

Foreword:

Barriers to Higher Education Access

Jonathan D. Glater*

Even with the understanding that advanced education is an essential tool to advancement in a complex, technologically sophisticated, and increasingly globalized culture and economy, barriers to access persist and operate in subtle ways to restrict who enrolls in and graduates from college. The symposium hosted by the University of California, Irvine School of Law, brought together scholars and advocates to identify such barriers and analyze their causes, with an eye to developing concrete proposals to put college within reach of more aspiring students—especially students who are members of groups historically denied access to higher education in the United States. Coming fifty years after the legislation¹ that produced the architecture of federal student aid, the symposium also explored the ways that policies pursued over the decades have simultaneously helped and burdened students in need of financial assistance to matriculate, persist, and graduate.

While the population on college and university campuses has grown far more racially and ethnically diverse,² sizable gaps persist along lines of race and ethnicity,³ as well as class.⁴ To promote higher education access among students who enroll

* Professor of Law, University of California, Irvine. The author is grateful to participants in the Symposium on Higher Education Access hosted by the School of Law on September 25, 2015, as well as to the student editors of the *Law Review* for their careful attention to this volume.

1. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965) (codified as amended at 20 U.S.C. §§ 1001–1161 (2016)).

2. See Institute of Education Sciences, Digest of Education Statistics 2015, at 492 tbl.306.10 [hereinafter Digest], http://nces.ed.gov/programs/digest/d15/tables/dt15_306.10.asp?current=yes [<https://perma.cc/A8JU-DQUQ>] (showing increasing numbers of college students who are African American, Latino, and Asian American between 1976 and 2014, the most recent year for which data exist).

3. *Id.* at 451 tbl.302.20, http://nces.ed.gov/programs/digest/d15/tables/dt15_302.20.asp?current=yes [<https://perma.cc/EYP5-WV6F>] (showing three-year average gaps in college enrollment across racial lines: in 2014, while 68.3% of white students and 84.8% of Asian American students who completed high school went on to enroll in two- or four-year post-secondary programs, 63.1% percent of African American students and 62.5% of Latinos did).

4. *Id.* at 452 tbl.302.30, http://nces.ed.gov/programs/digest/d15/tables/dt15_302.30.asp?current=yes [<https://perma.cc/5S46-6FYD>] (showing the share of low-income, middle-income, and

and graduate⁵ at lower rates requires recognition that they face multifaceted challenges. African American students and Latino students face challenges related to the history of racial subordination in the United States. For example, they face the burden of standardized testing that plays a critical role in admissions decisions at selective institutions. Students whose families lack sufficient income or wealth face financial challenges in paying the rising cost of higher education.

The core challenges confronting aspiring college students are not new, but as the cost of attendance has risen—approaching or exceeding \$60,000 per year at some private institutions⁶—access has become an increasingly controversial topic. In the Democratic presidential primary leading up to the fall 2016 election, both candidates spoke out against the pernicious effects of rising college costs on students and their families.⁷ Among younger voters in the Democratic primary, who are more likely to owe on student loans, college costs and a possible expanded federal role in paying for higher education are pressing, immediate concerns.

The symposium addressed college costs, exploring the implications of adoption of loans as the tool used by millions of students to pay for their education. The symposium also addressed use by selective institutions⁸ of admissions criteria that, in light of differences in performance on standardized tests that exist along lines of race and class, undermine college access for students who historically enjoyed less or no access to higher education. And the symposium tackled the underlying question of what the goal of federal policy should be, a question to which there is no single, consensus answer. A degree of policy confusion troubles reform

high-income students who completed high school and enrolled in college). In 2014, 57.8% of low-income students who finished high school enrolled in college, while 63.6% of middle-income students and 83.6% of high-income students did. *Id.*

5. *Id.* at 635 tbl.322.20, http://nces.ed.gov/programs/digest/d15/tables/dt15_322.20.asp?current=yes [<https://perma.cc/Q5ST-H8GZ>] (showing that in 2013–14, 67.7% of recipients of bachelor's degrees were white, 10.6% were African American, 11.2% were Latino, and 7.3% were Asian American).

