resources of two-year and less selective four-year institutions that many of these students attend.⁴⁴

Finally, state and federal officials must determine whether they will provide robust support to MSIs. Although these colleges and universities are sometimes treated as anomalies in a colorblind system of higher education, they continue to serve a large proportion of traditionally underrepresented racial and ethnic minorities.⁴⁵ To ignore the plight of these schools is to disregard ongoing patterns of stratification and segregation among institutions of higher education. Those patterns in turn correlate with substantial disparities in per-pupil funding, suggesting that diversity has indeed been a distraction from the separate and unequal characteristics of colleges and universities today.⁴⁶ There have been repeated calls for Congress to enhance allocations to MSIs. Historically Black colleges and universities (HBCUs) have made the most forceful case for increased resources.⁴⁷ However, there has been little in the way of decisive action on funding for HBCUs, much less HSIs.⁴⁸ As a matter of policy, federal officials should consider how to strengthen MSIs, including HSIs, as they do the yeoman's work of preparing historically underrepresented students to obtain a college degree.

44. See *infra* notes 381–85.

45. *A Brief History of MSIs*, THE RUTGERS CTR. FOR MINORITY SERVING INSTs. (Apr. 2014), <https://cmsi.gse.rutgers.edu/content/brief-history-msis> [<https://perma.cc/R9DN-RRRH>]. MSIs serve a disproportionate number of students of color and low-income students, some of whom otherwise would not attend college. *Id.*

46. See Rachel F. Moran, *City on a Hill: The Democratic Promise of Higher Education*, 7 U.C. IRVINE L. REV. 73, 100–02, 105–07 (2017); NICHOLLS, *supra* note 23, at 2–3; Baker et al., *supra* note 23, at 12–13; Rothwell, *supra* note 23.

47. See William Casey Boland, *The Higher Education Act and Minority Serving Institutions: Towards a Typology of Title III and V Funded Programs*, 8 EDUC. SCI. 1, 5, 14 (2018), <https://www.mdpi.com/2277-7102/8/33/pdf> [<https://perma.cc/9TEC-KR9E>]; HOUSE COMM. ON EDUC. & LAB., INVESTING IN ECONOMIC MOBILITY: THE IMPORTANT ROLE OF HBCUS, TCUS, AND MSIS IN CLOSING RACIAL AND WEALTH GAPS IN HIGHER EDUCATION 17 (2019).

48. ADAM HARRIS, THE STATE MUST PROVIDE: WHY AMERICA'S COLLEGES HAVE ALWAYS BEEN UNEQUAL—AND HOW TO SET THEM RIGHT 205, 212–13 (2021) (describing repeated federal failures to address disparities in funding for HBCUs and non-HBCUs in historically segregated system of public higher education); Bohanon, *supra* note 35 (describing ongoing lack of federal support for HSIs).

II. DIVERSITY'S DISTRACTIONS: THE ONGOING DEBATE OVER AFFIRMATIVE ACTION

Professor Bell's critique of affirmative action targeted the diversity rationale itself.⁴⁹ He questioned the turn away from overcoming racial subordination, a goal that he found both more coherent and more compelling.⁵⁰ He predicted that there would be ongoing instability in affirmative action jurisprudence because of the fundamental weakness of the diversity concept.⁵¹ As this Part shows, Bell was certainly right that battles over the propriety of race-conscious admissions have persisted and even intensified in recent years. In fact, heated contests over affirmative action suggest that diversity is not an idle distraction. Instead, it has become emblematic of a high-stakes competition for entrée to elite institutions, the schools that act as gatekeepers to positions of unparalleled influence and prominence.

That said, the admissions process is just one part of the competition for comparative advantage. Students' experiences at prestigious schools depend on their ability to penetrate exclusive social networks that allocate access to opportunities. For Latinx students, who often come from segregated, low-performing high schools, those networks may seem as daunting as the odds of admission. Though affirmative action cases focus on highly selective institutions, the decisions have consequences for other schools. Because the United States Supreme Court has consolidated a norm of colorblindness as the constitutional ideal, the Justices have cast doubt on the propriety of race-conscious admissions. As a result, voters have gone to the ballot box in a number of states to ban affirmative action at public institutions of higher education.⁵² Those bans have repercussions, even for students who do not aspire to attend a selective college or university.

A. *How Diversity Came to Be a Distraction*

In 1978, in *Regents of the University of California v. Bakke*,⁵³ Justice Lewis Powell became the decisive swing vote in a lawsuit that determined the permissibility of considering race in college and university admissions.⁵⁴ At

49. Bell, *supra* note 1, at 1622.

50. *See id.* at 1632–33.

51. *See id.* at 1622.

52. *See infra* notes 123–31 and accompanying text.

53. 438 U.S. 265 (1978).

54. JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR. 456–57, 500 (1994). “Powell’s was the decisive view” because “the Court was evenly split and [Powell] held the balance of power.” *Id.* George Clemon Freeman, Jr., *Justice Powell’s Constitutional Opinions*, 45 WASH. & LEE L. REV. 411, 411, 457–59 (1988). *See generally Bakke*, 438 U.S. 265.

the time, the United States Supreme Court was consolidating a principle of colorblindness that rejected any official use of race except when needed to correct past intentional discrimination. Once that discrimination had been rectified, there was no place for race-based considerations in government decision-making.⁵⁵ In *Bakke*, the newly created medical school at the University of California at Davis had set aside seats in its entering class for underrepresented students, even though it had not been found guilty of any discriminatory behavior in its admissions process. A disappointed White applicant, Allan Bakke, sued the school, alleging that its use of race was unconstitutional and had wrongly denied him a seat in the class.⁵⁶ The California state courts agreed with him.⁵⁷

When the United States Supreme Court decided to hear the *Bakke* case, the Justices were deeply divided.⁵⁸ Aligning themselves with the lower courts, four Justices made plain that the Davis program violated a principle of colorblindness and therefore was impermissible.⁵⁹ Four other Justices saw the matter differently. Without affirmative action, the medical profession would remain overwhelmingly White, and minority communities would continue to be underserved. The admissions process offered a meaningful way to address the ongoing impact of general societal discrimination. For that reason, these Justices believed that the Constitution allowed Davis to counter persistent inequities by setting aside sixteen seats in the entering class of 100 for members of traditionally underrepresented groups.⁶⁰

With a 4–4 split, Justice Powell became the decisive vote. He wanted to “find a middle way,” one that endorsed neither strict colorblindness nor wide-ranging color-consciousness.⁶¹ To avoid these polarizing options, Powell had to extricate himself from the confines of equality discourse and identify an alternative rationale that could justify a limited role for race in college and university admissions. To that end, he grounded his analysis in the First Amendment’s guarantee of institutional academic freedom.⁶² The Court should, he contended, defer to educators’ conclusions about the importance of enrolling a diverse student body to promote the robust exchange of ideas.⁶³

55. See Bryan K. Fair, *Foreword: Rethinking the Colorblindness Model*, 13 NAT’L BLACK L.J. 1, 2 (1993) (describing Justice Powell’s approach in *Bakke* as one version of constitutional colorblindness).

56. Complaint for Mandatory Injunctive and Declaratory Relief at 2, 3, *Bakke v. Regents of the Univ. of Cal.* (Sup. Ct. Cal. 1974) (No. 31287).

57. *Bakke v. Regents of the Univ. of Cal.*, 553 P.2d 1152, 1156, 1172 (1976).

58. Rachel F. Moran, *Bakke’s Lasting Legacy: Redefining the Landscape of Equality and Liberty in Civil Rights Law*, 52 U.C. DAVIS L. REV. 2569, 2597 (2019).

59. *Bakke*, 438 U.S. at 415–21 (Stevens, J., concurring in part and dissenting in part).

60. *Id.* at 336–49 (Brennan, J. concurring in part and dissenting in part).

61. JEFFERIES, *supra* note 54, at 473. See also Moran, *supra* note 58, at 2594–95, 2597.

62. *Bakke*, 438 U.S. at 311–13.

63. *Id.* at 313.

That deference, however, could not be boundless. Because academic administrators had no specific expertise in correcting societal ills or the failings of the medical profession, courts should grant leeway only when diversity operated as a pedagogical strategy to enhance the learning process.⁶⁴ Moreover, consistent with norms of equality, applicants had to be considered as individuals based on their own merits. Consequently, Powell concluded, the medical school at Davis could justifiably weigh race in its admissions process but could not set aside seats in the entering class and deny Allan Bakke an opportunity to compete for them.⁶⁵ As an alternative, Powell offered Harvard University's undergraduate admissions program as a model. Harvard relied on holistic review of applicants with race as just one factor among many.⁶⁶

In the intervening years, Powell's pragmatic compromise, embodied in the concept of diversity, endured in the face of sharp criticism that has spanned the ideological spectrum. Some, like Professor Bell, emphasized the shortcomings of Powell's decision to abandon color-conscious remedies aimed at overcoming racial subordination, while others dismissed Powell's opinion as an idiosyncratic departure from colorblindness.⁶⁷ In 1996, the Fifth Circuit Court of Appeals asserted the primacy of race-neutral approaches in *Hopwood v. Texas*. According to the court, Powell had written only for himself and his lonely opinion did not qualify as binding precedent.⁶⁸ Having rejected the diversity rationale, the court precluded public institutions of higher education in Louisiana, Mississippi, and Texas from using race in admissions.⁶⁹ Confronted with this mandate, Texas legislators responded by guaranteeing admission to the University of Texas for all students in the state who graduated in the top 10% of their high school classes.⁷⁰ Because of the segregated nature of many Texas high schools, the Top Ten Percent Plan yielded substantial racial and ethnic diversity in the University's student body.⁷¹

The Supreme Court declined to review the *Hopwood* decision and waited until 2003 to respond to the Fifth Circuit's claim that Powell's opinion represented nothing more than the educational musings of a single Justice. In

64. See *id.* at 305–12.

65. *Id.* at 314–16.

66. *Id.* at 316–24.

67. See Dahlia Lithwick, *The Legal Fiction of "Diversity": Good Intentions and the Unraveling of Affirmative Action*, SLATE (May 16, 2002), <https://slate.com/news-and-politics/2002/05/the-legal-fiction-of-diversity.html> [<https://perma.cc/NW5T-SG4R>].

68. *Hopwood v. Texas*, 78 F.3d 932, 944–45 (5th Cir. 1996) (describing Powell's lonely opinion as insufficient to constitute binding precedent), *abrogated by* *Grutter v. Bollinger*, 539 U.S. 309 (2003).

69. See *Hopwood*, 78 F.3d at 934–35.

70. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 305 (2013).

71. *Id.*

Grutter v. Bollinger, the Court considered a challenge to the use of race in the University of Michigan School of Law's admissions policy.⁷² Like Harvard, Michigan Law used a holistic approach that weighed race as one factor. However, a disappointed applicant drew on the *Hopwood* opinion to contend that any consideration of race was impermissible, given that Michigan Law had never been found guilty of past discrimination.⁷³ In a 5–4 decision, Justice Sandra Day O'Connor endorsed and expanded the diversity rationale. She made clear that diversity was a compelling interest that could justify the use of race in admissions.⁷⁴ Administrators at elite institutions like Michigan's flagship law school might properly conclude that a diverse student body was important not only to the exchange of ideas but to the development of inclusive pathways to leadership.⁷⁵ Law school officials could properly determine that diversity not only would better prepare students for their chosen profession but also would advance democratic legitimacy.⁷⁶

The Court was careful to note that Powell's diversity rationale did not confer an unrestricted license to use race in the admissions process. In *Grutter*, Justice O'Connor pointed out that race-conscious admissions should be temporary, used only so long as necessary to enroll a diverse student body. She expressed a fervent hope that the need for such programs would end in twenty-five years.⁷⁷ Meanwhile, the Court also restricted the methods that colleges and universities could use to achieve diversity. In the companion case of *Gratz v. Bollinger*, Justice William Rehnquist wrote for a 6–3 majority that found the undergraduate admissions program at the University of Michigan unconstitutional.⁷⁸ That program accorded a fixed number of points for applicants from underrepresented racial or ethnic minority groups.⁷⁹ The Court concluded that this rigid quantitative approach violated Powell's strictures because it did not afford nuanced attention to individuals' lived experiences of race.⁸⁰

After the *Grutter* decision effectively overruled *Hopwood*, institutions of higher education in Louisiana, Mississippi, and Texas once again were free to use race in admissions so long as they refrained from unduly mechanistic methods. The University of Texas continued to rely on the Top Ten Percent Plan to fill most seats in the entering class, but administrators reinstated holistic review to accord some weight to race when allocating the remaining

72. *Grutter*, 539 U.S. at 306.

73. *See id.* at 317, 321.

74. *Id.* at 325.

75. *See id.* at 328–32.

76. *See id.* at 330–32.

77. *Id.* at 342, 343.

78. *Gratz v. Bollinger*, 539 U.S. 244, 275–76 (2003).

79. *Id.* at 246.

80. *See id.* at 271–76.

spaces.⁸¹ A disappointed applicant, Abigail Fisher, filed suit alleging that because the University already was achieving substantial diversity under its percentage plan, it was unnecessary and therefore unconstitutional to consider race in any facet of the admissions process.⁸² The lower courts upheld the reintroduction of race under a “good faith” test for evaluating university officials’ exercise of discretion.⁸³ In a 2013 opinion by Justice Anthony Kennedy, the Court remanded the case, indicating that this standard was too deferential when evaluating whether the use of race remained necessary to enroll a diverse student body.⁸⁴ On remand, the district court applied the more rigorous strict scrutiny test and once again upheld the admissions program. The court relied on the University’s evidence that some courses still had miniscule numbers of students from underrepresented racial and ethnic groups and that Black and Latinx students still felt isolated on campus.⁸⁵ Three years after *Fisher I*, Justice Kennedy wrote for a 4–3 majority, this time affirming the district court’s conclusion that there was sufficient proof that race-based admissions remained necessary to achieve diversity in the student body.⁸⁶ The dissenters vigorously objected, accusing Kennedy of retreating from the exacting standard of review he had previously endorsed to protect a norm of colorblindness.⁸⁷

The *Fisher* lawsuit did not end litigation over affirmative action in higher education. In 2017, just one year after the Supreme Court issued its final opinion in the case, the Department of Justice under President Trump announced that it would launch investigations into race-conscious admissions programs at colleges and universities throughout the country.⁸⁸ The Department eventually opened inquiries into race-conscious practices at Yale University and Princeton University.⁸⁹ President Joseph Biden’s

81. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 305–06 (2013).

82. *Id.* at 306; *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 381–85 (2016).

83. *Fisher I*, 570 U.S. at 312–14.

84. *Id.*

85. *Fisher II*, 579 U.S. at 381–85.

86. *Id.* at 387–90.

87. *See id.* at 389–92 (Alito, J., dissenting).

88. Charlie Savage, *Justice Dept. to Take on Affirmative Action in College Admissions*, N.Y. TIMES (Aug. 1, 2017), <https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html> [https://perma.cc/7NNE-V2RU].

89. Deirdre Fernandes, *Justice Department Increasing Attacks on Affirmative Action in College Admissions*, BOS. GLOBE (Aug. 24, 2020), <https://www.bostonglobe.com/2020/08/23/metro/justice-department-is-increasing-attacks-affirmative-action-college-admissions/> [https://perma.cc/ZM6U-RPVD]; Anemona Hartocollis, *Princeton Admitted Past Racism. Now It’s Under Investigation by the Justice Department*, N.Y. TIMES (Sept. 17, 2020), <https://www.nytimes.com/2020/09/17/us/princeton-racism-federal-investigation.html> [https://perma.cc/8VKL-BAN9].

administration dropped the investigations when he assumed office.⁹⁰ Private individuals also continued to challenge the use of affirmative action at selective colleges and universities. Even before the *Fisher* case was resolved, a nonprofit organization called Students for Fair Admissions filed suit against Harvard University, alleging that the process used as a model in *Bakke* wrongly discriminated against Asian-American applicants.⁹¹ At the same time, SFFA sued the University of North Carolina, claiming that it used race in an unduly, heavy-handed way that converted it from a plus factor to a quota-like feature.⁹² So far, SFFA has lost both suits in the lower courts,⁹³ but there is widespread speculation that the United States Supreme Court has granted certiorari to bring affirmative action in admissions to an end.⁹⁴ The Justices could either declare that diversity is not a compelling interest or make the strict scrutiny standard so onerous that it is impossible to meet.⁹⁵

B. *Is Diversity Really a Distraction?*

Just as Professor Bell predicted, affirmative action in higher education admissions remains deeply contentious.⁹⁶ There is good reason for that. As *Grutter* made clear, elite institutions of higher education enjoy a virtual monopoly over pathways to positions of national prominence.⁹⁷ This is especially true for the most prestigious private universities. As education scholar David Labaree notes,

90. Patricia Hurtado & Janet Lorin, *Trump's Diversity Fights with Princeton, Yale Are Dropped*, BLOOMBERG (Feb. 3, 2021), <https://www.bloomberg.com/news/articles/2021-02-03/yale-says-u-s-justice-department-drops-probe-into-admissions> [https://perma.cc/F6WS-49J4].

91. Complaint at 3, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-CV-14176-DJC).

92. Complaint at 4, *Students for Fair Admissions, Inc. v. Univ. of N. Carolina*, 2021 WL 7628155 (M.D.N.C. Oct. 18, 2021) (No. 1:14CV954).

93. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 201–04 (D. Mass. 2019), *aff'd*, 980 F. 3d 157 (1st Cir. 2020); Anemona Hartocollis, *The Supreme Court Tactic That Aims to Kill Affirmative Action*, N.Y. TIMES (Nov. 11, 2021), <https://www.nytimes.com/2021/11/11/us/affirmative-action-harvard-unc.html> [https://perma.cc/ADN4-JMZY].

94. Adam Liptak, *Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C.*, N.Y. TIMES (Jan. 24, 2022), <https://www.nytimes.com/2022/01/24/us/politics/supreme-court-affirmative-action-harvard-unc.html> [https://perma.cc/VG64-Z4BP]; Hartocollis, *supra* note 93.

95. SFFA's complaints attack both the legitimacy of the diversity rationale and the failure to narrowly tailor the use of race in admissions. Complaint, *supra* note 91, ¶¶ 115–18; Complaint, *supra* note 92, ¶¶ 61–63.

96. Bell, *supra* note 1, at 1632.

97. See generally *Grutter v. Bollinger*, 539 U.S. 306, 306, 332 (2003).

All nine of the Supreme Court justices in 2015 went to Yale or Harvard law schools; none ever attended a public university as undergrad or grad. The last U.S. president to have any degree from a public institution was Jimmy Carter (the Naval Academy). In fact, if you don't count military academies, only three presidents since 1850 had any degrees from a public institution (Benjamin Harrison, Gerald Ford, and Lyndon Johnson).⁹⁸

It's hardly surprising, then, that battles over access to these bastions of privilege are hard-fought and have moved from flagship public universities to private institutions at the apex of the higher education pyramid. Diversity is far from an idle distraction: it is a struggle over how elite leadership will be developed in a democracy riven by conflicts over race and class.⁹⁹

SFFA's litigation against Harvard shows how a prestigious university's admissions decisions reflect not only individual merit but other considerations that preserve an institution's place in circles of influence and power. SFFA used Harvard's own 2013 study of admissions to demonstrate that if grades and test scores were the sole criteria for evaluating applicants, the entering class would be racially and ethnically transformed: Asian Americans would make up 43.04% rather than 18.66% of the class; Whites, 38.37% rather than 43.21%, Blacks, 0.67% rather than 10.46%, and Latinx, 2.42% rather than 9.46%.¹⁰⁰ According to Professor Bell, grades and test scores have been used to preserve White privilege,¹⁰¹ but the Harvard lawsuit reveals that this is only

98. LABAREE, *supra* note 11, at 126. *But c.f.* Steven Brint et al., *Where Ivy Matters: The Educational Background of U.S. Cultural Elites*, 93 SOC. EDUC. 153, 153 (2020) (concluding that selective institutions of higher education are more influential in producing cultural elites than political and business elites). This observation was made before President Joseph R. Biden, a graduate of public institutions of higher education, was elected in 2020. Norman Vanamee, *Where Did Joe Biden & Kamala Harris Go to School?*, TOWN & COUNTRY (Jan. 20, 2021), <https://www.townandcountrymag.com/society/money-and-power/a34304249/joe-biden-kamala-harris-schools-universities/> [<https://perma.cc/X4T5-8S72>] ("When President Joseph Biden and Vice President Kamala Harris were sworn into office earlier today, they became the first President and Vice President combo in 36 years with no Ivy League credentials on their resumes . . ."). Moreover, with Justice Amy Coney Barrett's confirmation, Yale and Harvard law schools no longer monopolized the Supreme Court. Mike Stetz, *Harvard, and Yale Out of the Picture for Next Supreme Court Justice*, NAT'L JURIST (Oct. 6, 2020), <https://www.nationaljurist.com/national-jurist-magazine/harvard-and-yale-out-picture-next-supreme-court-justice> [<https://perma.cc/LT92-W76H>].

99. See THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION 108, 299 (2009).

100. Aaron Mak, *Admitting Bias*, SLATE (Oct. 15, 2018), <https://slate.com/news-and-politics/2018/10/harvard-admissions-lawsuit-trial-asian-american-discrimination-reports.html> [<https://perma.cc/4T6X-YPZ5>].

101. See Bell, *supra* note 1, at 1630–31.

part of the story. To maintain its connections to power and influence, Harvard gives preference to children of wealthy donors and alumni, who already occupy positions of national importance.¹⁰² Maintaining access to these exclusive networks is essential to Harvard's ongoing place as an elite institution of higher education. In 1961, in an earlier and perhaps more candid era, one dean of admissions brought this point home:

Harvard is a great university partly at least because it is rich, although it is rich partly because it is great. Harvard's wealth has come out of its special mixture of gentlemen and scholars, with the gentlemen, for whatever reason, giving of their substance to support the scholars. The eighty-two plus million raised for the Program for Harvard College did not come to any significant degree from the scholars, the *summas*, and the Phi Beta Kappas.¹⁰³

In short, Harvard requires a marriage of merit and money to survive as an elite educational destination.

Diversity can alter the racial and ethnic composition of the student body, but it must not undermine this defining partnership of prestige. Even today, after decades of holistic review and a commitment to a diverse student body, children from families that make \$630,000 a year (the top 1% of the income distribution) are 77% more likely to attend an Ivy League college than children from families that make \$30,000 or less.¹⁰⁴ At some elite schools, there are more students from families in the top 1% than from the bottom 60% of the income distribution, that is, families making less than \$65,000.¹⁰⁵ In addition, some studies have found that despite a longstanding commitment to diversity at highly selective schools, many underrepresented students are unable to access social networks of influence critical to making the most of an elite education.¹⁰⁶ In his book *The Privileged Poor*, education researcher Anthony Abraham Jack describes the difficulties that students from underrepresented backgrounds face in navigating exclusive circles at

102. DANIEL GOLDEN, *THE PRICE OF ADMISSION: HOW AMERICA'S RULING CLASS BUYS ITS WAY INTO ELITE COLLEGES—AND WHO GETS LEFT OUTSIDE THE GATES* 4–6, 25–28, 54–57, 88–93 (2005).

103. LABAREE, *supra* note 11, at 127.

104. ANTHONY ABRAHAM JACK, *THE PRIVILEGED POOR: HOW ELITE COLLEGES ARE FAILING DISADVANTAGED STUDENTS* 5 (2019).

105. *Id.* See also Raj Chetty et al., *Mobility Report Cards: The Role of Colleges in Intergenerational Mobility* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23618, 2017) (reporting that at the "Ivy-Plus" colleges (that is, Ivy League institutions plus the University of Chicago, Stanford, MIT, and Duke), more students come from families in the top 1% of the income distribution than from the bottom half and that only 3.8% of students are from the lowest quintile).

106. See JACK, *supra* note 104, at 189, 191–92.

"Renowned University,"¹⁰⁷ which journalist Paul Tough speculates is Harvard.¹⁰⁸ Jack observes that the Doubly Disadvantaged, students of color from public high schools readily identifiable by race and poverty, frequently "felt like outsiders at Renowned, isolated from both their new peers and the larger college community."¹⁰⁹ Though the Doubly Disadvantaged enjoyed unprecedented opportunities, they also came to appreciate their differences in profound ways as they "encountered tacit social codes that they had never learned and that they struggled to decipher."¹¹⁰ By contrast, Jack notes, the Privileged Poor, those students who attended elite private boarding schools on scholarship, already had mastered the mores of their affluent peers and did not experience the same culture shock when arriving at top colleges and universities.¹¹¹

Even when diversity offers underrepresented students a spot at a highly selective school, dynamics like these can pose serious difficulties for students' chances at upward mobility, as sociologist Maria Rendon's work on Latinx youth demonstrates.¹¹² For many Latinx growing up in segregated, low-income neighborhoods, their ambition is sustained by the "immigrant bargain," the belief that their success will redeem their parents' years of sacrifice.¹¹³ This sense of possibility is reinforced by family, friends, and community members, but when students arrive at four-year campuses, they often struggle to find their way.¹¹⁴ Indeed, when Rendon met with Manuel, an Ivy League graduate in her study, he told her that he was going to be her "biggest disappointment."¹¹⁵ As a Doubly Disadvantaged student, he described not only "academic shock" because of his lack of preparation at an inner-city high school but also "culture shock" because he could not relate to other people on campus.¹¹⁶ After being an A+ student in Advanced Placement courses at his high school, Manuel had to focus on catching up in his classes and made few friends.¹¹⁷ Later, he found ways to connect with his peers, but even ten years after getting his bachelor's degree, Manuel was still hunting for jobs commensurate with his college credential.¹¹⁸ The immigrant bargain that supported his dreams of higher education could not open up employment

107. *Id.* at 12–19.

108. PAUL TOUGH, *THE INEQUALITY MACHINE: HOW COLLEGE DIVIDES US* 128 (2019).

109. JACK, *supra* note 104, at 38.

110. *Id.* at 52.

111. *Id.*

112. MARIA G. RENDON, *STAGNANT DREAMERS: HOW THE INNER CITY SHAPES THE INTEGRATION OF SECOND-GENERATION LATINOS* 22 (2019).

113. *Id.* at 10.

114. *Id.* at 149–55.

115. *Id.* at 155.

116. *Id.* at 156.

117. *Id.*

118. *Id.* at 156–58.

opportunities, and Manuel did not build the kind of networks while on campus that might have advanced his job search.¹¹⁹ Ironically, feelings of isolation like those described by Doubly Disadvantaged students, including Manuel, are one reason that the Court permitted the University of Texas to continue weighing race in admissions.¹²⁰ Yet, merely factoring race into holistic review does little to penetrate the exclusionary social networks that can hamstring these youth.

The diversity rationale does not engage with these obstacles to meaningful inclusion because the focus is on the point of admission and not the educational experiences that follow. In *Bakke*, Justice Powell emphasized diversity's role in promoting the learning process and ignored the part that highly selective institutions play as gatekeepers to power and privilege.¹²¹ Although Justice O'Connor acknowledged the significance of elite colleges and universities as pathways to leadership, she did not elaborate on how this new insight might amplify the measures necessary to make diversity authentic. On the contrary, she was far more preoccupied with making clear that affirmative action was a temporary concession and ideally should disappear in twenty-five years.¹²² Even though she broadened the underpinnings of the diversity rationale, she clearly aligned herself with a principle of colorblindness and left larger issues of stratification in higher education unaddressed.

C. *The Complications of Diversity at the Ballot Box*

Predictably, opponents of race-based admissions have used litigation to insist that the time has come to end affirmative action programs, but the Court's ambivalence has had other noteworthy effects. A normative commitment to colorblindness undercuts diversity's legitimacy by treating it as a desirable end coupled with a distasteful means. That palpable discomfort has enabled critics to turn to the political process to outlaw any use of race in admissions. In 1996, the same year that *Hopwood* was decided, California voters went to the polls to bar the consideration of race in all governmental decision-making, including admissions at public colleges and universities.¹²³ Just as California could voluntarily adopt affirmative action programs, it could

119. *Id.* at 157.

120. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 383–85 (2016).

121. *See Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 312 (1978).

122. *See Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

123. *California Proposition 209, Affirmative Action Initiative (1996)*, BALLOTPEDIA, [https://ballotpedia.org/California_Proposition_209,_Affirmative_Action_Initiative_\(1996\)](https://ballotpedia.org/California_Proposition_209,_Affirmative_Action_Initiative_(1996)) [<https://perma.cc/AUY5-WUVS>]; Bill Stall & Dan Morain, *Prop. 209 Wins, Bars Affirmative Action*, L.A. TIMES (Nov. 6, 1996), <https://www.latimes.com/archives/la-xpm-1996-11-06-mn-62738-story.html> [<https://perma.cc/CBR8-RU4W>].

also decide to terminate them.¹²⁴ Although *Bakke* remained good law, it became irrelevant to enrolling a diverse student body in the state. Washington and Florida soon followed with their own bans.¹²⁵ In 2006, just a few years after *Grutter* was decided, Michigan voters also eliminated the use of affirmative action at public institutions of higher education.¹²⁶ Once again, *Grutter* remained the law of the land, but it no longer provided a basis for considering race in admissions at the University of Michigan.¹²⁷ Within the next six years, Arizona, Nebraska, New Hampshire, and Oklahoma adopted prohibitions of their own.¹²⁸ In 2020, Idaho outlawed affirmative action,¹²⁹ and California and Washington voters recently chose to retain their bans.¹³⁰ While the outcome in Washington was close, the California electorate rejected affirmative action by a wide margin. In fact, in the Golden State, voters rebuffed race-based government decision-making even more soundly than they had in 1996.¹³¹

124. *See* *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 697–98, 710–11 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997).

125. *Current State Bans on Affirmative Action*, JURIST (June 5, 2014), <https://www.jurist.org/archives/feature/state-bans-on-affirmative-action/> [<https://perma.cc/W9WA-9DVF>]; *Washington Initiative 200, Affirmative Action (1998)*, BALLOTPEdia, [https://ballotpedia.org/Washington_Initiative_200_Affirmative_Action_Initiative_\(1998\)](https://ballotpedia.org/Washington_Initiative_200_Affirmative_Action_Initiative_(1998)) [<https://perma.cc/7S6T-79CA>]; Susan K. Brown & Charles Hirschman, *The End of Affirmative Action in Washington State and Its Impact on the Transition from High School to College*, 79 SOCIO. EDUC. 106, 107 (2006).

126. *Michigan Proposal 2, Affirmative Action Initiative (2006)*, BALLOTPEdia, [https://ballotpedia.org/Michigan_Proposal_2_Affirmative_Action_Initiative_\(2006\)](https://ballotpedia.org/Michigan_Proposal_2_Affirmative_Action_Initiative_(2006)) [<https://perma.cc/TM95-KLFP>].

127. *See* *Schuetz v. Coal. to Def. Affirmative Action*, 572 U.S. 291, 313–14 (2014) (plurality opinion) (upholding constitutionality of Michigan's affirmative action ban).

128. *Current State Bans on Affirmative Action*, *supra* note 125.

129. *Idaho Governor Signs Affirmative Action Ban into Law*, AP NEWS (Mar. 31, 2020), <https://apnews.com/article/bbe0f81d2b4ef63102d749879c045a10> [<https://perma.cc/E9D3-ZZCU>].

130. *California Proposition 16, Repeal Proposition 209 Affirmative Action Amendment (2020)*, BALLOTPEdia, [https://ballotpedia.org/California_Proposition_16_Repeal_Proposition_209_Affirmative_Action_Amendment_\(2020\)](https://ballotpedia.org/California_Proposition_16_Repeal_Proposition_209_Affirmative_Action_Amendment_(2020)) [<https://perma.cc/5LTJ-5RMY>]; *Washington Initiative 200, Affirmative Action*, *supra* note 125.

131. Conor Friedersdorf, *Why California Rejected Racial Preferences Again*, ATLANTIC (Nov. 10, 2020), <https://www.theatlantic.com/ideas/archive/2020/11/why-california-rejected-affirmative-action-again/617049/> [<https://perma.cc/GRD2-ADG5>]; Joseph O'Sullivan, *With the Loss of Referendum 88, Affirmative-Action Advocates Wonder What's Next. Inslee Offer Some Answers*, SEATTLE TIMES (Dec. 29, 2019, 6:00 AM), <https://www.seattletimes.com/seattle-news/politics/with-the-loss-of-referendum-88-affirmative-action-advocates-wonder-whats-next/> [<https://perma.cc/UV75-47UY>].

In response to the bans, some public institutions of higher education pursued race-neutral means of diversifying student bodies.¹³² In doing so, academic administrators found themselves in a quandary.¹³³ They wanted to find ways to preserve diversity without running afoul of legal strictures on the use of race. If the strategies succeeded, however, they would embolden critics of affirmative action by providing evidence that institutions no longer needed to consider race in the admissions process. That dynamic was certainly evident in the *Fisher* litigation, when the plaintiff alleged that the success of the Top Ten Percent Plan rendered race-conscious admissions practices unnecessary.¹³⁴

Success could come at a jurisprudential price, but if race-neutral policies failed, the gaps in access to higher education between Whites and traditionally underrepresented racial and ethnic groups would grow even greater.¹³⁵ In fact, some researchers have concluded that affirmative action bans did worsen disparities and that any gains in diversity were “likely due to demographic change rather than successful interventions.”¹³⁶ In California, for instance, Latinx received the largest number of offers of admission to the freshman class at the University of California in 2020, which was a first in the institution’s history. Latinx accounted for 38% of the offers, narrowly surpassing Asian Americans at 35% as well as Whites at 21% and Blacks at 5%.¹³⁷ Yet, despite this historic feat, Latinx remained the most

132. WILLIAM C. KIDDER & PATRICIA GANDARA, *THE CIV. RTS. PROJECT, TWO DECADES AFTER THE AFFIRMATIVE ACTION BAN: EVALUATING THE UNIVERSITY OF CALIFORNIA’S RACE-NEUTRAL EFFORTS* 2–3, 22–27 (2015), https://www.civilrightsproject.ucla.edu/research/college-access/affirmative-action/two-decades-after-the-affirmative-action-ban-evaluating-the-university-of-california2019s-race-neutral-efforts/Kidder_PIC_paper.pdf [<https://perma.cc/77KR-LGP7>].

133. Noue George La & Kenneth L. Marcus, “*Serious Consideration*” of Race-Neutral Alternatives in Higher Education, 57 CATH. U. L. REV. 991, 994–95, 1026 (2008).

134. See *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 381–83 (2016).

135. See Halley Potter, *Transitioning to Race-Neutral Admissions: An Overview of Experiences in States Where Affirmative Action Has Been Banned*, in *THE FUTURE OF AFFIRMATIVE ACTION: NEW PATHS TO HIGHER EDUCATION DIVERSITY AFTER FISHER V. TEXAS* 75, 88–89 (Richard D. Kahlenberg ed., 2014).

136. Mark C. Long & Nicole A. Bateman, *Long-Run Changes in Underrepresentation After Affirmative Action Bans in Public Universities*, 42 EDUC. EVAL. & POL. ANALYSIS 188, 203 (2020) (studying public institutions of higher education in Arizona, California, Florida, Georgia, Michigan, Nebraska, New Hampshire, Texas, and Washington); Scott Jaschik, *Losing Minority Students*, INSIDE HIGHER ED (Apr. 13, 2020), <https://www.insidehighered.com/admissions/article/2020/04/13/study-finds-public-universities-lose-minority-students-when-the-y-ban> [<https://perma.cc/YXZ7-U97T>] (describing results of Long and Bateman study).

137. *UC Admits Most Diverse Class Ever, Led by Latino Students*, L.A. TIMES (July 16, 2020), <https://www.latimes.com/california/story/2020-07-16/latinos-uc-berkeley-diverse-class-history> [<https://perma.cc/3PK7-PZP5>]; Ashley A. Smith & Betty Marquez Rosales, *Latino Students Make Up Largest Ethnic Group of Students Admitted to UC*, EDSOURCE (July 16,

underrepresented group because they accounted for over half of the students in the state's public schools.¹³⁸ By contrast, Asian Americans made up approximately 10%, Whites just over 20%, and Blacks about 5%.¹³⁹

Exit polls indicate that a majority of Latinx voted to retain the ban on affirmative action, just as Whites and Asian Americans had.¹⁴⁰ Only African Americans favored reinstating the programs.¹⁴¹ That pattern might seem puzzling, given that Latinx are severely underrepresented in the University of California despite the growth in offers of admission. However, it is worth noting that affirmative action had been banned in the state for approximately twenty-five years when voters revisited the issue.¹⁴² The youthful, Latinx college-eligible population has had no experience with race-conscious admissions in public colleges and universities; in that sense, colorblindness had been normalized for them.