6. For example, Oberlin College charges \$51,324 in tuition, \$7278 for room, \$6732 for board, and \$728 in “Health & Activity Fees,” which adds up to \$66,062 altogether. OBERLIN COLL. & CONSERVATORY, *Finances for Incoming Students*, <http://new.oberlin.edu/arts-and-sciences/admissions/finances/usa-students.dot> [<https://perma.cc/WA6T-4QFP>] (last visited July 13, 2016).

7. See, e.g., Patrick Healy, *Clinton Will Offer Plan on Paying College Tuition Without Needing Loans*, N.Y. TIMES, Aug. 10, 2015, at A10 (describing Clinton’s plan involving federal government assistance to undergraduate students to help them pay tuition at public colleges); Stephanie Saul & Matt Flegenheimer, *Hillary Clinton Adopts a Sanders Idea in Tuition Plan*, N.Y. TIMES, July 7, 2016, at A1 (describing how Clinton, the presumptive Democratic nominee, modified her proposal to adopt tactics from her rival’s higher education plan).

8. It bears emphasis that the share of college students attending selective institutions is small. Slightly more than 20% of students enrolled at degree-granting, two- or four-year institutions that accepted less than 50% of applicants; less than 5% attended institutions that accepted less than 25% of applicants. Digest, *supra* note 2, at 491 tbl.305.40, http://nces.ed.gov/programs/digest/d15/tables/dt15_305.40.asp?current=yes [<https://perma.cc/DMM2-PKV2>]. Most students attend less selective institutions: more than 75% of students enrolled at institutions that accept half or more of all applicants. *Id.*

efforts aimed at promoting access because of uncertainty over the objective⁹: Is the goal to enroll students who in the absence of government intervention would not matriculate? To reward those high school students who have already demonstrated academic skill? To steer students toward particular career paths—and if so, career paths that serve national need or that promote those students' personal, financial success?

California Supreme Court Justice Goodwin Liu surveys the landscape of higher education in his opening essay, which conveys the diversity of the student population as well as of the institutions that they attend. Higher education may repeatedly be in crisis, he observes, but that is its nature. Higher education is always changing, and concern about the changes reflects the importance placed on education in our society. He identifies three challenges deserving of close attention at this moment. First, racial, ethnic, and especially socioeconomic diversity of the college-going population does not reflect the national population of young people, especially at the most elite institutions. Second, conversations about the need for more college-educated workers often do not attend to the question of how to increase the overall number of graduates that institutions of higher education produce. That problem requires greater efforts at retention, to help enrolled students to complete their education. And third, too often left out of discussions of higher education access are those students who do not go to college or who do not graduate. Providing some postsecondary education for these students, too, promotes socioeconomic mobility. But care must be taken, Justice Liu notes, to ensure that students from particular, historically subordinated groups are not consistently steered away from degree-granting college programs.

The first set of articles for the symposium examined the financial challenge of paying for college, focusing on student indebtedness, use of non-need-based or so-called merit financial aid, and the proper method of evaluating the value of college education for students. These issues, all related to the question of money, were the focus of the first symposium panel. Sandy Baum responds directly and forcefully to arguments that rising student indebtedness constitutes a crisis of its own,¹⁰ presenting evidence that most students who borrow to pay for higher education are in fact able to manage their repayment obligations and that borrowers carrying excessive debt burdens are outliers who, while lightning rods for media coverage, do not represent the typical experience. Student borrower experiences vary widely, Professor Baum reports, and policies seeking to address the effects of rising tuition should recognize this diversity and aim at those students who do struggle with debt. For most, higher education yields significant benefits; problems

9. Jonathan D. Glater, *Student Debt and Higher Education Risk*, 103 CAL. L.R. 1561, 1576–77 (2015).

10. See, e.g., Andrew Martin & Andrew W. Lehren, *A Generation Hobbled by College Debt*, N.Y. TIMES, May 13, 2012, at A1 (describing the plight of indebted college graduates struggling to find employment earning wages sufficient to repay their student loans).

are greatest for those who borrow to pay for an education that is unlikely to lead to a career that earns enough to enable repayment of loans.