Bans on affirmative action arguably have had an outsized impact on Latinx students' expectations about college. The six states with the largest Latinx populations are Arizona, California, Florida, Illinois, New York, and Texas.¹⁴³ Of these, only Illinois and New York have allowed affirmative action in higher education admissions to continue uninterrupted since the *Bakke* decision.¹⁴⁴ Arizona, California, and Florida still prohibit the consideration of race in admissions, and Texas only restored affirmative action programs in 2003, after a nearly twenty-year hiatus, once the Supreme Court decided *Grutter*.¹⁴⁵ As the Latinx population continues to grow, affirmative action at colleges and universities may not figure prominently in

2020), <https://edsources.org/2020/latino-students-make-up-largest-ethnic-group-of-students-admitted-to-uc/636230> [<https://perma.cc/URE3-QE9T>].

138. See *Fingertip Facts on Education in California*, CAL. DEP'T OF EDUC., <https://www.cde.ca.gov/ds/ad/ceffingertipfacts.asp> [<https://perma.cc/HLT6-HPR7>].

139. *Id.*

140. See Liz Peek, *Hispanics Shock Democrats in Deep Blue California*, THE HILL, (Nov. 20, 2020), <https://thehill.com/opinion/education/526642-hispanics-shock-democrats-in-deep-blue-california> [<https://perma.cc/T2GD-6F24>].

141. See *id.*

142. Scott Wilson, *California Voters Revisit a Fraught History on Race with a Referendum on the 1990s*, WASH. POST (Oct. 28, 2020), https://www.washingtonpost.com/national/california-affirmative-action-ballot-measure/2020/10/28/9449726c-1492-11eb-9f38-35350e52c23c_story.html [<https://perma.cc/936L-VAUB>] (describing the ban on affirmative action as having been in place for decades).

143. Renee Stepler & Mark Hugo Lopez, *Ranking the Latino Population in the States*, PEW RSCH. CTR. (Sept. 8, 2016), <https://www.pewresearch.org/hispanic/2016/09/4-ranking-the-latino-population-in-the-states/> [<https://perma.cc/8JW3-RH2M>].

144. See *Affirmative Action in New York*, BALLOTPEDIA, https://ballotpedia.org/Affirmative_Action_in_New_York [<https://perma.cc/7LLE-2PBB>]; *Affirmative Action in Illinois*, BALLOTPEDIA, https://ballotpedia.org/Affirmative_Action_in_Illinois [<https://perma.cc/4ZLL-RCMX>].

145. Potter, *supra* note 135, at 77–79 tbl.6.1.

young people's understanding of the parameters of opportunity. That indifference in turn could damage the political will necessary to keep the programs in place.

All of this suggests that the challenge of providing inclusive access to higher education will not be resolved any time soon by focusing exclusively on battles over affirmative action in admissions at elite institutions. While certainly noteworthy, these hard-fought contests leave many barriers to a college diploma unaddressed, as Professor Bell indicated.¹⁴⁶ Those additional obstacles deserve a thorough exploration of their own, requiring a shift in focus from prestigious colleges and universities to the workhorses of post-secondary education. These engines of opportunity are the community colleges and less selective four-year institutions that most students attend. Although making broad access possible, these schools often are segregated by race and ethnicity, hampered by resource constraints, and challenged to meet their students' needs.

III. DISTRACTED NO MORE: MASSIFICATION, PRIVATIZATION, AND THE DESTABILIZATION OF MINORITY-SERVING INSTITUTIONS (MSIs)

Now it is time to turn to another dimension of diversity's distractions: the way in which a narrow focus on affirmative action at highly selective colleges and universities obscures other forms of stratification and segregation in higher education. Professor Bell identified the challenges that poverty poses to access, but there are other dynamics at work as well.¹⁴⁷ This Article will explore three of them. First, access to a college degree broadened after World War II, but inequities nonetheless persisted. Although massification brought new opportunities, it intensified stratification and perpetuated segregation in higher education, as low-income students and students of color disproportionately attended community colleges and less selective four-year institutions. Second, the rise of privatization in higher education increasingly required students to self-finance their college degrees. As a result, the cost of attendance became a significant barrier for low-income students. Black and Latinx youth often come from families with fewer resources than White and Asian-American families, so the high price of a college degree has discouraged these disadvantaged youth from pursuing upward mobility and membership in the middle class. Third, the Court's embrace of colorblindness in affirmative action cases complicated the role of MSIs, which educate a substantial share of students of color. Uncertainties surrounding the propriety of color-consciousness clouded the legitimacy of these schools' claims to a special mission. As a consequence, federal definitions of MSIs have been

146. *See supra* Part II.

147. *See supra* Part II.

weakened by fears of anything that resembles a racial set-aside. For example, Hispanic-Serving Institutions are identified by their undergraduate enrollment numbers, rather than any normative commitment to recruiting and supporting Latinx students.¹⁴⁸ Because a norm of colorblindness calls the identity of MSIs into question, they have struggled to gain federal funding, even as the diversity of the college population grows.¹⁴⁹

A. Massification, Stratification, and Segregation: The Limits of Access

Even before World War II, higher education had been gradually opening its doors to a wider swath of the population. At the beginning of the twentieth century, fewer than 250,000 Americans, or around 2%, attended college.¹⁵⁰ By 1939–40, shortly before the war, that number had grown to 1.5 million. This figure could have been larger, but President Franklin D. Roosevelt's administration declined to make higher education part of the New Deal.¹⁵¹ Even so, by 1949–50, enrollments had swelled to nearly 2.7 million due to government policy, most notably the G.I. Bill.¹⁵² That Bill was part of a congressional strategy to prevent returning veterans from overwhelming the labor market and producing high levels of unemployment.¹⁵³ When Congress approved the educational benefit in 1944, supporters projected that 8%–10% of qualifying veterans would take advantage of the opportunity.¹⁵⁴ That prediction proved a serious underestimate: by 1950, 16% had enrolled in college.¹⁵⁵ In 1946 and 1947, veterans accounted for nearly half of all students in higher education, and their tuition dollars filled the coffers of the schools they attended.¹⁵⁶

In the 1970s, colleges and universities continued to expand enrollments by inviting women and people of color to pursue a bachelor's degree. In part

148. *Hispanic-Serving Institution Definitions*, HISP. ASS'N OF COLLS. & UNIVS., https://www.hacu.net/hacu/HSI_Definition.asp [<https://perma.cc/W68T-FKY6>].

149. See, e.g., Danielle Douglas-Gabriel, *Funding for Minority-Serving Colleges Caught in the Crossfire of Senate Dispute*, WASH. POST (Nov. 5, 2019), <https://www.washingtonpost.com/education/2019/11/05/funding-minority-serving-colleges-caught-cross-fire-senate-dispute/> [<https://perma.cc/EPW3-P5DV>].

150. ANDREW DELBANCO, *COLLEGE: WHAT IT WAS, IS, AND SHOULD BE* 108 (2012).

151. ROGER L. GEIGER, *AMERICAN HIGHER EDUCATION SINCE WORLD WAR II: A HISTORY* 8–9 (2021).

152. See JOHN R. THELIN, *A HISTORY OF AMERICAN HIGHER EDUCATION* 261 (2019); see also SUZANNE METTLER, *DEGREES OF INEQUALITY: HOW THE POLITICS OF HIGHER EDUCATION SABOTAGED THE AMERICAN DREAM* 6 (2014) (describing the rising number of college graduates in the United States after World War II).

153. THELIN, *supra* note 152, at 262.

154. *Id.* at 263.

155. *Id.* Women veterans were even more likely than their male counterparts to attend college under the bill with 30% enrolling. *Id.* at 267.

156. GEIGER, *supra* note 151, at 5–6.

this was a strategy to boost revenues. Between 1968 and 1973, fourteen studies documented financial strains at the nation's institutions of higher education.¹⁵⁷ This “depression” in post-secondary funding coincided with growing unrest over unequal educational opportunities for underrepresented racial and ethnic groups and women.¹⁵⁸ Although “changing the racial and gender composition of higher education was a long-term project,” the growing numbers and steady advancement of women in the academy became “[t]he most significant quantitative and qualitative changes in American higher education.”¹⁵⁹ Meanwhile, “minority rights on campus was a permanent revolution.”¹⁶⁰

Despite clear gains for previously underrepresented groups, it would be a mistake to describe the developments as an unalloyed march of progress.¹⁶¹ Along with massification came intensified stratification in colleges and universities. In the face of dramatic increases in enrollments after World War II, community colleges became “[t]he most important force in democratizing American higher education.”¹⁶² Yet, the growth in college enrollments triggered what David Labaree describes as the “elevator effect.”¹⁶³ This strategy is used to reconcile conflicting demands from competing constituencies, some seeking access and others seeking to preserve advantage. To accomplish that daunting feat, Labaree explains:

Schools allow both rising access and continuing advantage. They allow outsiders into the zone of educational advantage. And at the same time they allow insiders to barricade themselves in the upper tracks of this zone, while simultaneously allowing them to pour into the new zone of educational advantage at the next higher level of the system. Educational access steadily grows, average levels of schooling keep rising, and the relative advantage among social groups remains the same.¹⁶⁴

The elevator effect explains why increased access is accompanied by growing stratification. The point is to give newcomers “the possibility of getting ahead and, simultaneously, the probability of not getting ahead very far if at all.”¹⁶⁵

157. *Id.* at 219.

158. *See id.* at 222–24.

159. *Id.* at 228.

160. *Id.*

161. *See* DELBANCO, *supra* note 150, at 112.

162. *Id.* at 110.

163. LABAREE, *supra* note 11, at 97.

164. *Id.*

165. *Id.* at 176.

These dynamics are readily observable in the rise of affirmative action for underrepresented people of color and ongoing patterns of segregation in higher education. While debates over race-conscious admissions focus on how best to integrate highly selective colleges and universities, that discussion largely ignores the ways in which people of color remain clustered at less selective schools readily identifiable by race and ethnicity. The enrollment trajectory for Latinx undergraduates illustrates the phenomenon. For many years, there was a significant gap in college-going rates between Latinx and White students.¹⁶⁶ In recent years, that gap has narrowed as increasing numbers of Latinx high school graduates opt to attend college.¹⁶⁷ This growth in Latinx enrollments has been concentrated in community colleges.¹⁶⁸ In the fall of 2019, for instance, 53% of Latinx went to two-year institutions compared to only 41% of all undergraduates.¹⁶⁹ Latinx often find that this path does not lead to a bachelor's degree. Only 37.2% of Latinx students in two-year schools transferred to four-year institutions compared to nearly half of White and Asian-American students.¹⁷⁰

For those who enroll but do not obtain a bachelor's degree, the returns on going to college are modest. According to the Bureau of Labor Statistics, the median weekly wage for high-school graduates in 2017 was \$712 compared to \$774 for students who attended college but did not obtain a degree. Graduates who earned an associate's degree brought home a weekly median wage of \$836, but those with a bachelor's degree made \$1173.¹⁷¹ These data

166. See Maria Estela Zarate & Rebeca Burciaga, *Latinos and College Access: Trends and Future Directions*, 2010 J. COLL. ADMISSION 25, 25 (describing how increasing Latinx college enrollments did not narrow the gap with Whites).

167. See 66.2 Percent of 2019 High School Graduates Enrolled in College in October 2019, U.S. BUREAU OF LAB. STAT., TED: THE ECON. DAILY (May 22, 2020), <https://www.bls.gov/opub/ted/2020/66-point-2-percent-of-2019-high-school-graduates-enrolled-in-college-in-october-2019.htm> [<https://perma.cc/R5A2-QN8H>]. There have been concerns that the COVID-19 pandemic will disrupt the steady growth in Latinx enrollments, which substantially closed the gap with college-going rates among White high school graduates. Danielle Douglas-Gabriel et al., *A Steady Stream of Latino Students was Arriving on College Campuses. Then the Pandemic Hit.*, WASH. POST (Jan. 31, 2020), <https://www.washingtonpost.com/education/2021/01/31/latino-college-enrollment-pandemic/> [<https://perma.cc/W9F8-D3K4>].

168. SANTIAGO ET AL., *supra* note 37.

169. AM. ASS'N OF CMTY. COLLS., FAST FACTS 2021 (2021). Only Native Americans had higher community college enrollments at 56%, while 43% of Blacks and 38% of Asian Americans went to two-year schools. *Id.*

170. NAT'L STUDENT CLEARINGHOUSE RSCH. CTR., SIGNATURE REPORT 15: TRANSFER AND MOBILITY: A NATIONAL VIEW OF STUDENT MOVEMENT IN POSTSECONDARY INSTITUTIONS 16 fig.13 (2018). The rate of transfer for Black students was even lower at 28.4%. *Id.*

171. Elka Torpey, *Measuring the Value of Education*, U.S. BUREAU OF LAB. STAT.: CAREER OUTLOOK (Apr. 2018), https://www.bls.gov/careeroutlook/2018/data-on-display/education-pays.htm?view_full [<https://perma.cc/T3BQ-MA7Z>].

have led some to conclude that students who enroll but leave without a bachelor's degree more closely resemble high school than college graduates. According to these studies, growing access to higher education means that the credentialing race has escalated: employers now look for a bachelor's degree as a signal that a job applicant is qualified for a higher-paying position.¹⁷² For Latinx students, many of whom fail to finish college at a four-year institution, this kind of "degree inflation"¹⁷³ is part and parcel of the elevator effect that expands access while preserving advantage.

Further evidence of stratification and segregation comes from data on Hispanic-Serving Institutions. In 2017–18, HSIs accounted for 17% of all colleges and universities but enrolled two-thirds of Latinx undergraduates.¹⁷⁴ In fact, nearly 50% of the students at HSIs were Latinx, over twice the proportion in the general undergraduate population in the United States.¹⁷⁵ Almost half of HSIs were community colleges, and in 2018, only eleven were Research I universities, defined as those with very high research activity.¹⁷⁶ Unsurprisingly, given that Latinx regularly attend a college near home, HSIs are geographically concentrated in areas with substantial Latinx populations. In fact, nearly 70% are located in California, Texas, Puerto Rico, and New York.¹⁷⁷ As these statistics suggest, ongoing growth in Latinx college enrollments has been accomplished through attendance at colleges that are near home, less selective, and readily identifiable by ethnicity.

As the Latinx experience demonstrates, the effects of stratification in higher education are compounded by ongoing segregation by race, ethnicity, and income in colleges and universities. Community colleges disproportionately serve traditionally underrepresented students of color, low-income students, and first-generation students. For example, 53% of first-generation students enroll at a community college compared to 39% of students with parents who hold a college degree.¹⁷⁸ Meanwhile, highly

172. See Catherine Rampell, Opinion, *The College Degree Has Become the New High School Degree*, WASH. POST (Sept. 9, 2014), https://www.washingtonpost.com/opinions/catherine-rampell-the-college-degree-has-become-the-new-high-school-degree/2014/09/08/e935b68c-378a-11e4-8601-97ba88884ffd_story.html [https://perma.cc/46Q9-P4WG].

173. *Id.*

174. SANTIAGO ET AL., *supra* note 37.

175. See *id.*; THE POSTSECONDARY NAT'L POL'Y INST., FIRST-GENERATION STUDENTS IN HIGHER EDUCATION (2021), https://pnpi.org/wp-content/uploads/2021/11/FIRST-GENERATION-STUDENTS-IN-HIGHER-EDUCATION_.pdf [https://perma.cc/F7Y8-KAQJ].

176. SANTIAGO ET AL., *supra* note 37; MARTINEZ & GARCIA, *supra* note 38, at 7.

177. SANTIAGO ET AL., *supra* note 37.

178. THE POSTSECONDARY NAT'L POL'Y INST., *supra* note 175; see also Mitchell Wellman, *Report: The Race Gap in Higher Education Is Very Real*, USA TODAY (Mar. 7, 2017, 4:15 PM), <https://www.usatoday.com/story/college/2017/03/07/report-the-race-gap-in-higher-education-is-very-real/37428635/> [https://perma.cc/4LNJ-JTEQ]. Blacks and Latinx

selective institutions of higher education enroll substantial proportions of wealthy students, most of whom are White and Asian-American.¹⁷⁹ Although affirmative action has been described as a means to integrate higher education, it in no way addresses the racial and ethnic—much less the socioeconomic—disparities between the top and the bottom of the educational pyramid. As Professor Bell rightly noted, high-profile battles over access to elite institutions ignore the challenges of using community colleges as a foothold to gain entree to four-year institutions.¹⁸⁰

B. Privatization and Declining Upward Mobility

A critical factor in deciding whether to attend and complete college is affordability. As we have seen, the massification of higher education after World War II began with generous support for returning veterans to get a degree. At the same time, the federal government began to allocate substantial funding to support research that would preserve the United States' global dominance, for instance, in the space race with the Soviet Union.¹⁸¹ This post-war period is sometimes referred to as the golden age of American higher education, but it did not last.¹⁸² In the 1980s, the election of President Ronald Reagan was hailed as a new "Morning for America," one that included substantial changes for colleges and universities.¹⁸³ As historian Roger Geiger explains, "After three decades of public exertions by state and federal governments to erect the world's most comprehensive and competent system of higher education, the tide was turning toward privatization."¹⁸⁴ One distressed college president went so far as to liken the change to "a new dark age for higher education."¹⁸⁵

disproportionately enroll at community colleges and for-profit institutions. *Id.* Jon Marcus & Molly K. Hacker, *The Rich-Poor Divide on America's College Campuses Is Getting Wider, Fast*, HECHINGER REP. (Dec. 17, 2015), <https://hechingerreport.org/the-socioeconomic-divide-on-americas-college-campuses-is-getting-wider-fast/> [<https://perma.cc/PQY4-THQV>] (describing how low-income students disproportionately enroll at community colleges and for-profit institutions).

179. See Marcus & Hacker, *supra* note 178.

180. See Bell, *supra* note 1, at 1622, 1632.

181. See THELIN, *supra* note 152, at 271–74, 277–80; LABAREE, *supra* note 11, at 142–43, 144–50.

182. LABAREE, *supra* note 11, at 141; see CLARK KERR, *THE GREAT TRANSFORMATION IN HIGHER EDUCATION: 1960–1980*, at 263 (1991).

183. GEIGER, *supra* note 151, at 269; see METTLER, *supra* note 152, at 7–8.

184. GEIGER, *supra* note 151, at 269.

185. KERR, *supra* note 182, at 263.

One consequence of privatization was that students were expected to pick up a larger share of the cost of a college degree.¹⁸⁶ A first step in shifting the expense from federal and state taxpayers to the students themselves came with congressional passage of the Middle Income Student Assistance Act (MISAA) in 1978.¹⁸⁷ By lifting income restrictions on federally guaranteed student loans, MISAA allowed colleges and universities to begin drawing on students' future earnings as a source of revenue.¹⁸⁸ Previously, the federal government had focused on grants that would allow low-income students to pursue a degree.¹⁸⁹ At that time, "Federally guaranteed student loans were intended as a backstop for those with additional needs."¹⁹⁰ With the rise of privatization, however, borrowing became the dominant means of financing higher education. Students depended on loans to pay their tuition, and colleges and universities depended on tuition to stay afloat.¹⁹¹

Interestingly, MISAA responded to concerns about expanding access and diminishing advantage. When the federal government focused on helping low-income students to attend college, need-based aid reflected "the egalitarian spirit of that era," a vision for "promoting a more just and equal society."¹⁹² After World War II and throughout the 1960s, middle-class families enjoyed steady increases in income and growth in their children's college enrollments.¹⁹³ By the 1970s, however, both middle-class income and college attendance stagnated, jeopardizing educational and economic advantages.¹⁹⁴ This in turn prompted "a 'middle-class revolt,' that demanded federal financial-aid provisions be extended to families with larger incomes."¹⁹⁵ The Reagan administration resisted social spending, so it responded in a way that did not require any dramatic expansion of federal funding. Instead, officials cut back on grants for low-income students while expanding eligibility to cover some middle-class students. As a result, federal policy helped to preserve middle-class advantages in obtaining higher education but diminished prospects for low-income youth.¹⁹⁶

As student loans largely eclipsed federal grants to the needy, states were simultaneously disinvesting in the educational workhorses of higher

186. GEIGER, *supra* note 151, at 281; *see also* METTLER, *supra* note 152, at 114, 120–21 fig. 4.

187. GEIGER, *supra* note 151, at 269.

188. *Id.*

189. *See id.* at 281 (describing Pell Grants and State Student Incentive Grants); *see also* METTLER, *supra* note 152, at 51–53.

190. GEIGER, *supra* note 151, at 281.

191. *Id.* at 281–82; *See* METTLER, *supra* note 152, at 52.

192. GEIGER, *supra* note 151, at 282.

193. *Id.* at 283.

194. *Id.*

195. *Id.* at 282.

196. *Id.* at 283–84.

education. Beginning in the 1980s, state appropriations fell, and public colleges and universities began to raise tuition to make up the difference.¹⁹⁷ State legislatures emphasized the schools' ability to generate revenue through tuition hikes to justify further decreases in funding.¹⁹⁸ The upshot was that tuition began a steep climb, increasing at a rate that exceeded growth in family incomes.¹⁹⁹ Although the most selective flagship public universities were able to preserve their programs, community colleges and less selective four-year public schools suffered a deterioration in quality due to increased student-faculty ratios and erosion in curricular offerings, among other things.²⁰⁰

As a result of these changes, there often are few satisfactory options for low-income students to finance a college degree today. Some worry about taking on large amounts of debt but find that need-based financial aid is not always generous. Not only have federal grants stagnated, but some private universities direct their scholarship funds to merit aid to attract students with high grades and test scores.²⁰¹ Because these students predominantly come from affluent families, the awards divert funds from needy youth.²⁰² Schools often hope that merit aid will improve their selectivity, boost their *U.S. News & World Report* rankings, and eventually allow them to reduce their reliance on scholarships to recruit students.²⁰³ As a result, growing stratification coupled with privatization has led to an "arms race" for students with high grades and test scores.²⁰⁴

Normally, college is considered the great equalizer, the path to intergenerational mobility.²⁰⁵ That kind of role is especially significant today, given the widening income and wealth gap in the United States. In 1970, affluent households earned approximately six times the amount that working-class and needy households did, but by 2018, that figure had grown to about eight times as much.²⁰⁶ The expanding divide in wealth was even more pronounced. Upper-income families could draw on twenty-eight times the wealth that lower-income households had in 1983, but by 2018, that figure had increased to seventy-five times as much.²⁰⁷ As these gaps grew starker,

197. *Id.* at 293.

198. *Id.*

199. *Id.* at 294.

200. *Id.* at 298.

201. *Id.* at 287.

202. *See id.* at 288.

203. *See id.* at 288–89.

204. *Id.* at 290.

205. *See TOUGH, supra* note 108, at 11–13 (stating that mobility has always been "a defining feature of the United States" with access to college playing a vital role).

206. *See JULIANA MENASCE HOROWITZ ET AL., PEW RSCH. CTR., MOST AMERICANS SAY THERE IS TOO MUCH ECONOMIC INEQUALITY IN THE U.S., BUT FEWER THAN HALF CALL IT A TOP PRIORITY 15* (2020).

207. *See id.* at 19.

the middle class continued to shrink.²⁰⁸ Today, income inequality in the United States outstrips levels observed in peer countries like the United Kingdom, Italy, Japan, Canada, Germany, and France.²⁰⁹ Moreover, despite a rhetoric of personal responsibility, it is not easy to pull oneself up by one's bootstraps in this nation as compared to other parts of the world. According to research reports published in 2012 and 2016, intergenerational mobility rates are lower for Americans than for Scandinavians, Germans, French, Spanish, Japanese, Canadians, and Australians, among others.²¹⁰

So far, higher education has not tempered the disparities. As Professor Bell noted, academic indicators correlate with wealth.²¹¹ Consequently, highly selective institutions with the most resources are overwhelmingly educating the most privileged students.²¹² At prestigious schools, over half of the student body comes from families in the top 6% of the earnings distribution.²¹³ In a study by economist Raj Chetty and his colleagues, Princeton had the most concentrated wealth on its campus: 72% of the students grew up in families in the top quintile of the income distribution and just 2.2% in families in the bottom quintile.²¹⁴ Far from being a great equalizer, higher education has become “a powerful inequality machine.”²¹⁵ Once again illustrating the elevator effect, the system is now “a mobility engine that functions incredibly well for a small number of people and quite poorly for many others.”²¹⁶ Those who benefit are “wealthy and talented and well-connected,” while those who struggle are “from families that are deprived or isolated or fractured or all three.”²¹⁷

Declining state support for public colleges and universities coupled with shrinking financial aid for the needy means that affordability looms large for those striving to move up the socioeconomic ladder. In the United States, the gap in college-going rates is wide. In 1980 and again in 2000, there was a 40% difference in rates of post-secondary education for students in the bottom and top quintiles of the income distribution.²¹⁸ As a result, America's overall rates

208. *Id.* at 15.

209. *See id.* at 21.

210. *See* MILES CORAK, STANFORD CTR. ON POVERTY & INEQ., ECONOMIC MOBILITY 51–52 fig.1 (2016), <https://inequality.stanford.edu/sites/default/files/Pathways-SOTU-2016-Economic-Mobility-3.pdf> [<https://perma.cc/8Y2Y-YBMK>]; Elise Gould, *U.S. Lags Behind Peer Countries in Mobility*, ECON. POL'Y INST. (Oct. 10, 2012), <https://www.epi.org/publication/usa-lags-peer-countries-mobility/> [<https://perma.cc/S2AA-J522>].

211. Bell, *supra* note 1, at 1630–31.

212. GEIGER, *supra* note 151, at 290.

213. *Id.* at 291.

214. TOUGH, *supra* note 108, at 19.

215. *Id.* at x.

216. *Id.* at 328.

217. *Id.*

218. GEIGER, *supra* note 151, at 284.

of college completion lag behind those of nations like Canada, Lithuania, and Russia.²¹⁹

So far, there appears to be little political appetite for making college access more equitable. In 2009, President Barack Obama announced an American Graduation Initiative that would restore the United States to first in college graduation rates worldwide, rather than twelfth.²²⁰ With a price tag of \$12 billion, the bill was supposed to target the most neglected segment of higher education—community colleges—to increase degree completion.²²¹ However, the initiative ultimately collapsed, even though Obama's own party had control of Congress.²²² In 2018, the United States remained twelfth in college completion rates,²²³ and in 2021, President Joe Biden proposed free community college for students from families with modest incomes as part of a multi-trillion dollar social spending package.²²⁴ In an admittedly contentious process, one of the first items to be cut was the proposal for free tuition.²²⁵

According to Paul Tough, these failures of policy reflect an entrenched shift in the public's view of higher education. As he explains,

Over the last few decades, we have come to think of higher education principally as a competitive marketplace, one where our natural goal is to get the best that we can for ourselves or our children or our institution, even at the expense of others. When college educations are redefined as private goods, rather than public ones, the fact that they are so unequally distributed seems less jarring. Not everyone gets a big house or a sports car; not everyone gets a high-quality college education.²²⁶

In short, privatization has normalized stratification, just as new generations of college students grow more diverse.

The shift to privatization in higher education has occurred just as Latinx students are entering college in substantial numbers. Today, 19.5% of the

219. Alex Baumhardt & Chris Julin, *U.S. Continues to Slip Behind Other Countries in Percentage of Population with Degrees*, APM REPS. (Jan. 28, 2019), <https://www.apmreports.org/episode/2019/01/28/american-graduation-initiative-population-with-degrees> [<https://perma.cc/K39C-GBPK>].

220. See TOUGH, *supra* note 108, at 320–23.

221. *Id.* at 323.

222. *Id.*

223. *Id.* at 322.

224. Scott MacDonald, *Build Back Better No Longer Addresses College Affordability—But \$10,000 Pell Grants Would*, FORTUNE (Nov. 11, 2021, 11:16 AM), <https://fortune.com/2021/11/11/affordable-college-build-back-better-pell-grants/> [<https://perma.cc/ZZE8-7MZN>].

225. *Id.*

226. TOUGH, *supra* note 108, at 328.

college population is Latinx, which represents “a 441.7% increase since 1976.”²²⁷ Latinx youth are disproportionately from low-income backgrounds. According to a Postsecondary National Institute fact sheet, 34% of independent Latinx college students made less than \$30,000 a year, and 50% of dependent Latinx students earned less than \$40,000 a year.²²⁸ Moreover, nearly half of Latinx students, 44%, were the first in the family to attend college compared to just 22% of White students, 29% of Asian-American students, and 34% of Black students.²²⁹ In some cases, Latinx students were also the first to finish high school. Twenty-three percent of Latinx children under age eighteen grew up in households in which neither parent finished secondary school, which was a higher rate than for other racial and ethnic groups.²³⁰

Like earlier generations of newcomers to higher education, Latinx have relied heavily on community colleges. Of those who were enrolled in public post-secondary schools in 2014, 56% attended a community college or technical school compared to 41% of Whites, 37% of Asian Americans, and 51% of Blacks.²³¹ In addition, Latinx students have been concentrated at HSIs, with two-thirds enrolled at schools that comprise less than one-fifth of all colleges and universities.²³² HSIs, like community colleges, generally charge lower tuition and so appear to be a more affordable option for Latinx.²³³ However, these schools also have fewer resources per capita to spend on

227. Melanie Hanson, *College Enrollment & Student Demographic Statistics*, EDUC. DATA INITIATIVE (Jan. 22, 2021), <https://educationdata.org/college-enrollment-statistics> [https://perma.cc/KHY8-EFHR].

228. THE POSTSECONDARY NAT'L POL'Y INST., *LATINO STUDENTS IN HIGHER EDUCATION* (2021), https://pnpi.org/wp-content/uploads/2021/08/PNPI_LatinoStudentsFactSheet_July2021.pdf [https://perma.cc/JE6L-6DH3].

229. *Id.*

230. *Id.*

231. Elizabeth Baylor, *Closed Doors: Black and Latino Students Are Excluded from Top Public Universities*, CTR. FOR AM. PROGRESS (Oct. 13, 2016), <https://www.americanprogress.org/article/closed-doors-black-and-latino-students-are-excluded-from-top-public-universities/> [https://perma.cc/4C88-MZAD].

232. SANTIAGO ET AL., *supra* note 37.

233. Elizabeth Redden, *Where the Hispanic Students Are (And Aren't)*, INSIDE HIGHER ED (Aug. 17, 2007), <https://www.insidehighered.com/news/2007/08/17/where-hispanic-students-are-and-arent> [https://perma.cc/X7RW-6RQA]; but see Lee Waller et al., *Disparities in Tuition: A Study of Tuitions Assessed by Hispanic Serving Community Colleges Versus Non-Hispanic Serving Community Colleges in Texas*, 7 ACAD. LEADERSHIP ONLINE J. (2009) (finding a significant difference between tuition costs between community colleges servicing Hispanics in Texas versus non-HSI community colleges, with HSI colleges at a “distinct disadvantage” and the disparity has grown substantially from 1996-97 to 2006-07).

students, and awards of financial aid are lower than at more selective, better funded institutions.²³⁴

Perhaps for that reason, despite their socioeconomic disadvantage, Latinx receive the lowest average financial award of all racial and ethnic groups.²³⁵ According to a 2019 *Excelencia* in Education report, the average per-capita aid provided to Latinx students was just \$10,256 compared to \$12,520 for Blacks, \$12,852 for Whites, and \$13,016 for Asian Americans.²³⁶ Moreover, Latinx students mainly relied on federal aid rather than awards from their schools or states.²³⁷ Latinx received a slightly larger Pell grant than members of other racial groups with the exception of Asian Americans: A Latinx student's average award was \$3,855 compared to \$3,736 for Blacks, \$3,593 for Whites, and \$4,171 for Asian Americans.²³⁸ However, this slight advantage in the size of Pell grants could not offset limited institutional and state support, especially since federal awards have failed to keep pace with the cost of attendance.²³⁹

Despite low amounts of aid, many Latinx did not borrow to fund their education. Just under 30% of Latinx students took out a loan compared to 49% of African Americans and 38% of Whites.²⁴⁰ Only Asian Americans had a lower rate of borrowing at 21%.²⁴¹ Moreover, Latinx took out smaller loans than did other racial and ethnic groups. The average amount borrowed by a Latinx student was \$6,570 compared to \$6,955 for African Americans, \$6,670

234. See CHRISTOPHER J. NELLUM & KATHERINE VALLE, AM. COUNCIL ON EDUC., GOVERNMENT INVESTMENT IN PUBLIC HISPANIC-SERVING INSTITUTIONS 2 (2015), <https://www.acenet.edu/Documents/Government-Investment-in-Public-Hispanic-Serving-Institutions.pdf> [<https://perma.cc/S83X-LALZ>] (describing inequitable federal funding and inadequate state funding for HSIs when compared to non-HSIs); Bohanon, *supra* note 35 (reporting that HSIs receive 68 cents on the dollar of federal funding compared to non-HSIs); Sylvia Y. Acosta, *Corazón a Corazón: Examining the Philanthropic Motivations, Priorities, and Relational Connectedness of Mexican American, Spanish American, and Other Latino/Hispanic University Alumni/Alumnae to a Hispanic Serving Institution* 8–19 (Aug. 2010) (Ph.D. dissertation, New Mexico State University) (ProQuest) (describing the Latinx cultural perspective on philanthropic activity and its impact on the future of HSI's resources).

235. SANTIAGO ET AL., *supra* note 37.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* Moreover, 56% of Latinx students received federal aid, but only 29% received state aid and just 19% received institutional aid. *Id.* Jason D. Delisle, *What Better Data Reveal about Pell Grants and College Prices*, URB. INST.: URB. WIRE (Aug. 18, 2021), <https://www.urban.org/urban-wire/what-better-data-reveal-about-pell-grants-and-college-prices> [<https://perma.cc/ZEW8-AF6E>] (explaining that Pell grants have not kept up with the cost of tuition, that students depend on state and institutional grants to make up the difference, and, even then, there is a growing gap in the resources needed to cover the full cost of attendance due to rapid increases in the cost of food and housing).

240. SANTIAGO ET AL., *supra* note 37.

241. *Id.*

for Whites, and \$6,600 for Asian Americans.²⁴² Perhaps the comparatively low level of grants and loans explains why most Latinx students held jobs to pay for college. About 75% were working their way through school, a figure comparable to that of Whites and Asian Americans and higher than for Blacks.²⁴³ Of Latinx students who were employed, nearly one-third worked 40 hours or more per week, nearly one-fifth worked 30 to 39 hours, over one-fourth worked 20 to 29 hours, and just under one-fourth worked one to 19 hours.²⁴⁴ Long hours of working through school correlate with lower college graduation rates, which in turn contribute to ongoing gaps in completion for Latinx as compared to students from other racial and ethnic groups.²⁴⁵

Privatization also can create dangers of exploitation by predatory for-profit colleges and universities. Without parents who have gone to college, Latinx (like Black students) can be vulnerable to marketing by these schools. In fact, Latinx and Black students are disproportionately likely to enroll in for-profit institutions, and once there, Latinx take out student loans at higher levels than their counterparts at public schools.²⁴⁶ As a result, both Latinx and Black students at for-profit institutions can incur larger debt loads to obtain degrees with smaller market values.²⁴⁷ Moreover, most Latinx who attend for-profit colleges and universities default on their loans, while less than 25% of Latinx who go to public schools do.²⁴⁸ As is true for Whites, default rates for Latinx who do not complete a degree are notably higher than for those who finish. Forty percent of Latinx who leave college without a degree default compared to just 12% who obtain a bachelor's degree.²⁴⁹

For Latinx, privatization has created financial barriers to obtaining a bachelor's degree and achieving upward mobility. Despite coming from homes with low levels of income and education, Latinx college students have the lowest level of grants and scholarships of all racial and ethnic groups. To

242. *Id.*

243. *Id.*

244. *Id.*

245. See Amy Leisenring, *Higher Tuition, More Work, and Academic Harm: An Examination of the Impact of Tuition Hikes on the Employment Experiences of Under-represented Minority Students at one CSU Campus*, in CIVIL RIGHTS PROJECT, FINANCING COLLEGE IN HARD TIMES: WORK AND STUDENT AID 2, 12–13 (2011), <https://civilrightsproject.ucla.edu/research/college-access/financing/financing-college-in-hard-times-work-and-student-aid/Financing-College-in-Hard-Times.pdf> [<https://perma.cc/ZQ33-7HZ9>] (describing impact of tuition increases and heavy workloads on the academic success of Black and Latinx students at a California public university).