Institutional grant aid, which does not need to be repaid, can reduce or eliminate the need to borrow. However, in her remarks at the symposium, Eileen O'Leary, director of student financial assistance and assistant vice president for finance at Stonehill College in Easton, Mass., questioned the efficacy of current financial aid practices at colleges and universities as means of promoting access. Too often, she noted, institutions use financial aid to serve their own goals, such as improving the quality of incoming students' academic credentials. This has become possible, she argued in her remarks, as a result of the combination of the threat of antitrust litigation if colleges and universities share financial aid information with each other and the rising cost of college, which has made institutional aid that much more important.

James Ming Chen's contribution delves into the complex challenges created by non-need-based financial aid offered by law schools. Many schools offer aid that students continue to receive only if they meet academic standards, like maintaining a specified grade point average (GPA). Because of the risk that recipients of this conditional aid will fail to meet the requirements, at the time students receive offers of admission, the grant aid is not worth face value but a lesser amount, reflecting the risk of loss. In a world with perfect information, a student would know the likelihood that she would lose a conditional aid award: she would know what percentage of students maintain the required GPA, for example. But in the real world, law schools are not required to disclose such information to students, leaving them unable to evaluate conditional aid. Professor Chen argues that institutions offering conditional grant aid should make the appropriate disclosures, but in his article goes further, developing estimates of the share of students at a hypothetical (but quite realistic) law school who will fail to meet a "merit stipulation" and analyzing the consequences for an informed and rational student evaluating an offer of conditional grant aid.

Michael Simkovic addresses a different dimension of the college cost conundrum, arguing that in assessing the value of higher education, the proper question is not whether it is a worthwhile investment but whether attending a particular institution adds enough value to outweigh the cost. It is the value added, he contends, that matters most: Is a student better off having enrolled than she would have been had she not enrolled? While accepting that higher education may be usefully evaluated as an investment like any other, Professor Simkovic pushes the analysis to be more sophisticated, noting that institutions whose graduates earn the most may not be the institutions that add the most value. Instead, these institutions may simply be the ones that admit the most gifted students, who would have experienced the greatest postgraduate material success regardless of the institution attended. Professor Simkovic's argument allows for the possibility that some higher education, short of a degree, may still be worthwhile for the student,

and that even defaulting on a student loan should not necessarily be construed to reflect the low value of the education provided.

The next panel addressed conceptions of merit, which matters because it is the basis for admissions decisions at selective institutions. While a relatively small share of students attends these elite colleges and universities,¹¹ they command outsized attention, and less selective institutions seek to emulate their practices. To the extent that the definition of merit operates to exclude students from groups historically excluded from and/or underrepresented on campus, it demands scrutiny. Students compete fiercely in ever more difficult contests for a fixed number of slots at the nation's most elite institutions, which may accept just 5% of the thousands of people who apply.¹² Yet merit is a slippery concept, encompassing more than grades and test scores—even when grades and test scores form the basis for an admission decision.

In her article examining the use of race as a factor in admissions decisions at the University of Texas at Austin (UT), Kimberly West-Faulcon delves into data showing who is more likely to get in. UT's admissions procedures were challenged in litigation that reached the Supreme Court twice.¹³ While the University admitted the vast majority of its entering undergraduate students under a plan created and imposed by the state legislature, which mandated admission for students who graduated in the top tenth of their high school class, at issue in the lawsuit was the consideration of race in deciding whom to admit outside that plan. The plaintiff, Abigail Fisher, a white student, was denied a spot at the state's flagship institution and contended that her race hurt her chance of admission. The Supreme Court upheld the University's race-conscious admissions procedures in the Term that ended in June 2016,¹⁴ after the symposium, but Professor West-Faulcon's analysis of the differing rates of admission for white applicants, Latino applicants, Asian American applicants and African American applicants remains meaningful. She shows that notwithstanding the inclusion of race in evaluation of applications, white students are significantly more likely to be admitted outside the 10% plan than are African American and Latino students. A greater percentage of slots offered outside the top 10% plan went to white students than to any other racial group, she finds. She argues that the disparities are such that a court could well find that the University's practices violated Title VI of the Civil Rights Act of 1964¹⁵—a

11. See *supra* note 8.

12. Richard Pérez-Peña, *Best, Brightest and Rejected: Elite Colleges Turn Away Up To 95%*, N.Y. TIMES, Apr. 9, 2014, at A1.

13. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411 (2013), *aff'd*, 136 S.Ct. 2198 (2016).

14. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2202.

15. 42 U.S.C. § 2000d (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.”). The Supreme Court has stated, however, that this provision of Title VI does not permit an individual to sue but may be enforced only by the federal government. *Alexander v. Sandoval*, 532 U.S. 275, 290–93 (2001).

conclusion that would compel visiting the difficult, deep question of how we should define merit, measure it, and decide what role it should play in deciding who enjoys greater higher education opportunity.¹⁶

It is the question of who does and who should enjoy access to higher education—and at what cost—that occupies Rachel Moran’s contribution to the symposium. Professor Moran describes the role that colleges and universities have historically played in the United States, where they have served as training grounds for the children of elite families, as engines of socioeconomic mobility and opportunity, as means of helping students adjust to life in this country, and of course as generators of research and scholarship. She then identifies the ways that these rationales for seeking higher education have evolved and affected aspiring college students, and warns of the consequences should access be further restricted. With a college education increasingly associated with private benefits to the student in the form of better employment prospects and a higher income, the other ideals underlying a public role in subsidizing access may be crowded out, Professor Moran warns, and the consequences for democracy could be severe. She offers a number of prescriptions aimed at promoting access, such as raising the amount of grant aid awards to poorer students and increasing funding for community colleges, and thereby strengthening both political democracy and civic culture.

This final article responds to the need to recognize the purpose of a public, federal role in providing higher education, providing a justification for taking steps suggested in the other pieces that make up the symposium. Without a sophisticated, historically informed understanding of the role that higher education plays in enabling both personal opportunity and national development, it is difficult to make arguments for spreading the cost of college beyond the individual student who stands to benefit, for example, or even for improving disclosures related to the cost of attendance. The choice to provide education loans, rather than increasing either grant aid to students or direct support to the institutions they attend, rests on a view of education as conferring a private benefit, helping the individual. That view makes it seem fair to put the cost of attendance onto the student, and student loans are an appropriate tool to effect such a shift.

These articles, the other presentations that made up the symposium, and the conversations that occurred around them examine some of the problems beleaguering higher education in the ongoing quest for greater equity in access and, correspondingly, in opportunity. Needless to say, the symposium touched on only a few facets of an enormously complicated problem. As of this writing, more than a year after the symposium proper, concern over college accessibility has only increased. More novel proposals have entered the debate; one presidential campaign

16. And these are precisely the questions Professor West-Faulcon has engaged in her prior scholarship. See, e.g., Kimberly West-Faulcon, *More Intelligent Design: Testing Measures of Merit*, 13 U. PA. J. CONST. L. 1235 *passim* (2011) (noting that scores on the SAT college entrance examination do not alone reveal who is more or less deserving of admission to a selective college or university).

proposed that student loan terms be tied to borrowers' expected earnings,¹⁷ for example, and another that public university education be free to students whose families earn less than \$125,000 per year.¹⁸ Given the diversity of views on the causes of current barriers to access, on the effects on current and aspiring students, and on the goals of any public intervention to overcome them, the perspectives and analyses offered by this volume's participants provide critical guidance to those who would make real the promise embodied in the Higher Education Act more than fifty years ago. In the words of President Lyndon Baines Johnson, the Act sought to ensure "that a high school senior anywhere in this great land of ours can apply to any college or any university in any of the 50 States and not be turned away because his [sic] family is poor."¹⁹

While President Johnson's pledge remains aspirational, his words are at least as relevant today as they were when he spoke them.

17. Matt Krupnick, *Trump Plan Would Base Student Loans on Employability*, HECHINGER REPORT (July 19, 2016), <http://hechingerreport.org/trump-plan-base-student-loans-employability/> [<https://perma.cc/UDZ2-DR8A>].

18. Saul & Flegenheimer, *supra* note 7, at A1.

19. President Lyndon Baines Johnson, Remarks at Southwest Texas State College Upon Signing the Higher Education Act of 1965 (Nov. 8, 1965) (transcript available at <http://www.txstate.edu/commonexperience/pastsitearchives/2008-2009/lbjresources/higheredact.html> [<https://perma.cc/JC3B-3AFB>]).