246. SANTIAGO ET AL., *supra* note 37.

247. See THE LEADERSHIP CONF. EDUC. FUND, GAINFUL EMPLOYMENT: A CIVIL RIGHTS PERSPECTIVE 4–5 (2019), <http://civilrightsdocs.info/pdf/education/Gainful-Employment-Brief-Final.pdf> [<https://perma.cc/D9KQ-EAH4>].

248. SANTIAGO ET AL., *supra* note 37.

249. *Id.* The comparable default rates for Whites are 33% for those who do not complete college and 6% for those with a bachelor's degree. *Id.*

fund their degrees, they work long hours while attending school. These job commitments reduce the odds of graduating, which in turn means that many Latinx will not enjoy the increased earning power that comes with getting a bachelor's degree. For those who take out student loans and do not finish, there will be obligations to pay that are not covered by enhanced future income. Almost half of these students will discover not upward mobility but intractable debt that cannot be discharged in bankruptcy without proof of undue hardship.²⁵⁰ Like stratification, privatization contributes to the elevator effect for Latinx students. They can close the gap on enrollment rates, even as disparities in completion rates persist. These youth get farther than their parents, but not too far. For some, saddled with debt and no degree, they may not move forward at all.

C. Affirmative Action, Colorblindness, and the Destabilization of the Identity of Hispanic-Serving Institutions

Affirmative action jurisprudence focuses on highly selective institutions, which serve a relatively small fraction of the student population, including students of color. Programs to ensure access to these schools are often portrayed as part of an effort to integrate higher education. It is certainly true that students of color continue to be underrepresented at elite schools, but as we have seen, affirmative action decisions are largely indifferent to wider patterns of stratification and segregation. Colleges and universities remain racially and ethnically identifiable with students of color, including Latinx, concentrated in less prestigious institutions. Many of these schools are MSIs, which have no difficulty in admitting and enrolling students of color. Yet, the Court's decisions on affirmative action have consequences for these colleges and universities. In particular, the Justices' embrace of colorblindness has cast doubt on MSIs' mission and identity. MSIs, like race-conscious admissions, can be seen as temporary concessions to inequities in access to higher education. In fact, though, these schools often define themselves in terms of their service to underrepresented students, reflecting a sustained and significant commitment to color-consciousness.

Not all MSIs are the same, however. HBCUs were created during an era of Jim Crow segregation as a way to provide "separate but equal" education to African-American students.²⁵¹ The schools are funded through tuition,

250. 11 U.S.C. § 523(a)(8)(B). There are currently efforts to amend the Bankruptcy Act to permit student loans to be dischargeable. See Fresh Start Through Bankruptcy Act, S. 2598, 117th Cong. § 2 (2021).

251. HARRIS, *supra* note 48, at 68–70; see also DENISE A. SMITH, ACHIEVING FINANCIAL EQUITY AND JUSTICE FOR HBCUS 3–4 (2021), https://production-tcf.imgix.net/app/uploads/2021/09/13101131/HBCU_Smith_Final_21.pdf [<https://perma.cc/PS49-99BC>].

private gifts, and federal and state funds, but from the outset, per-pupil resources have regularly fallen short of what predominantly White institutions have at their disposal.²⁵² Nor can HBCUs draw on generous endowments to augment their resources. According to a 2021 Century Foundation report, the average size of a public HBCU's endowment is only 28% of a public non-HBCU's, while a private HBCU's endowment is just 13% of a private non-HBCU's.²⁵³ When the Court declared "separate but equal" public schooling unconstitutional in 1954 in *Brown v. Board of Education*,²⁵⁴ the decision destabilized the role of HBCUs because they were founded under the now discredited regime of state-mandated segregation. Even so, many educators remain convinced that HBCUs continue to play an important part in educating Black youth. As a 2007 article observes, "While many believed the *Brown* decision and increased access to White colleges would make HBCUs unnecessary, these institutions remain critical, providing a consistent, important educational pathway for Black students and a touchstone for the Black community."²⁵⁵

Even though many African Americans now enroll in predominantly White institutions, HBCUs still serve a disproportionate number of Black college students, particularly those from less privileged backgrounds.²⁵⁶ That said, enrollment declines among Black students have posed serious financial challenges for HBCUs.²⁵⁷ Those drops have compounded the effects of years

252. HARRIS, *supra* note 48, at 68–69, 179, 204–05; *see also* SMITH, *supra* note 251, at 4–6 (explaining that while HBCUs have relied on a combination of state support, support from the United Negro College Fund (UNCF), The Higher Education Act of 1965 (HEA), and HEA Title III Part B, public and private HBCUs have experienced declines in federal funding per full-time equivalent student between 2003 and 2015); KRYSTAL L. WILLIAMS & BREANNA L. DAVIS, AM. COUNCIL ON EDUC., PUBLIC AND PRIVATE INVESTMENTS AND DIVESTMENTS IN HISTORICALLY BLACK COLLEGES AND UNIVERSITIES 3–7 (2019), <https://www.acenet.edu/Documents/Public-and-Private-Investments-and-Divestments-in-HBCUs.pdf> [<https://perma.cc/CJ3X-BMF9>] (explaining that HBCUs' endowments are smaller than those of non-HBCUs).

253. *See* SMITH, *supra* note 251, at 7 tbl.2.

254. 347 U.S. 483, 495 (1954).

255. Walter R. Allen et al., *Historically Black Colleges and Universities: Honoring the Past, Engaging the Present, Touching the Future*, 76 J. NEGRO EDUC. 263, 264 (2007).

256. *Id.*; Nick Chiles, *HBCUs Graduate More Poor Black Students Than White Colleges*, NPR (Mar. 1, 2017, 5:01 AM), <https://www.npr.org/sections/codeswitch/2017/03/01/517770255/hbcus-graduate-more-poor-black-students-than-white-colleges> [<https://perma.cc/56G2-H86J>].

257. *See Fast Facts: Historically Black Colleges and Universities*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=667> [<https://perma.cc/7M3K-RC32>] (describing an 11% drop in enrollments for HBCUs between 2010 and 2018 as other schools experienced a 7% decline; the percentage of Black students enrolled at HBCUs dropped from 18% to 9% between 1976 and 2010 and then stayed flat); Maria Amante, *Lower Enrollment Hits Higher Ed Hard, HBCUs Among the Hardest*, FORBES (Feb. 8, 2019, 9:58 AM),

of parsimonious public funding, prompting some public HBCUs to sue for a fair allocation of state higher education resources.²⁵⁸ Yet, these lawsuits sometimes have highlighted the identity crisis that colorblindness poses for HBCUs. In a high-profile decision in *United States v. Fordice*, public HBCUs challenged Mississippi's policies for perpetuating past discrimination in the state college and university system.²⁵⁹ The Supreme Court mainly concerned itself with ways in which officials made decisions that preserved racially identifiable institutions of higher education.²⁶⁰ The Court made clear that the suit could not be a vehicle for preserving HBCUs with predominantly Black enrollments: "If we understand private petitioners to press us to order the upgrading of Jackson State, Alcorn State, and Mississippi Valley State *solely* so that they may be publicly financed, exclusively black enclaves by private choice, we reject that request."²⁶¹ Instead, reflecting a commitment to desegregation and colorblindness, the Court held that all campuses must be open to every citizen of the state.²⁶² Even as the Court expressly called into question any ongoing commitment to color-consciousness, *Fordice* and similar lawsuits in other states did not overcome the impact of years of neglect. Nor did the litigation reach private HBCUs, which have struggled with comparable challenges.²⁶³ In fact, the battle for the future of these schools

<https://www.forbes.com/sites/debtwire/2019/02/08/lower-enrollment-hits-higher-ed-hard-hbcus-the-hardest/?sh=5e87947e1ff8> [<https://perma.cc/X7ED-ETZX>] (explaining that due to declining enrollments, several HBCUs are experiencing financial troubles and are at-risk of closing and losing their accreditation); *see also* Curtis Bunn, *Enrollment Declines Threaten Future of HBCUs, Disheartening Alumni*, NBC NEWS (Mar. 23, 2020, 8:02 PM), <https://www.nbcnews.com/news/nbcblk/enrollment-declines-threaten-future-hbcus-disheartening-alumni-n1158191> [<https://perma.cc/F2N9-WY2D>] (explaining that due to declining enrollments, several HBCUs are experiencing financial troubles and are at-risk of closing and losing their accreditation).

258. *See* Danielle Douglas-Gabriel & Ovetta Wiggins, *Hogan Signs Off on \$577 Million for Maryland's Historically Black Colleges and Universities*, WASH. POST (Mar. 24, 2021, 5:32 PM), <https://www.washingtonpost.com/education/2021/03/24/maryland-hbcus-lawsuit-settlement/> [<https://perma.cc/K63R-6FUQ>] (describing litigation and settlements in Alabama, Maryland, and Mississippi and how the president of one HBCU in Maryland described the litigation as "a desperate act of last resort").

259. 505 U.S. 717, 723 (1992).

260. *See id.* at 733–42 (questioning different admissions standards, duplicative programs, and the failure to consolidate campuses).

261. *Id.* at 743.

262. *See id.* ("That an institution is predominantly white or black does not in itself make out a constitutional violation. But surely the State may not leave in place policies rooted in its prior officially segregated system that serve to maintain the racial identifiability of its universities if those policies can practicably be eliminated without eroding sound educational policies.").

263. *See generally id.*; *The Challenges Facing HBCU Campuses*, NPR: WEEKEND EDITION SATURDAY (May 25, 2019), <https://www.npr.org/2019/05/25/726941875/the-challenges-facing-hbcu-campuses> [<https://perma.cc/X5EM-DYLN>].

continues to this day with HBCU presidents demanding enhanced federal support and students protesting substandard conditions on campus.²⁶⁴

While HBCUs were well-established when the Court decided *Brown* in 1954, other communities of color had no similar network of institutions of higher education focused on their academic advancement. For instance, only a handful of colleges have expressly dedicated themselves to serving Latinx students, and these schools were mainly established during the civil rights era of the 1960s and 1970s.²⁶⁵ Without any infrastructure dedicated to serving Latinx students, advocates had to find other strategies to enhance access. One high-profile lawsuit challenged the dearth of public colleges and universities available to meet this growing population's post-secondary needs. In 1987, the Mexican American Legal Defense and Educational Fund (MALDEF) sued the state of Texas for failing to invest in institutions of higher education in south Texas, a region that was overwhelmingly Latinx.²⁶⁶ After years of legal wrangling, the lawsuit failed because the court concluded that the lack of college and university offerings was not a product of intentional racial discrimination.²⁶⁷ Even so, the high-profile dispute contributed to legislative approval of the South Texas Border Initiative, which allocated unprecedented support to strengthen the system of higher education in the area.²⁶⁸ The improvements that resulted were not denominated as Latinx-centric, but

264. See, e.g., Gloria Oladipo, *Rats, Mold, Roaches: Howard Students Stage Sit-In Over Housing Conditions*, GUARDIAN (Oct. 25, 2021, 6:30 AM), <https://www.theguardian.com/us-news/2021/oct/25/howard-university-students-protest-housing-conditions> [https://perma.cc/L4UK-CP7C] (describing substandard housing conditions at a leading HBCU due to lack of maintenance); see also Gerren Keith Gaynor, *HBCU Presidents Demand Seat at the Table as They Push Congress for Billions in BBB Funding*, THE GRIO (Dec. 2, 2021), <https://thegrio.com/2021/12/02/hbcu-presidents-build-back-better-funding/> [https://perma.cc/3LSF-XXH4] (describing a letter sent by “[m]ore than 60 HBCU presidents” to Senators Chuck Schumer and Mitch McConnell, urging the Senate to pass the Build Back Better Act, which would provide increased federal funding to HBCUs); WILLIAMS & DAVIS, *supra* note 252, at 5–6 (explaining that private HBCUs have experienced a decline in federal funding over the years and receive little state funding).

265. See Anne-Marie Núñez et al., *Why Study Hispanic-Serving Institutions?*, in *HISPANIC-SERVING INSTITUTIONS: ADVANCING RESEARCH AND TRANSFORMATIVE PRACTICE* 1, 2 (Anne-Marie Núñez et al. eds., 2015) (describing the development of Colegio Cesar Chavez, Hostos Community College, and Boricua College by 1982); Imaculada Lara-Bonilla, *Crafting a Latina/o Higher Education Discourse in New York: The Founding and “Saving” of Eugenio María de Hostos Community College*, 97 N.Y. HIST. 187, 187 (2016).

266. *Richards v. League of United Latin Am. Citizens*, 868 S.W.2d 306, 306–08 (Tex. 1993).

267. *Id.* at 314. The court continued: “Even if intent is not required under the Texas equal rights clause, the evidence of impact in this case simply does not rise to an adequate level to show discrimination.” *Id.*

268. TERI FLACK, TEX. HIGHER EDUC. COORDINATING BD., *PRESENTATION ON SOUTH TEXAS BORDER INITIATIVES* 1 (2003), <http://www.thecb.state.tx.us/DocID/pdf/0592.pdf> [https://perma.cc/PN6R-A8P4]

instead as a regional expansion of the state's public colleges and universities.²⁶⁹ However the initiative was framed, the new schools and programs in south Texas clearly enrolled large proportions of Latinx students.²⁷⁰

In addition to state reforms, Latinx advocates pursued federal recognition and support. When *Brown* was decided in 1954, the Latinx population was so small that the U.S. Census Bureau did not even collect systematic data on it.²⁷¹ The Hispanic population successfully pushed for inclusion on the Census, first on the long form for select households in 1970 and then on the short form for all households in 1980.²⁷² Encouraged by this official acknowledgement, advocacy organizations mobilized to form the Hispanic Higher Education Coalition (HHEC) in 1978.²⁷³ The HHEC's primary concern was the systematic underfunding of colleges and universities that served Latinx students.²⁷⁴ To address this issue, HHEC prepared testimony for federal hearings that highlighted the inconsistent allocation of resources under Title III of the Higher Education Act, which focused on "Strengthening Developing Institutions."²⁷⁵ In 1979, HHEC representatives made the case for enhanced funding by relying on evidence of growth in the Latinx population, low levels of Latinx educational attainment, and resulting implications for the labor market.²⁷⁶

When HHEC began participating in the legislative process in the late 1970s, the Court already had begun to consolidate its commitment to

269. *Id.* at 1, 5 (acknowledging that the *LULAC v. Richards* lawsuit was "a catalyst for this initiative" but characterizing the effort as a regional expansion plan that also would help close college participation gaps between Black and Latinx students on the one hand and White students on the other).

270. See DEBORAH A. SANTIAGO, *EXCELENCIA IN EDUCATION, ACCELERATING LATINO STUDENT SUCCESS AT TEXAS BORDER INSTITUTIONS: POSSIBILITIES AND CHALLENGES* 5 (2008), <https://files.eric.ed.gov/fulltext/ED506007.pdf> [<https://perma.cc/H2MK-Y7ND>] ("The institutions on the U.S./Mexico border in Texas rank among the top institutions in Texas and the nation enrolling and graduating Hispanics in higher education.").

271. See Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States* tbl.1 (U.S. Census Bureau, Working Paper No. 56, 2002), <https://www.census.gov/content/dam/Census/library/working-papers/2002/demo/POP-twps0056.pdf> [<https://perma.cc/GRA2-Y978>].

272. See G. CRISTINA MORA, *MAKING HISPANICS: HOW ACTIVISTS, BUREAUCRATS, AND MEDIA CONSTRUCTED A NEW AMERICAN* 87–88, 114 (2014).

273. See Patrick L. Valdez, *An Overview of Hispanic-Serving Institutions' Legislation: Legislation Policy Formation Between 1979 and 1992*, in *HISPANIC-SERVING INSTITUTIONS IN AMERICAN HIGHER EDUCATION* 5, 7 (Jesse Perez Mendez et al. eds., 2015). HHEC was formed to "increase funding to under-resourced institutions that were educating large numbers of Hispanic students." *Id.*

274. *Id.*

275. *Id.* at 7–8.

276. *Id.* at 8.

colorblindness. Perhaps for that reason, HHEC often avoided color-conscious policy strategies. Initially, HHEC asked that more resources be provided to community colleges. At the time, over 50% of Latinx college students attended these two-year institutions, so this was a race-neutral proxy for advancing their interests.²⁷⁷ Later, HHEC tried another colorblind tactic, this time demonstrating that a lack of support for Latinx in higher education disproportionately hurt the flow of funding to states in the West.²⁷⁸ In 1979, this regional approach allowed HHEC to mobilize a bipartisan group of senators in support of demands for greater attention to Latinx students' needs.²⁷⁹ HHEC members continued to testify at hearings on the Higher Education Act, appearing not only in 1979 but also in 1981, 1984, and 1985.²⁸⁰ That sustained presence allowed advocates to raise their profile and refine their legislative agenda.²⁸¹

In 1982, Representative Paul Simon, a Democrat from Illinois, became a champion of the importance of addressing the needs of Latinx in higher education.²⁸² With this high-profile support, HHEC was emboldened to make a color-conscious argument, criticizing the lack of Latinx representation in the federal office that awarded Title III grants. As Representative Robert Garcia, a Democrat from New York, testified that year:

Several legislative programs designed to serve economically disadvantaged students have failed to reach Hispanic students because program administrators at Federal, State, and institutional levels are unfamiliar with Hispanic demographics and because too few Hispanic professionals are employed in positions of influence and policymaking, such as Title III funding and developing institutions.²⁸³

By openly acknowledging the need to include Latinx in the decision-making process, HHEC laid the foundation for a new politics of color-conscious recognition that would culminate in the demand for funding for HSIs.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 11–12.

²⁷⁹ *Id.* at 11.

²⁸⁰ *Id.* at 19, 21 & 23.

²⁸¹ *Id.* at 10.

²⁸² *See id.* at 12–13 (describing how Representative Simon sponsored the Hispanic Access to Higher Education congressional hearing and opened the hearing with a statement acknowledging that the needs of Hispanic students in higher education had been ignored and which “elevated the concern over Hispanic higher education and provided a platform for Hispanic congressional members to lend support”).

²⁸³ *Id.* at 13.

By 1984 and 1985, HHEC had repeatedly demanded that Congress establish and support HSIs.²⁸⁴ In 1986, the Hispanic Association of Colleges and Universities (HACU) was created to keep waging this fight.²⁸⁵ Initially, the proposed definition of an HSI looked at a range of factors: whether a college or university was located in a region with a substantial number of Latinx residents; whether it had cooperative agreements with local educational agencies that served schools with significant Latinx enrollments; whether it provided outreach and service programs that included 50% or more Latinx students; whether it employed substantial numbers of Latinx faculty and staff; and whether it had a demonstrated commitment to Latinx learners and the Latinx community.²⁸⁶ Eventually, this multi-factor approach was whittled down to just an enrollment figure. The main bone of contention was whether the threshold should be 40% Latinx, which would mainly include schools in Puerto Rico, or whether it should be a lower figure that would reach colleges and universities on the mainland.²⁸⁷ After nearly a decade, Congress finally recognized HSIs as one type of MSI, setting an enrollment threshold of 25%.²⁸⁸ Notably, institutions of higher education did not have to take deliberate steps to enroll a Latinx student body; in fact, many historically White colleges and universities became HSIs due to demographic change in their region.²⁸⁹ In reality, rapid growth in the youthful Latinx population drove the remarkable increase in HSIs.²⁹⁰

The reasons for the pared-down definition of HSIs are complex, but at least one factor related to concerns about impermissible color consciousness. Although Congress eventually became receptive to providing resources to schools that served Latinx students, it did not want to run afoul of the Supreme Court's jurisprudence on race, particularly the restrictions on set-asides.²⁹¹

284. *See id.* at 15, 18–19.

285. *Id.* at 19–20.

286. *Id.* at 15–16.

287. *Id.* at 15.

288. *Id.* at 23 tbl.1.3.

289. Lilah Burke, *HSIs on the Rise*, INSIDE HIGHER ED (Apr. 7, 2021), <https://www.insidehighered.com/news/2021/04/07/hispanic-serving-institutions-growing-number> [<https://perma.cc/3YYF-JFZR>] (reporting that the growth in HSIs is primarily driven by an increasing number of college-age Latinx youth, many of whom attend schools close to home, though some institutions have engaged in intentional recruitment).

290. *Id.*

291. Patrick Lee Valdez, *Hispanic-Serving Institution Legislation: An Analysis of Policy Formation Between 1979 and 1992*, at 142 (May 2013) (Ph.D. dissertation, The University of Texas at Austin), <https://repositories.lib.utexas.edu/bitstream/handle/2152/21872/VALDEZ-DISSERTATION-2013.pdf?sequence=1> [<https://perma.cc/6UJZ-BWNY>] (“When we responded to the invitation from this subcommittee to present our legislative recommendations, it was made clear that the set-aside option probably would be foreclosed.” (quoting *Reauthorization of the Higher Education Act: Hearing Before the Subcomm. on*

Concerns about quota-like reforms first emerged in 1979 when HHEC challenged funding patterns under Title III. The lion's share of grants went to traditionally Black colleges, but there were concerns about earmarking dollars for them, given restrictions on race-conscious government action. As a result, Secretary of Health Education and Welfare Joseph Califano asserted that money did not flow to Black colleges "because they are Black" but "because they meet the statutory requirements for being a 'developing institution' and the eligibility criteria which measure the degree to which they serve disadvantaged students and their financial need."²⁹² Meanwhile, at the same hearing, an auditor for the General Accounting Office asserted that 49% of the funds under the program in fact were set aside for traditionally Black institutions of higher education.²⁹³ The Deputy Commissioner of the Office of Education then disputed this characterization,²⁹⁴ as Representative William Ford, a Democrat from Illinois who presided over the hearings, worried that "the set-aside game gets to be a little like a quota game."²⁹⁵

The concerns about quotas and the race-neutral language in Title III put Black higher education advocates in an awkward position. The United Negro College Fund (UNCF) took the position that Title III had in fact been designed to support traditionally Black colleges based on its legislative history.²⁹⁶ At the same time, the leader of the National Association for Equal Opportunity in Higher Education opposed any form of set-aside, believing that race-neutral criteria could produce large appropriations for traditionally Black colleges.²⁹⁷ In the ensuing years, as the norm of colorblindness grew more entrenched, opposition to set-asides grew.²⁹⁸ During this time, HHEC relied on colorblind strategies to improve funding for colleges and universities serving Latinx students, but by 1984, it turned to a strategy of explicit recognition of Hispanic-Serving Institutions. This proposal met with resistance from African American leaders, who feared a dilution of support for traditionally Black colleges.²⁹⁹ Some even accused Latinx advocates of pursuing impermissible set-asides.³⁰⁰ By 1992, after decades of struggle, Congress was comfortable

Postsecondary Educ. of the H. Comm. On Educ. and Lab., 99th Cong. 237 (1985) (statement of John Trasvina, Legislative Attorney, Mexican American Legal Defense and Educational Fund))).

292. *Id.* at 93.

293. *Id.* at 97.

294. *Id.* at 99–100.

295. *Id.* at 101.

296. *Id.* at 168; *see also id.* at 112–16 (describing testimony from Dr. Broadus Butler, a representative of the UNCF, who believed that Title III was drafted with the intent to provide relief on an institutional basis).

297. *Id.* at 116.

298. *Id.* at 122.

299. *Id.* at 136–37.

300. *See id.* at 140–42.

in appropriating funds based on an enrollment-driven definition of HSIs,³⁰¹ so long as there was no requirement that institutions of higher education engage in race-conscious admissions practices. Eventually, this approach was expanded to include institutions that enroll threshold numbers of other racial and ethnic groups, including Blacks, Native Americans, and Asian Americans.³⁰²

These ongoing tensions between colorblindness and color-consciousness also are evident in the administration of the federal grant program for HSIs. Sociologists Nicholas Vargas and Julio Villa-Palomino did a content analysis of all grant abstracts for successful proposals for HSI funding between 2009 and 2016.³⁰³ They found that the abstracts overwhelmingly characterized Latinx students as at risk due to poor academic preparation, limited financial resources, and lack of familiarity with higher education.³⁰⁴ Despite portraying this student population as in need of special assistance, 85% of the abstracts did not seek funds specifically directed to Latinx youth on campus.³⁰⁵ Instead, applications pursued funding for programs and services that would benefit all students.³⁰⁶ According to Vargas and Villa-Palomino, these institutions were “not operating under a racialized logic that prioritizes the eradication of racial inequalities in higher education, but rather, a colorblind one.”³⁰⁷ Ultimately, Vargas and Villa-Palomino found that only 10% of the abstracts reflected a Latinx-centered approach, one that prioritized directing resources to programs and services directly benefiting Latinx students.³⁰⁸ As a result, the researchers concluded, some HSIs were actually “promulgating a usurping of resources from the racially marginalized to those atop the U.S. racial hierarchy.”³⁰⁹ This tendency in turn reflected the fact that HSIs often developed due to demographic change, rather than deliberate action. For that reason, Vargas and Villa-Palomino asserted, “tacit white norms [could] persist in the organization, curricula, and policy implementation” of HSIs even as they became “demographically non-white institutions of higher education.”³¹⁰ In

301. *See id.* at 172.

302. *See* CLIFTON CONRAD & MARYBETH GASMAN, EDUCATING A DIVERSE NATION: LESSONS FROM MINORITY-SERVING INSTITUTIONS 21, 27–34 (2015); *see also* *What Are MSIs?*, THE RUTGERS CTR. FOR MINORITY SERVING INSTS., <https://cmsi.gse.rutgers.edu/content/what-are-msis> [<https://perma.cc/3SB9-6TZ4>]. These new categories supplement HBCUs, HSIs, and tribal colleges and universities. *Id.*

303. Vargas & Villa-Palomino, *supra* note 34, at 406–07.

304. *Id.* at 407.

305. *Id.*

306. *Id.*

307. *Id.* at 410.

308. *Id.* at 409.

309. *Id.* at 410.

310. *Id.* at 412.

fact, many faculty and administrators at HSIs were White and sometimes uncomfortable with or indifferent to color-conscious educational strategies.³¹¹

As this research shows, colorblindness has had implications that go well beyond affirmative action programs at prestigious institutions. The desire to avoid illicit quotas has produced a descriptive definition of HSIs, one that relies solely on the composition of the student body. Colleges and universities can become HSIs through accidents of geography and demography without taking any deliberate steps to enroll Latinx students or address their needs. The federal grant process has not deepened this minimalist definition of HSIs. On the contrary, a spirit of colorblindness pervades successful applications, which seek money for campus-wide programs and services that do not single out Latinx youth for any special treatment. The level of federal funding for HSIs is quite modest,³¹² and the failure to focus resources on Latinx-oriented initiatives means that the awards may have only a tangential impact on these students' campus experiences. The normative bind that colorblindness poses for HSIs provides another opportunity for the elevator effect to operate. Even as HSIs appear to broaden access to higher education, the opportunities they afford to Latinx students are far from systematic. Given the weak definition of HSIs and the tendency to administer grants in a colorblind way, Latinx students' concerns may get short shrift, even as more privileged peers benefit from federal funding awards. Once again, Latinx get ahead but not too far.

311. See Frances Contreras, *Latino Faculty in Hispanic-Serving Institutions: Where is the Diversity?*, 11 ASS'N MEXICAN AM. EDUCATORS J. 236–44 (2017) (describing lack of diverse faculty, including Latinx faculty, at HSIs in California); see also Nicholas Vargas et al., *Latinx Faculty Representation and Resource Allocation at Hispanic Serving Institutions*, 23 RACE ETHNICITY & EDUC. 39, 47 tbl.3 (2020) (reporting a Latinx student to Latinx faculty ratio of 146:1 at Title V funded HSIs from 2009 to 2016, compared to a ratio of 10:1 for White students and White faculty); Gina Ann Garcia, *What Does It Mean to be Latinx-serving? Testing the Utility of the Typology of HSI Organizational Identities*, 11 ASS'N MEXICAN AM. EDUCATORS J. 109, 128–29 (2017) (concluding that six Midwestern HBCUs had low percentages of Latinx faculty and administrators compared to Latinx student enrollments and how they often relied on a “Latinx-neutral” approach). *But cf.* Gina A. Garcia et al., *Assessing Color-Neutral Attitudes of Faculty at Hispanic-Serving Institutions*, AERA OPEN, July–Sept. 2020, at 7 (finding that professors at ten HSIs were aware of racial and ethnic challenges facing students with the exception of faculty in Science, Technology, Engineering, and Mathematics).

312. Vivianne Anguiano & Janette Martinez, *Ensuring an Equitable Recovery for Latinos*, INSIDE HIGHER ED (Mar. 9, 2021), <https://www.insidehighered.com/views/2021/03/09/federal-government-should-increase-support-hispanic-serving-institutions-given> [https://perma.cc/Y5ND-SERC]. Federal funding has not kept pace with the growth in HSIs, many of which are “woefully underfunded” and amounts to \$87 per enrolled Latinx student. *Id.*

IV. TRANSCENDING DIVERSITY'S DISTRACTIONS: RETHINKING HIGHER EDUCATION POLICY

Debates over affirmative action continue to matter. Elite institutions of higher education are a pathway to the most prominent positions in the nation, and as the Harvard litigation has shown, an admissions process driven entirely by grades and test scores would lead to paltry numbers of Black and Latinx students on prestigious campuses. Yet, it is not evident that challenges to race-conscious admissions can be readily deflected by relying on corrective justice rather than diversity, as Professor Bell argued.³¹³ The population of the United States continues to grow more racially and ethnically complex, making the task of rectifying discrimination increasingly complicated, even for Black Americans. As a result, whatever the constitutional reasoning, courts are not likely to provide a complete answer to how best to include a range of students in higher education, including Latinx youth. Bell rightly noted that other features of the college and university system matter greatly, so it is important to consider how policies will shape access to colleges and universities for previously underrepresented students seeking entree to the middle class and not just the power elite. In this section, I explore ongoing complexities surrounding affirmative action at elite colleges and universities and address possible responses to stratification and privatization in higher education as well as the destabilization of MSIs, especially HSIs.

A. Affirmative Action and Demographic Complexity: Why Policy Matters Even More

In critiquing affirmative action, Professor Bell argued that a corrective justice rationale was more powerful than an amorphous justification rooted in diversity.³¹⁴ The underlying assumption was that combatting past and present discrimination provided a stronger, clearer framework for considering the use of race in the admissions process. Yet, it is far from certain that resuscitating a corrective justice rationale would solve the problems of access facing higher education. As legal scholar Kevin Brown notes,

When affirmative action policies were first instituted, the racial and ethnic makeup of the United States was very different from what it is today. According to the 1960 census, whites constituted 88.8 percent of all Americans, with an additional 10.6 percent classified as black. The 1960 census categorized Hispanics/Latinos based on their race, not their ethnicity; thus, blacks and whites comprised 99.4 percent of

313. See Bell, *supra* note 1, at 1624, 1632–33.

314. See *id.*

the American population. Also, in 1960, interracial marriage between blacks and whites was still illegal in over twenty states. Of the nearly twelve million blacks over the age of fifteen, less than one half of one percent of them were married to whites.³¹⁵

As a result, when programs began to consider race, admissions officials could safely assume that plus factors were being given to what Brown terms “Ascendant Blacks,” that is, “the sons and daughters of two American-born black parents” and that these applicants had “ancestors [who] were victims of the history of discrimination in the United States.”³¹⁶

Today, however, Brown concludes that admissions processes favor “Black Multiracials,” who are the offspring of intermarriage, and “Black Immigrants,” who are foreign-born.³¹⁷ Brown contends that the diversity rationale has permitted Ascendant Blacks, those most deserving of corrective justice, to be displaced by applicants who have not suffered a similar history of racial harms.³¹⁸ Although mainly preoccupied with the rectification of past wrongs, Brown also argues that this pattern poses problems for diversity. In his view, the dearth of Ascendant Blacks at highly selective schools obscures their unique vantage point on race, one that represents the predominant perspective among Blacks in the United States.³¹⁹

In more recent research, Brown and Professor Kenneth Dau-Schmidt have documented similar patterns in law school admissions, and they have tried to identify the dynamics that underlie these trends.³²⁰ In his previous work, Brown noted that all Blacks are apt to experience some contemporary discrimination, even if Ascendant Blacks are more burdened by the legacy of racism.³²¹ The empirical analysis of law students bears this out. While applicants who are Ascendant Blacks have smaller household incomes than those who are Black Immigrants or Black Multiracials, all three groups report less income than applicants from White households.³²² Similarly, Ascendant Blacks are least likely to attend a top-ranked law school, but all Black groups are represented at lower levels than Whites.³²³ Finally, Ascendant Black applicants have the lowest average grades and Law School Admissions Test

315. BROWN, *supra* note 39, at 3–4.

316. *Id.* at 5.

317. *Id.* at 5, 7–9.

318. *Id.* at 12–16.

319. *Id.* at 16–17.

320. Kevin D. Brown & Kenneth G. Dau-Schmidt, *Racial and Ethnic Ancestry of the Nation’s Black Law Students: An Analysis of Data from the LSSSE Survey*, 22 BERKELEY J. AFR.-AM. L. & POL’Y 101, 107 (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3947996 [<https://perma.cc/7J7Q-TQN8>].

321. BROWN, *supra* note 39, at 240, 248–49.

322. Brown & Dau-Schmidt, *supra* note 320, at 121 tbl.1.

323. *Id.* at 127 charts 3 & 4.

(LSAT) scores, but Whites' average grades and test scores are higher than those for all Black applicant groups.³²⁴

In the law school study, Brown and Dau-Schmidt address the category of "Black Hispanics," who simultaneously identify as Black and Hispanic or Latino.³²⁵ Brown previously recognized this classification, but data limitations prevented him from exploring it fully.³²⁶ As it turns out, there is considerable overlap among Black Hispanics, Black Immigrants, and Black Multiracials.³²⁷ As the new research shows, Black Hispanics largely resemble Black Immigrants and Black Multiracials: they do better than Ascendant Blacks on measures like median household income, grades, LSAT scores, and attendance at top law schools, but they do worse than Whites.³²⁸ What these findings indicate is that contemporary discrimination harms all Black applicants, but the vestiges of past discrimination weigh most heavily on Ascendant Blacks.

Brown offers some proposed ways to address this complexity by having Black applicants submit statements about their experiences with racism.³²⁹ It is hard to imagine how a college or university could use these statements for Black applicants and not for others, like Latinx, Asian-American, and Native American applicants, who also may have encountered racial and ethnic discrimination. Moreover, Brown acknowledges that savvy applicants could easily game this system by slanting their statements in ways that do not accurately reflect their life histories.³³⁰ All of this suggests that implementing an admissions program rooted in corrective justice for past societal wrongs, even if it were constitutionally permissible, would be far from a straightforward matter. The difficulties are only likely to grow in coming years, as Latinx and Asian Americans become a larger segment of the population and rates of intermarriage increase.³³¹

As a result, it seems fair to say that a focus on corrective justice will not entirely ameliorate the conceptual difficulties of relying on race in the admissions process. The diversity rationale, by contrast, is forward-looking, emphasizing the training of students for their roles in the workforce and civic

324. *Id.* at 125–28.

325. *Id.* at 105.

326. BROWN, *supra* note 39, at 34.

327. Brown & Dau-Schmidt, *supra* note 320, at 121 tbl.1.

328. *Id.* at 116, 122, 126–27 & 133 chart 8.

329. BROWN, *supra* note 39, at 240–41.

330. *Id.* at 249.

331. RICHARD ALBA, *THE GREAT DEMOGRAPHIC ILLUSION: MAJORITY, MINORITY, AND THE EXPANDING AMERICAN MAINSTREAM* 70–74, 79–81, 131 (2020); JONATHAN VESPA ET AL., U.S. CENSUS BUREAU, P25-1144, *DEMOGRAPHIC TURNING POINTS FOR THE UNITED STATES: POPULATION PROJECTIONS FROM 2020 TO 2060*, at 6–8 (2020), <https://www.census.gov/content/dam/Census/library/publications/2020/demo/p25-1144.pdf> [<https://perma.cc/LBR4-3CTQ>].

life.³³² As society changes, so too does the meaning of diversity, making the concept elastic and commodious. Brown himself notes that concerns about underrepresentation of Ascendant Blacks can be couched not just as a failure of corrective justice but also as a failure to include an important perspective, especially at highly selective colleges and universities.³³³ If anything, ongoing demographic change provides a strong reason for college and university educators to prepare students for lives in diverse workplaces and civic spaces. The ongoing transformation of the American population explains why the need for affirmative action is unlikely to disappear anytime soon. Yet, so long as the Court tacitly understands these admissions programs as temporary remedial measures, they will face the danger of extinction as unnecessary affronts to colorblindness. Regardless of how the Justices decide this issue, the United States must rise to the challenge of educating a changing student body, one that is increasingly diverse and riven by socioeconomic divides. For that reason, policy reforms are more important than ever.

B. Doing Equity in a Diversifying and Socioeconomically Divided Society

For the nation to succeed in once again being a world leader in college completion rates, officials must look beyond affirmative action to tackle stratification and privatization in higher education. These trends have damaged the prospects of obtaining a college degree for students disadvantaged by race, ethnicity, and class, including Latinx youth. In addition, policy makers must think more creatively about the role of MSIs in educating a new generation of college students. Rather than focus on the dialectic of colorblindness and color-consciousness, federal decision-makers should understand these schools as laboratories of innovation responding to the needs of diverse and often non-traditional student bodies. HSIs, for example, serve a segment of America's population that is increasingly vital to its economic and political future—a mission entirely independent of constitutional limits on rectifying past wrongs.

1. Stratification and Meaningful Access

Stratification is a longstanding feature of the American system of higher education and, indeed, of American life more generally.³³⁴ It would be Panglossian to suggest that this pattern will disappear anytime soon,

332. Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J. C.R.-C.L. 171, 175–76 (2005).

333. See BROWN, *supra* note 39 and accompanying text.

334. LABAREE, *supra* note 11, at 4–5.

particularly given that disparities between highly selective institutions and less selective institutions have only widened in recent years.³³⁵ Yet, that does not mean that there are no meaningful steps that policy makers can take to enhance the fairness of the higher education system. Those steps must focus on the educational workhorses that enroll most undergraduate students: community colleges and less selective four-year colleges, especially those that are public.

These policy strategies should emphasize two conditions for achieving greater equity in higher education: (1) students should be able to make an informed choice when they decide where to enroll in college; and (2) once enrolled, all students should have a clear path to completing a degree, most notably a bachelor's degree. To promote informed choice, President Barack Obama's administration created a College Scorecard, an online, searchable tool that allows students to evaluate whether enrolling at a particular campus is a good investment. The key information relates to cost of attendance, retention and graduation rates, and earnings shortly after completing a degree.³³⁶ There have been criticisms of the Scorecard's methodology as well as the way in which it presents data to prospective students.³³⁷ That said, it is a step in the right direction in promoting transparency in higher education. Even so, more can be done to support informed student decision-making. In recent years, due to state budget cuts, many high schools have greatly reduced

335. Moran, *supra* note 46, at 97–100.

336. Amanda Holley, *Education Department Releases College Scorecard to Help Student Choose Best Colleges for Them*, ETV NEWS (Feb. 13, 2013), <https://etvnews.com/education-department-releases-college-scorecard-to-help-students-choose-best-college-for-them/> [<https://perma.cc/N68L-TDGY>] (announcing that the College Scorecards would provide students with “five key pieces of data about a college: costs, graduation rates, loan default rate, average amount borrowed, and employment”); GROVER J. WHITEHURST & MATHEW M. CHINGOS, BROOKINGS INST., *DECONSTRUCTING AND RECONSTRUCTING THE COLLEGE SCORECARD 2* (2015), <https://www.brookings.edu/wp-content/uploads/2016/07/Deconstructing-and-Reconstructing-the-College-Scorecard.pdf> [<https://perma.cc/UJL7-XQTC>] (describing the initial College Scorecard as “a portal to the attainment and earnings records, aggregated to the institutional level, of college students receiving direct federal financial aid through individual grants and loans”). The Scorecard was recently amended to include more information about student debt outcomes. Meghan Lustig, *Additional College Scorecard Info: What to Know*, U.S. NEWS (Feb. 24, 2021, 12:47 PM), <https://www.usnews.com/education/blogs/student-loan-ranger/articles/what-to-know-about-additional-college-scorecard-student-loan-info> [<https://perma.cc/68DX-W6QH>].

337. See, e.g., Kevin Kiley, *A Blunt Instrument*, INSIDER HIGHER ED. (Feb. 14, 2013), <https://www.insidehighered.com/news/2013/02/14/white-houses-new-scorecard-oversimplifies-institutions-liberal-arts-advocates-say> [<https://perma.cc/QF5V-5ZUV>] (explaining the Scorecard was criticized for being “too focused on finance”); Patricia McGuire, *A Scorecard is No Way to Pick a College*, HUFFINGTON POST (Apr. 23, 2013), http://www.huffingtonpost.com/patricia-mcguire/college-scorecard-flaws_b_2707702.html [<https://perma.cc/B8K6-4K2D>].

their guidance counseling staff.³³⁸ Yet, one-on-one consultation can be critically important for first-generation and low-income students, many of whom are Latinx.³³⁹ These youth are unable to rely on family and friends to help with the college application process.³⁴⁰ As a report by *Excelencia* in Education notes, traditional counselors play a key role in fostering Latinx students' aspirations to pursue college. The College Scorecard is helpful once students have decided to apply, but high school counselors can help to build a college-going culture that inspires students to submit an application.³⁴¹ In addition, counselors can assist students in compiling a high school record that supports their aspirations and work with them to explore their options, using the Scorecard as just one tool.³⁴²

The Scorecard accurately reflects the higher education system in its current form, but standing alone, it does nothing to address growing stratification within that system. To ensure that students who enroll at a campus have a meaningful opportunity to complete a degree, state legislatures and education officials must bolster support for community colleges and less selective four-year institutions.³⁴³ When legislators steadily trim allocations for higher education, they often emphasize that public colleges and universities can raise tuition or bring in large gifts to make up the difference.³⁴⁴ That rhetoric tacitly assumes that all schools can adopt strategies that work on flagship campuses: increase tuition, expand enrollment of out-of-state and international students who pay more tuition than in-state students, and double down on private fundraising.³⁴⁵ As a result, state legislatures often impose across-the-board cuts for all public colleges and universities.³⁴⁶ Yet, the workhorses of higher education tend to serve low-income students who may forego college altogether if tuition seems daunting.³⁴⁷ Moreover, these

338. SARAH HURLEY & ANN COLES, NAT'L ASS'N FOR COLL. ADMISSION COUNSELING & EXCELENCIA IN EDUC., COLLEGE COUNSELING FOR LATINO AND UNDERREPRESENTED STUDENTS 6 (2015), <https://files.eric.ed.gov/fulltext/ED587560.pdf> [<https://perma.cc/Q8BC-EEFU>] (describing "lack of school/personnel resources" as a "[w]ell-known barrier" to "intensive college counseling").

339. *Id.* at 9.

340. *Id.*

341. *Id.* at 8.

342. SANTIAGO ET AL., *supra* note 37.

343. Moran, *supra* note 46, at 105–07.

344. LABAREE, *supra* note 11, at 135, 153–54, 156; Moran, *supra* note 46, at 106.

345. LABAREE, *supra* note 11, at 135, 153–54, 156; *see also* Moran, *supra* note 46, at 105–06.

346. *See* Moran, *supra* note 46, at 106–07.

347. Meredith Kolodner, *Why Are Low-Income Students Not Showing Up to College, Even Though They Have Been Accepted?*, HECHINGER REP. (Aug. 14, 2015), <https://hechingerreport.org/why-are-low-income-students-not-showing-up-to-college-even-though-they-have-been-accepted/> [<https://perma.cc/G33T-5ULW>] (describing how 40% of low-income students accepted to college did not attend, in part due to concerns about cost).

schools mainly serve youth in the region and are not seen as a destination for out-of-state and international students.³⁴⁸ Finally, these institutions struggle to attract large donations because they do not have the luster of big-name flagships.³⁴⁹

For these reasons, it has been difficult for community colleges and less selective four-year public schools to maintain educational quality and services in the face of a steady erosion in state support. The cuts have directly affected students' pathways to completing a degree. Administrators have been forced to reduce course offerings, making it difficult to finish a degree in a timely way.³⁵⁰ Schools increasingly must rely on low-cost adjunct faculty who may be less available to mentor students in a sustained way.³⁵¹ Administrators also have fewer resources to counsel students on the transfer process and to provide them with assistance when personal emergencies threaten to disrupt their

348. See Vivekanand Jayakumar & Brian Kench, *Is There An Economic Case for Saving Regional Public Universities and Mid-Tier Private Colleges?*, THE HILL (Nov. 28, 2020, 3:00 PM), <https://thehill.com/opinion/education/527722-is-there-an-economic-case-for-saving-regional-public-universities-and-mid> [<https://perma.cc/Z7VG-LNZ2>] (explaining that flagship public universities were able to weather state budget cuts by admitting out-of-state and international students, but this admissions strategy was not an option for less prestigious regional schools that mainly serve in-state students); Mike Scutari, *What Does It Take for Community Colleges to Raise More Money?*, INSIDE PHILANTHROPY (Dec. 1, 2019), <https://www.insidephilanthropy.com/home/2019/12/1/what-does-it-take-for-community-colleges-to-raise-more-money> [<https://perma.cc/EU3M-NCAT>] (describing lack of affluent alumni and need to build fundraising infrastructure as reasons why community colleges lag behind four-year institutions in raising money from donors).

349. Richard D. Kahlenberg, *How Higher Education Funding Shortchanges Community Colleges*, CENTURY FOUND. (May 28, 2015), <https://tcf.org/content/report/how-higher-education-funding-shortchanges-community-colleges/> [<https://perma.cc/8FZQ-SVHJ>]; see Sara Goldrick-Rab, *Challenges and Opportunities for Improving Community College Student Success*, 80 REV. EDUC. RES. 437, 443 (2010); Dorine Bethea, *Community Colleges Explore Creative Approaches to Counter Budget Cuts*, DIVERSE: ISSUES IN HIGHER EDUC. (Jan. 7, 2014), <https://www.diverseeducation.com/institutions/community-colleges/article/15094154/community-colleges-explore-creative-approaches-to-counter-budget-cuts> [<https://perma.cc/E8U8-Q685>] (providing example of the kind of financial donation a flagship university might receive).

350. See, e.g., UNIV. OF CAL. TRANSFER ACTION TEAM, *PREPARING CALIFORNIA FOR ITS FUTURE: ENHANCING COMMUNITY COLLEGE TRANSFER TO UC 15–16* (2014), <http://www.ucop.edu/transfer-action-team/transfer-action-team-report-2014.pdf> [<https://perma.cc/C88R-D24K>] (highlighting the critical finding that community colleges must decrease course offerings in response to budget cuts which could be a catalyst in lower admissions).

351. See *Growing Proportion of Part-Time Faculty Portends Problems*, DIVERSE: ISSUES IN HIGHER EDUC. (Aug. 3, 2019), <https://www.diverseeducation.com/faculty-staff/article/15105155/growing-proportion-of-part-time-faculty-portends-problems> [<https://perma.cc/X9M9-TCH3>] (providing statistical information about the nation-wide increase of part-time faculty members at colleges).

progress toward a degree.³⁵² For all of these reasons, state officials must rethink across-the-board cuts in higher education and direct additional aid to institutions that serve a disproportionate number of students of color, low-income students, and first-generation students. This approach is not unprecedented. Some states have adopted an analogous method of redressing inequities in public elementary and secondary education. The school funding formulas allocate per-pupil resources based on the number of students with extra educational needs.³⁵³ In addition, states should allocate monies to support the transfer process from two-year to four-year institutions. In addition to mandating that credits earned at one state school be fully recognized at another, legislators should appropriate funding for sufficient counselors at two-year and four-year schools as students navigate the transfer process.³⁵⁴ For schools that serve a common regional population, states can support partnerships and consortia to develop innovative strategies to promote successful transfer.³⁵⁵

All these strategies would help Latinx students who are often low-income and first-generation. Improved information would enable these youth to make better choices by, for example, foregoing expensive for-profit institutions with problematic rates of completion and degrees that are not highly regarded in the marketplace.³⁵⁶ Latinx also could opt for colleges and universities that better align with their credentials. Evidence has shown that Latinx tend to enroll at schools that are less selective than their qualifications warrant.³⁵⁷ That pattern may reflect some preferences, such as a desire to stay closer to

352. See Rachel Fulcher Dawson et al., *Why Expanded Student Supports Can Improve Community College Outcomes and Boost Skill Attainment*, BROOKINGS INST.: BROWN CTR. CHALKBOARD (Apr. 7, 2021), <https://www.brookings.edu/blog/brown-center-chalkboard/2021/04/07/why-expanded-student-supports-can-improve-community-college-outcomes-and-boost-skill-attainment/> [https://perma.cc/5PML-PRA2] (describing the need for emphasis on college counseling services).

353. ROBERTA C. FURGER ET AL., LEARNING POL'Y INST., *THE CALIFORNIA WAY: THE GOLDEN STATE'S QUEST TO BUILD AN EQUITABLE AND EXCELLENT EDUCATION SYSTEM* 3 (2019), https://learningpolicyinstitute.org/sites/default/files/product-files/California_Way_Equitable_Excellent_Education_System_REPORT.pdf [https://perma.cc/XNW7-BYHX] (providing an example of the California education funding formula).

354. ANDREEA SERBAN ET AL., *TRANSFER ISSUES AND EFFECTIVE PRACTICES: A REVIEW OF THE LITERATURE* 14–15 (2008), <https://files.eric.ed.gov/fulltext/ED521887.pdf> [https://perma.cc/E64B-FLY6].

355. *Id.* at 20–22.

356. See UNIDOS US, *FOR-PROFIT COLLEGES ARE HARMFUL TO LATINO STUDENTS* (2019), https://www.unidosus.org/wp-content/uploads/2021/07/unidosus_highereducationact_accountability.pdf [https://perma.cc/AX8J-QMSC].

357. SARAH FITCH ET AL., *UNDERSTANDING HISPANIC STUDENT ACADEMIC UNDERMATCH AND COLLEGE COMPLETION* 10–11 (2019), https://cdn.ymaws.com/www.ncan.org/resource/resmgr/publications/NCAN_Understanding_Hispanic_.pdf [https://perma.cc/S8Q8-CVMQ].

home and family, but it also likely stems from lack of access to good information about college options.³⁵⁸ Given Latinx students' disproportionate enrollment at community colleges, reforms that enhance the educational experience at these two-year institutions and improve transfer rates will be vital. At present, Latinx have been closing the college enrollment gap, but the college completion gap remains substantial. While commentators attribute the ongoing disparities to differences in academic preparedness and financial wherewithal, the significant disinvestment in community colleges is also an important factor. The stretched resources at two-year institutions make it hard for schools to address students' challenges, contributing to differential success rates.³⁵⁹

2. *Privatization and Blocked Mobility*

For many years, affirmative action has been the flashpoint for debates over inclusion in higher education. As Professor Bell noted, this diverts policy makers' attention from other fundamental issues related to access and opportunity.³⁶⁰ With rising tuition, limited need-based aid, and growing income and wealth inequality in the United States, the affordability of a college degree has finally garnered some political attention. In 2015, President Obama announced a College Promise proposal, which would have offered tuition-free community college to responsible students.³⁶¹ Inspired by initiatives in Tennessee and Chicago, the plan was designed to cover three-quarters of the cost for states that provided free tuition to eligible students at qualifying institutions.³⁶² Under the proposal, community colleges had to demonstrate that credits would transfer to a four-year institution, and students had to be enrolled at least half-time, maintain a 2.5 grade point average, and make steady progress toward completing their degrees.³⁶³

Congress failed to enact the College Promise,³⁶⁴ but the idea of free college tuition nonetheless reappeared that same year when Senator Bernie

358. *Id.* at 20.

359. Moran, *supra* note 46, at 99–100, 105–07.

360. *See supra* notes 1–5 and accompanying text.

361. America's College Promise Act of 2015, H.R. 2962, 114th Cong. (2015); Press Release, The White House, Fact Sheet—White House Unveils America's College Promise Proposal: Tuition-Free Community College for Responsible Students (Jan. 9, 2015) [hereinafter Fact Sheet], <https://obamawhitehouse.archives.gov/the-press-office/2015/01/09/fact-sheet-white-house-unveils-america-s-college-promise-proposal-tuition> [https://perma.cc/2F39-X3WY].

362. Fact Sheet, *supra* note 361.

363. *Id.*

364. Andrew Kreighbaum, *Biden Revives Obama-Era Plan that Fueled Free College Movement*, BLOOMBERG L. (Apr. 30, 2021, 5:05 AM), <https://news.bloomberglaw.com/social->

Sanders, then a Democratic candidate for President, introduced the College for All Act.³⁶⁵ Sanders' bill extended Obama's proposal to four-year public institutions.³⁶⁶ To be eligible, colleges and universities had to meet quality measures based on spending per student, availability of need-based financial aid, operational expenditures, and the proportion of tenured faculty offering instruction.³⁶⁷ Rival candidate Hillary Clinton offered her own New College Compact, which would have provided no-loan college tuition at four-year public institutions and free tuition at community colleges.³⁶⁸ Clinton's plan envisioned that low-income students could graduate debt-free, and higher-income students could as well if they attended in-state public schools and committed to public service jobs immediately following graduation.³⁶⁹ Under her plan, Clinton also required that students work ten hours per week while attending college.³⁷⁰

None of these proposals was adopted, so in 2021, President Joseph Biden included a provision for free community college tuition in his Build Back Better plan.³⁷¹ During intense negotiations over the size of the spending package, the community-college measure ended up on the chopping block.³⁷² Despite the lack of congressional action, there is evidence that tuition programs make a difference, even if they are not a panacea for disparities in access to higher education. Tennessee, the state that inspired President Obama's College Promise, has reported positive results based on increases in college-going and college retention.³⁷³ The groups most benefited are low-income students and students of color.³⁷⁴ Evidence like this has encouraged

justice/biden-revives-obama-era-plan-that-fueled-free-college-movement [https://perma.cc/P626-6D6E].

365. College for All Act, S. 1373, 114th Cong. (2015).

366. *Id.*; Michael Schramm, *Bernie Sanders Issues Bill to Make 4-Year Colleges Tuition-Free*, USA TODAY (May 19, 2015, 11:47 AM), <http://college.usatoday.com/2015/05/19/bernie-sanders-issues-bill-to-make-4-year-colleges-tuition-free> [https://perma.cc/FL52-WVTG].

367. Schramm, *supra* note 366.

368. Marisa Taylor, *Clinton Unveils Plan for No-Loan College Tuition*, AL JAZEERA AM. (Aug. 10, 2015, 11:20 PM), <http://america.aljazeera.com/articles/2015/8/10/clinton-education-plan-calls-for-no-loan-tuition.html> [https://perma.cc/AYS4-Y927]; *see also* Stephanie Saul & Matt Flegenheimer, *Hillary Clinton Embraces Ideas from Bernie Sanders's College Tuition Plan*, N.Y. TIMES (July 6, 2016), <https://www.nytimes.com/2016/07/07/us/politics/hillary-clinton-bernie-sanders-education.html> [https://perma.cc/FB9X-ACL2].

369. *Clinton's College Affordability Proposal Explained*, COMM. FOR A RESPONSIBLE FED. BUDGET (Oct. 13, 2015), <https://www.crfb.org/blogs/clintons-college-affordability-proposal-explained> [https://perma.cc/2K5P-KE39].

370. *Id.*

371. Fabiola Cineas, *The Uncertain Future of Free Community College*, VOX (Nov. 1, 2021, 10:50 AM), <https://www.vox.com/2021/11/1/22747728/free-tuition-community-college-biden> [https://perma.cc/WRR5-L3J6].

372. *Id.*

373. *Id.*

374. *Id.*

other states to experiment with free college tuition at public institutions of higher education. Even without federal support, a number of states have adopted some version of free community college in the last decade.³⁷⁵ Three states offer support for four-year institutions, but most focus on community colleges.³⁷⁶ Unfortunately, many Latinx students reside in states that have yet to endorse free tuition plans. According to a 2016 Pew Research Center report, the top ten states for Latinx residents in order of population size are California, Texas, Florida, New York, Illinois, Arizona, New Jersey, Colorado, New Mexico, and Georgia.³⁷⁷ Of these states, only California has adopted a plan, one for free community college tuition.³⁷⁸ Arizona, New Jersey, and Texas have entertained proposals but have yet to act on them.³⁷⁹ The Biden administration has made clear that it is not giving up on the free community college plan and will find other ways to advance this agenda.³⁸⁰ That kind of action could be especially impactful for Latinx students who disproportionately rely on two-year colleges to get a degree.

Although free community college has disappeared from the Build Back Better bill, another provision relevant to access and affordability remains. The Biden administration has proposed to expand support under the Pell grant program by approximately \$550.³⁸¹ Coupled with another \$400 increase that already has gone through the congressional appropriations process, the total additional support would represent a 15% jump in the Pell grant's size.³⁸² Even so, because the grants have lagged so far behind the rising cost of attendance, the augmented awards would cover only 32% of that expense.³⁸³ By contrast, in 1979-80, a Pell grant covered the entire cost of attendance at a two-year school, 77% of the cost at a four-year public institution, and 36% at a private college or university.³⁸⁴ As eligibility criteria have expanded, the

375. *Id.*

376. See ANTHONY P. CARNEVALE ET AL., THE DOLLARS AND SENSE OF FREE COLLEGE 10 (2020), <https://repository.library.georgetown.edu/bitstream/handle/10822/1060568/CEW-The-Cost-of-Free-College-FR.pdf?sequence=1&isAllowed=y> [<https://perma.cc/ARP3-25ZP>].

377. Stepler & Lopez, *supra* note 143.

378. CARNEVALE ET AL., *supra* note 376, at 10 fig.2.

379. *Id.*

380. Matthew Cooper, *Where Does the Build Back Better Act Leave Higher Education?*, WASH. MONTHLY (Nov. 5, 2021), <https://washingtonmonthly.com/2021/11/05/where-does-the-build-back-better-act-leave-higher-education/> [<https://perma.cc/YW87-7MKQ>].

381. *Id.*; Alexis Gravely, *Down to \$40 Billion*, INSIDE HIGHER ED (Oct. 29, 2021), <https://www.insidehighered.com/news/2021/10/29/higher-ed-funding-continues-shrink-social-spending-bill> [<https://perma.cc/PX28-6AK2>].

382. Cooper, *supra* note 380.

383. Gravely, *supra* note 381.

384. BRYAN J. COOK & JACQUELINE E. KING, AM. COUNCIL ON EDU. CTR. FOR POL'Y ANALYSIS, 2007 STATUS REPORT ON THE PELL GRANT PROGRAM 4-5 (2007), <https://www.acenet.edu/Documents/2007-Status-Report-on-the-Pell-Grant-Program.pdf> [<https://perma.cc/XX4X-KBDX>].

level of per-capita support has lagged behind. There is now no cap on family income for students who seek a Pell grant, and the neediest students therefore must share allocated resources with some middle-class recipients.³⁸⁵ Despite these limitations, the proposed increase in Pell grant awards clearly would benefit Latinx, who are highly dependent on federal financial aid. Moreover, undocumented students in the Deferred Action for Childhood Arrivals program would be eligible for the funds for the first time.³⁸⁶

As previously noted, Latinx receive the lowest average grant and scholarship support of any racial or ethnic group.³⁸⁷ Neither states' free college-tuition plans nor modest changes in Pell grants will fully address these disparities in access to higher education. For one thing, most Latinx students—who disproportionately come from low-income households—still must find ways to finance the bulk of their educational costs. To that end, states could consider providing more means-tested scholarships to residents.³⁸⁸ The scholarships could be used at public and private schools in the state, and policy makers might consider making the awards contingent on seeking support from other sources, including Pell grants and college scholarships.³⁸⁹ The state aid would leverage all of these resources to make college more affordable.³⁹⁰ Although enhanced financial support for needy students is essential, augmented funding will mean little if students lack the

385. CASSANDRIA DORTCH, CONG. RSCH. SERV., R45418, FEDERAL PELL GRANT PROGRAM OF HIGHER EDUCATION ACT: PRIMER 12 (2021); Jason Delisle, *The Pell Grant Proxy: A Ubiquitous but Flawed Measure of Low-Income Student Enrollment*, BROOKINGS INST. (Oct. 12, 2017), <https://www.brookings.edu/research/the-pell-grant-proxy-a-ubiquitous-but-flawed-measure-of-low-income-student-enrollment/> [https://perma.cc/SP98-MLXZ] (reporting that in 2011-2012, over 40% of Pell Grant recipients had household incomes between \$30,001 and \$65,994, the second income group).

386. Caroline Simon, *DACA Students Could Get Pell Grants Under Biden's Budget*, ROLL CALL (Apr. 13, 2021, 9:00 AM) <https://www.rollcall.com/2021/04/13/daca-students-could-get-pell-grants-under-bidens-budget/> [https://perma.cc/JY22-B267].

387. See *supra* note 235 and accompanying text.

388. See Doug Lederman, *States' Slow, Steady Embrace of Need-Based Aid*, INSIDE HIGHER ED (Nov. 5, 2018), <https://www.insidehighered.com/news/2018/11/05/proportion-state-financial-aid-awarded-based-financial-need-grows> [https://perma.cc/M25Z-P4L6]; see also Sophie Quinton, *Some States Move Toward Financial Aid Based on Need Rather than Merit*, PEW CHARITABLE TRS. (Dec. 10, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/12/10/some-states-move-toward-financial-aid-based-on-need-rather-than-merit> [https://perma.cc/66FU-7ZRT]; CRYSTAL COKER & JENNIFER GLYNN, JACK KENT COOKE FOUND., MAKING COLLEGE AFFORDABLE: PROVIDING LOW-INCOME STUDENTS WITH THE KNOWLEDGE AND RESOURCES NEEDED TO PAY FOR COLLEGE 6-7 (2017), <https://www.jkcf.org/wp-content/uploads/2018/05/2017-JKCF-Making-College-Affordable-Web.pdf> [https://perma.cc/U6BY-HJXP].

389. Lederman, *supra* note 388 (noting that approximately 20% of state aid goes to private non-profit colleges); CARNEVALE ET AL., *supra* note 376, at 23.

390. See COKER & GLYNN, *supra* note 388, at 10 (arguing against displacement of institutional aid when students receive private scholarships).

tools to navigate the financial aid application process successfully. Latinx college students not only have modest means, but they are often the first in the family to pursue higher education and may come from low-performing high schools.³⁹¹ As a result, counseling on higher education opportunities should include information on how to finance a college degree by drawing on a range of state and federal grants, institutional scholarships, and other awards programs.³⁹²

3. *The Destabilization of MSIs and the Importance of Recognition*

Another important feature of the Build Back Better bill is a proposal to augment funding for MSIs.³⁹³ This funding already has been scaled back substantially, much to the consternation of HBCU leaders.³⁹⁴ As the pot of money shrinks, HBCUs and HSIs have been pitted against each other.³⁹⁵ HBCUs have demanded earmarked dollars exclusively for their use due to concerns about competing with HSIs. According to Victor Santos, the senior director of government relations at the Thurgood Marshall College Fund, HBCUs would be significantly outnumbered in a competitive grant process. As he explains, "Minority-Serving Institutions include Hispanic-Serving Institutions, and there are 596 of them compared to 101 HBCUs."³⁹⁶ Moreover, Santos worries that HBCUs would have to go toe to toe with "HSIs . . . like the University of Texas and University of California and many more large schools with very few large endowments."³⁹⁷ Meanwhile, HACU and Latinx advocates in Congress have emphasized the need to support the large and growing number of HSIs, which enroll not only Latinx but one quarter of all Black students and 42% of Asian-American students.³⁹⁸ In fact, HACU's president, Antonio Flores, notes that HSIs educate "more than twice

391. See *supra* notes 228–29 and accompanying text.

392. See COKER & GLYNN, *supra* note 388, at 6; CARNEVALE ET AL., *supra* note 376, at 23.

393. Gravely, *supra* note 381.

394. Tiasia Saunders, *HBCUs and Supporters in Rage After Biden Reduces Funding for HBCUs in \$3.5 Trillion Reconciliation Bill*, THE HILLTOP (Oct. 11, 2021), <https://thehill.com/policy/education/2021/10/11/hbcus-and-supporters-in-rage-after-biden-reduces-funding-for-hbcus-in-3-5-trillion-reconciliation-bill/> [<https://perma.cc/C3ZX-F8FA>].

395. Bianca Quilantan, *Biden Plan Pits Hispanic-Serving Colleges Against HBCUs*, POLITICO (Oct. 20, 2021, 4:30 am), <https://www.politico.com/news/2021/10/20/biden-hispanic-serving-colleges-hbcus-516267> [<https://perma.cc/7ESH-RUKB>].

396. Saunders, *supra* note 394.

397. *Id.*

398. Press Release, Hisp. Ass'n of Colls. & Univs., HACU Statement on President Biden's Revised Build Back Better Framework (Oct. 29, 2021), <https://www.hacu.net/NewsBot.asp?MODE=VIEW&ID=3452> [<https://perma.cc/VJ9U-W2CL>]; Quilantan, *supra* note 395.

as many African Americans as all the HBCUs combined.”³⁹⁹ As HSI supporters insist on funding commensurate with the number of institutions and students served, they nonetheless worry that HSIs lack the “brand recognition” that HBCUs enjoy because of their longstanding commitment to serve Black students.⁴⁰⁰ The dramatic expansion of HSIs stems from a federal definition that emphasizes enrollment numbers rather than intentional efforts to address the needs of Latinx students.⁴⁰¹ As a consequence, HSIs are an eclectic category without a clear-cut identity.

Interestingly, the concern over brand recognition echoes Professor Bell’s arguments about the compelling nature of corrective justice and the conceptual weakness of diversity. HBCUs’ identities are rooted in a history of “separate but equal” higher education, and these schools have long devoted themselves to rectifying the harms of racial discrimination.⁴⁰² Meanwhile, HSIs reflect the diversity that inheres in the increasing demographic complexity of the American population.⁴⁰³ In fact, institutions of higher education are among the first to grapple with the needs of a population from a range of backgrounds—some first-generation, some foreign-born, and some from traditionally underrepresented racial and ethnic groups. The mission for these schools is a familiar one: preparing young people to assume their place in a society that will look very different from that of their parents. The explosive growth in HSIs clearly reflects these trends and offers an opportunity to realize diversity’s promise through a commitment to innovation and experimentation.

For that reason, educational advocate Deborah Santiago has asked that Congress target funds at colleges and universities taking steps to serve and not merely enroll Latinx students.⁴⁰⁴ This sort of change could address HBCUs’ concerns that they must compete with an amorphous category of HSIs, while it would also provide HSIs with a recognizable and unique identity. Despite these possible advantages, it seems unlikely that Congress will fine-tune the behemoth Build Back Better bill in this way. Yet, these concerns could be addressed by refining the criteria for successful grant applications for HSI funding. For instance, the Department of Education might give favorable consideration to grants that support programs and services for low-income students, first-generation students, and Latinx students. Given that a 25% enrollment threshold means that Latinx can comprise a minority of students on campus, indicia like these could counter the diversion of funds to the

399. Quilantan, *supra* note 395.

400. *Id.*

401. *See supra* notes 288–90 and accompanying text; *see also* Quilantan, *supra* note 395.

402. *See supra* notes 251–53 and accompanying text.

403. Burke, *supra* note 289.

404. *See id.*

general student body. As HSIs target the needs of Latinx students, some schools may want to address not only academic achievement but other facets of quality of life on campus. While measures of achievement are readily quantifiable, the experience of student life may not be.⁴⁰⁵ Nonetheless, schools can use surveys to measure students' satisfaction and sense of belonging to ensure that Latinx youth feel fully integrated into a college or university.⁴⁰⁶

Proposals to direct Title III funds more deliberately to Latinx students should not be stymied by the ongoing dialectic over the imperative of colorblindness and the propriety of color-consciousness. Fears that serving Latinx students somehow must involve impermissible quotas are ill-founded. Typically, admissions quotas involve differential treatment of individuals when seats are reserved for some applicants based on race or ethnicity.⁴⁰⁷ Once students are enrolled, however, institutions can create programs that meet a variety of educational needs. The grant process therefore could use some Latinx-oriented criteria as a plus factor when evaluating institutional applications to fund programs or services. The resources would not establish activities that exclude students based on race or ethnicity, and indeed, some Latinx-oriented criteria like socioeconomic status and first-generation status are race-neutral. So, it would be entirely possible for the Department of Education to send clearer signals about what it means to be "Hispanic serving," even if the congressional definition of HSIs remains focused on enrollments.

405. See, e.g., Gina A. Garcia et al., *Toward a Multidimensional Conceptual Framework for Understanding "Servingness" in Hispanic-Serving Institutions: A Synthesis of the Research*, 89 REV. EDUC. RSCH. 745, 760–61, 771–73 (2019) (analyzing the academic literature on "experiences" at HSIs, mostly based on interviews); Gina A. Garcia & Otgonjargal Okhidoi, *Culturally Relevant Practices that "Serve" Students at a Hispanic Serving Institution*, 40 INNOVATIVE HIGHER EDUC. 345, 352–54 (2015) (describing how culturally relevant curricula and support services enhanced Latinx students' experiences at one HSI).

406. See Gina A. Garcia & Nicholas D. Natividad, *Decolonizing Leadership Practices: Towards Equity and Justice at Hispanic-Serving Institutions (HSIs) and Emerging HSIs (eHSIs)*, 7 J. TRANSFORMATIVE LEADERSHIP & POL'Y STUD. 25, 33–34 (2018) (arguing for "metrics of equity" at HSIs); Lindsey E. Malcom-Piqueux & Estela Mara Bensimon, *Design Principles for Equity and Excellence at Hispanic-Serving Institutions*, PERSPECTIVAS: ISSUES IN HIGHER EDUC. POL'Y & PRAC., Spring 2015, at 1, 12 (urging culturally responsive practices and collaborative self-assessment to determine how well HSIs are serving Latinx students); see also Garcia et al., *supra* note 405, at 772 (describing both experiences and outcomes as measurable).

407. See Janis Hashe, *For Prop. 16, 'Equity and Inclusion' Must Replace 'Quotas' Misuse*, E. BAY EXPRESS (Dec. 16, 2020), <https://eastbayexpress.com/for-prop-16-equity-and-inclusion-must-replace-quotas-misuse-1/> [<https://perma.cc/AT9Y-M7YM>] (describing how advocates in California who sought to overturn the state ban on affirmative action tried to distinguish between practices that promote equity and inclusion and illicit quotas).

V. CONCLUSION

Nearly twenty years ago, when Professor Bell wrote “Diversity’s Distractions,” he made valuable points that remain relevant to concerns about access to higher education today, especially for the burgeoning Latinx student population. Affirmative action at highly selective colleges and universities is still a significant policy issue because of the gatekeeping role that these schools play when students aspire to positions of national prominence. Without admissions programs that weigh race and ethnicity, Black and Latinx students would be severely underrepresented at America’s elite institutions of higher education. Even with affirmative action, getting admitted is only part of the struggle for full inclusion. Exclusive social networks on elite campuses can make it difficult for the most disadvantaged students, including Latinx from high schools segregated by race, ethnicity, and poverty, to thrive.

Moreover, efforts to enroll a diverse student body are just one part of ensuring equitable access to a post-secondary degree. As Latinx students attend college in substantial numbers, they encounter the elevator effect, a deeply embedded feature of a highly stratified and segregated system of higher education. Due to this effect, greater access does not necessarily translate into equitable outcomes as more privileged peers find ways to retain their previous advantages. Illustrating this phenomenon, Latinx often attend schools at the bottom of the higher education pyramid where gaining admission is not a significant challenge. Instead, students’ difficulties relate to obtaining a degree, given the limited resources that these schools have to provide financial support and a quality education. Latinx also confront the problems of self-financing their degrees in an increasingly privatized system of higher education. Here, too, there is access, but without affordability, inequities persist in the ability to complete an educational program. Finally, despite high-profile efforts to enroll diverse student bodies at elite schools, most Latinx attend colleges and universities that are readily identifiable by race and ethnicity. Many of these schools are HSIs, yet a norm of colorblindness often has led to ambivalence and uncertainty about whether to use federal grants to target Latinx students’ needs. As a result, access does not necessarily translate into support dedicated to advancing newcomers’ success. For all these reasons, Latinx have made gains in access but have not yet closed the gap in college completion rates.

To overcome diversity’s distractions, policy makers must grapple with the elevator effect that crimps Latinx students’ full participation in higher education. To do so, officials should consider how best to support the workhorses of higher education that educate a large share of underrepresented students of color, including Latinx. In addition, educators must work to make the college application process transparent so that first-generation students

from modest backgrounds can make informed choices with their families about where to enroll. Both federal and state legislators must consider how to make a college degree affordable and attainable for the neediest students, including Latinx. Finally, Congress and federal administrators must acknowledge the dramatic expansion in HSIs, amplify and target support for these schools, and plan for a future in which diversity will transform the make-up of all institutions. Far from being anomalous, MSIs, including HSIs, could become the rule rather than the exception. Only by reckoning with diversity's distractions and the demographic changes underway in our country can policy makers ensure that higher education remains responsive and relevant to our nation's needs as a robust democracy and a world economy.